



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT ELDORET**

**Civil Case 43 of 2005**

**NICODEMUS H. OMOGO ..... PLAINTIFF**

**VERSUS**

**KENYA NATIONAL ASSURANCE COMPANY LTD ..... DEFENDANT**

**RULING**

This is an application dated 24<sup>th</sup> January, 2005 by the Plaintiff by way of Chamber Summons. He seeks the following orders against the Defendant Company:-

- (a) That the Honourable Court do issue an injunction restraining the Defendant from alienation, selling, transferring, eliciting and/or in any manner interfering with the Plaintiff's possession of the Eldoret Municipality Block 5/60/1 till determination of this suit.
- (b) That in the alternative, of the above the Honourable Court do adjudicate and fix a reserve price for the parcel and developments on land parcel ELD/Mun. Block 5/60/1 based on the independent impartial valuation.
- (c) Costs be provided for.

In the Plaint, the Plaintiff/Applicant's substantive claim is for a

declaration that the Defendant had no legal right to appropriate and offer for sale the suit property parcel Eldoret Municipality Block 5/60/1 which he had purchased through mortgage facilities from the Defendant.

The Defendant raised a preliminary objection to the application on the following grounds:-

1. the suit and the application are bad in law as the same is RES

JUDICATA and ought to be dismissed with costs based on the following indisputable facts:-

- (i) The matters directly and substantially in issue in this suit are the same as Eldoret HCCC. No. 225 of 1997.

(ii) The suit property is Eldoret Municipality Block 5/60/1 which was the cause of action in Eldoret HCCC. No. 225 of 1997.

(iii) That in Eldoret HCCC. No. 225 of 1997, a final judgment was recorded to determine the suit.

(iv) That in the same Eldoret HCCC. No. 225 of 1997 an injunction application was dismissed with costs together with an earlier suit before the Senior Eldoret Resident Magistrate Suit No. 610 of 1996.

(v) That the Plaintiff/Applicant has not applied for review or appeal against the decision of the Court of Appeal in Eldoret HCCC. No. 225 of 1997.

2. That the judgment dated 17<sup>th</sup> August, 2002 was final and to the extent that the applicant cannot have audience before this Honourable Court before making good the judgement against him and paying costs of the suit.

3. That the instant suit/application together with the applicant's various actions are a blatant abuse of the Court process.

4. That the Plaintiff/Applicant is guilty of lack of candour for failing to disclose and in fact concealing material facts as a result of which the court was misled to making an ex parte order.

At the hearing of the application, Counsel for the Defendant, Mr.

Kuloba abandoned grounds 2, 3 and 4. The only ground argued was 1 relating to Res Judicata. Counsel for the Plaintiff did not attend Court. The Court had ordered that the adjournment granted on 12.7.06 at the Plaintiff's behest would be the last. The date had been taken by consent.

The Defendant/Applicant supplied the court with a copy of the Judgement in **HCCC. No. 225 of 1997 NICODEMUS HONGO OMOGO -VS- KENYA NATIONAL ASSURANCE COMPANY LIMITED.** Judgement was delivered in the said case on 16<sup>th</sup> August, 2002 by Justice R. Nambuye.

In his Complaint, the Plaintiff stated that the Predecessor to the Defendant Assurance Company covered the Plaintiff for a life or long term cover maturing after 30 years. The Defendant herein is Kenya National Assurance Co. (2001) Ltd. In the supporting affidavit to the application, the Plaintiff annexed a copy of a charge in which the Chargee is said to be Kenya National Assurance Company Limited. This Company was placed under receivership and then liquidation.

The Plaintiff suggests that the official Receiver transferred the bulk of the mortgage division of the said company to a finance house that manages mortgages with Housing Finance Company Limited. He claims that the official Receiver maliciously has refused to transfer his account to a Mortgage Finance House.

I have carefully considered the aforesaid, and I am satisfied that the Defendant in HCCC. No. 225 of 1997 is strictly is not one and the same as the one here. They are two separate and distinct bodies. The Defendant in this case is Kenya National Assurance Company (2001) Limited. Also while the suit by the Plaintiff was dismissed, I have not seen the pleadings therein to compare. I am not able to determine that the issues in the pleadings were all dealt with in the judgement. The issues in a suit are determined from the pleadings. In the absence of the pleadings, it is not possible for this Court to apply the principles in Section 7 of the Civil Procedure Act and to determine what matters were directly and substantially in issue in the previous suit.

This Court has not been told how the present Defendant took over the rights, assets and also liabilities of the Defendant in HCCC 220 of 1997 for it to exercise similar powers of Chargee in respect of the suit property.

In summary, I am not convinced at this stage and without any evidence from the Defendant by way of

a Replying Affidavit that the matters directly and substantially in issue in this suit are the same as in Eldoret HCCC. No. 225 of 1997. The Defendants are certainly not the same. They are two distinct and separate limited liability Companies.

I do hereby dismiss the preliminary objection with costs to the Plaintiff.

**DATED AND DELIVERED AT ELDORET ON THIS 14<sup>th</sup> DAY OF APRIL, 2008.**

**M. K. IBRAHIM**

**JUDGE**

**In the presence of:-**

Miss Chege for the Applicant

No appearance for the Respondent