



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS) Civil Case 505 of 2008

MUIRI COFFEE ESTATE LTD..... PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....1<sup>ST</sup> DEFENDANT

BENJOH AMALGAMATED LTD.....2<sup>ND</sup> DEFENDANT

DAVID G. KARIUKI t/a WATTS ENTERPRISES...3<sup>RD</sup> DEFENDANT

BIDII KENYA LTD .....4<sup>TH</sup> DEFENDANT

RULING

Application dated 08.09.2008 by Chamber Summons

When the above application was scheduled for hearing there were 4 notices of Preliminary Objections by 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. These Preliminary Objections were argued first. The summary of the points raised is that the applicant lacks *locus standi* and that the entire suit is *subjudice* and *res judicata* the court has no jurisdiction to entertain the Application and that the applicant is guilty of non disclosure and that the application is an abuse of the court process.

In the plaint the Applicant seeks injunction against the 4<sup>th</sup> Defendant who has purchased plot No.10075 Thika (subject matter of the suit) a declaration that the sale to 4<sup>th</sup> defendant is illegal, unlawful, null and void and further that the plaintiff (guarantor relationship with the Bank) be restored as the proprietor of the suit land and its liability to the Bank under the guarantee be discharged and other consequential declarations and orders. Also claimed is damages for fraud against 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. At the same time as filing the plaint, the Plaintiff filed Chamber summons aforementioned seeking interlocutory injunction against 1<sup>st</sup> and 4<sup>th</sup> Defendants restraining them from dealing with the suit property pending hearing and determination of the suit, and that an order be made under section 52 of Transfer of Property Act 1882 that during the pendency of this suit, all further registration or change of registration of any dealings with the suit land be prohibited. The application is based on the grounds that the property was of the Plaintiff and he is in occupation but has been fraudulently been transferred to 4<sup>th</sup> Defendant purportedly under a charge that the property valued at 693,365,000 /= was sold only for Kshs. 70,000,000. Further, the sale is fraudulent and particulars are numbered iii (a – f) both inclusive.

In support of the Preliminary Objection, the first and third Defendants have filed list of authorities. For the proposition that injunction does not lie against any of the Defendants as the property has been transferred to 4<sup>th</sup> Defendant. The Counsel referred to the case of *Downhill ltd. –vs- Herith Ali El*

**Busaidy & City Finance Bank Ltd. Civil Appeal No.2541 of 1999.** This was a Court of Appeal decision. The Court was referred to Section 69 B (2) which states that where a transfer is made in exercise of mortgage statutory power of sale the title of purchaser shall not be impeached on ground that no case has arisen to authorize sale or due notice was not given or that the power of sale had been irregularly or improperly exercised. The Court found that the superior court judge exercised his discretion wrongly.

In the case of Rosemary Wambui Kanyagia & Patrick Kanyagia, the court of Appeal read Section 60 Transfer of Property Act as amended and declared that mortgagor Equity of Redemption is extinguished as soon as the mortgagee has entered into a binding contract for sale of mortgaged property.

The above provisions then lead one to conclude that the only remedy available to a mortgagor is in damages. Several other authorities are contained which are on the same principle.

On the issue of res judicata these Defendants submit that this is the 8<sup>th</sup> suit on this mortgage and at no time the court has found favour for the applicant. The case of Mburu Kinyua –vs- Gachiri Tuti (1978) eKLR 69. The court of appeal held that the second application to set aside judgment was res judicata since the facts on which it was based were known to the applicant at the time when he made first application.

However, the dissenting judgment was of Madam J. A. who said “***I am not aware of any bar generally to presenting more than one application until the conscience of the court comes to rest at ease that justice has been done.***” The learned Judge found that in special cases a matter can be out of the principle of res judicata. The primary consideration is whether he has merit to which the court should pay heed; If merits are shown the court will not prima facie desire to let pass judgment on which there has been no proper adjudication (quoted from Evans –vs- Barthlan (1937) 2 All E R 646.

In the case of **Pop-in (Kenya) Ltd. & 3 others –vs- Habib Bank A.G. Zurich.** It was held that the plea of res judicata applies not only to points upon which the court was actually required by parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject matter of litigation. In the case of **Omondi & another –vs- National Bank of Kenya Ltd and 2 others** the court said:

**“Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.”**

Several other authorities are cited on this ground and I have perused the same. Regarding the issue of injunction the 4<sup>th</sup> Defendant relies on the well known case of **Giella –vs- Cassman Brown & Co. Ltd.** wherein it is set out the grounds upon which an interlocutory injunction may be issued.

The second Defendant who is a “Principal debtor” to the bank opposes the Preliminary Objection. The 4<sup>th</sup> Defendant submits that the land was purchased and price fully paid. It relies on affidavit of Mr. Rahul Dilesh Bid who has sworn that a cheque in sum of Kshs.52,147,647 /= drawn upon Fina Bank Ltd . In respect of the balance of purchase price sent under condition set out “**and to hold the above balance of the purchase price as stake holders and in trust for our client pending transfer in client’s favour.**”

The 4<sup>th</sup> Defendant swears that he purchased the suit property at an Auction held on 19.09.2007. And that Land Control Board consent was granted on 06.11.2007. The sale was advertised in Local Dailies namely Daily Nation and Standard Newspaper and the 4<sup>th</sup> Defendant attended auction by the deponent its agent. The 2<sup>nd</sup> Defendant has caused an affidavit to be sworn by Kungu Mungai who confirms that the Plaintiff guaranteed the 2<sup>nd</sup> Defendant loan to 1<sup>st</sup> Defendant. He swears that the principal debtor (2<sup>nd</sup> Defendant) has never refused to pay the debt to the 1<sup>st</sup> Plaintiff and further the 1<sup>st</sup> Defendant has never attempted to sell the Principal Debtors property valued at 46 million before selling guarantors property. The suit property was transferred on 08.08.2008.

Regarding the Preliminary Objection the Plaintiff has relied on several authorities Mukhisa Biscuits Manufacturing Co. Ltd –vs- Westend Distributors Ltd 1969 E.A. 696. The court of Appeal stated what is a Preliminary point and deplored the prevalence of improperly raising points by way of Preliminary Objections saying “**Preliminary Objections consists of a point of law which has been pleaded ..... Which if argued may dispose of the suit.**” In the case of N.A.S Airport Services Ltd –vs- A. G. of Kenya 1959 E.A. 53. that case was in respect of Rule 9 of Court of Appeal Rules. It was held a point of law must be out which can be decided fairly, squarely, one way or the other on facts agreed or not in issue on the pleadings and not one which will not arise if some fact or facts in issue should be proved.

In the case of **Lasmanbhai Construction –vs- Ansper Beverages Ltd**, the matter of Preliminary Objection was discussed. The court also found that for a party to apply for temporary injunction need not pray for permanent or perpetual injunction in the plaint. The last case relied upon by applicant on issue of Preliminary Objection is Niazsons (K) Ltd –vs- China Road and Bridge Corporation (K) Where the court of Appeal held that “A Preliminary Objection is a pure point of law which is resolved without considering the merits of the case before the court

On the issue of res judicata the Plaintiff relies on Mulla on the code of Civil Procedure where it is **stated “In order to decide the question whether a subsequent proceeding is barred by res judicata”** it is necessary to examine the question with reference to:

- i. The competence of the court.
- ii. The party and representatives
- iii. Matters in issue
- iv. Matters which ought to have been made a ground of defence or attack in the former suit.
- v. The final decision.

The issue of estoppel is dealt with in the treatise “estoppel” is part of the law of evidence and prevents a man from saying one thing one time and the opposite at another time. Section 7 of Civil Procedure Act is also quoted which declares that “no court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a court competent to try such subsequent suit or the suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

There is also the case of **Manjit Singh Sethi & others – vs- Paramount Universal Bank & 2 others**. In that case the objection of *res judicata* was raised but the court (Hon. Waweru J.) found that the previous suits had not been heard and determined. They were knocked off at the stage of Preliminary Objection. Several other authorities are cited (numbering 8)

- (i) *HCC 797 of 1997 Kobo safaris –vs- Gichuki Kingara & another, where Hon. Ole Keiwua (as he then was) found differences in two suits involved and declared matter not res judicata.*
- (ii) *Kibogy –vs- Chemweno, court of Appeal Civil Appeal No. 41 of 1980. It was held that it was a condition precedent to the application of doctrine of res judicata that the issue has been finally decided.*
- (iii) *Nguyai –vs- Ngunayu. Where it was held that res judicata could not apply against the Plaintiff and the first defendant has not been a party to the previous suit.*
- (iv) *Mwanthi –vs- Imanene. Where it was held issue in two suits not same.*

On the issue whether the Application is an abuse of court process the Plaintiff relies on the judgment in Civil Appeal No. 132 of 1989 Nitin Properties Ltd –vs- Jagjit Kalsi & another, where the court was dealing with an issue for striking out a plaint. It said quoting a passage from D. T. Dobie –vs- Michelin & Another. **“a court of justice should aim at entertaining a suit rather than terminating it by a summary dismissal.”**

Other judgments were cited on this objection. It appears the case law points to sustaining the suit rather than dismissing the same even if the pleadings can be amended. Mr. Gautama has drawn the Courts attention to HCC No.122 of 2007 involving the Plaintiff and 2<sup>nd</sup> Defendant herein who is in that case 2<sup>nd</sup> Plaintiff. The ruling of Hon. M. A. Warsame was in a suit filed by the two Plaintiffs versus 1<sup>st</sup> Defendant and 3 other parties who are not parties to this suit.

In his ruling Justice Warsame enumerated several suits since 1992 where it is said that the Plaintiffs admitted liability and signed consent dated 04.05.1992. In 1993 the Plaintiff filed suit No. 285 of 1993 and obtained interim order restraining the 1<sup>st</sup> Defendant from selling the properties. In 1996 a suit HCC 1611 of 1996 was filed to restrain the 1<sup>st</sup> Defendant from selling the property, the suit was dismissed again in the same year the Plaintiff a suit HCC of 1996 was filed to restrain the 1<sup>st</sup> Defendant from selling the property the suit was dismissed again in the same year the Plaintiff in this case filed suit No.1611 of 1996 seeking orders that the purported sale was irregular, unlawful, null and void. This suit was struck off in the year 1997. Another suit was filed against the 1<sup>st</sup> Defendant being Nyeri HCC No.24 of 1997 an ex parte injunction was obtained. The suit was also dismissed on 09.05.1997.

There was an Appeal in Court of Appeal Civil Appeal No.276 of 1997 which was not in favour of the Plaintiffs. Then in the year 1999 another suit HCC No.1576 of 1999 was filed against the 1<sup>st</sup> Defendant. The suit was heard and determined on 23.07.2004 and dismissed. On appeal the court of Appeal said **“In any case a party who brings for decision of the Court matters which have already been determined can truly be said to be abusing the process of the Court..... We think the appellants will not like it but we also must point out to them that irrespective of how many cases they may wish to bring on the same issues the answer will and can only be one.”** The Plaintiff filed Constitutional Reference arguing that the Banks attempt to sell properties including LR 10075 was in contravention of their rights to property under Section 75 of Constitution.

The Plaintiffs were not successful. In the year 2005, they filed HCC No.243 of 2005 in this court. Hon. Justice Ochieng said: **“The answer remains that this court is not entitled to try any of the issues which the Plaintiffs or any of them have previously raised in other suits and which have already been determined..... I have no alternative but to hold that this suit is an abuse of court. I can only hope that this decision will finally bring to an end the institution of new suits by the Plaintiffs on the same issues.**

Hon. Justice Warsame continued to state: **“No matter the number of suits no matter the distance traveled, no matter who files the case the matter.....”** Furthermore the Hon. Justice Warsame pointed out that parties should enter into reconciliation.

Looking again, at the application, the Plaintiff does plead collusion and fraud of 3<sup>rd</sup> Defendant and 1<sup>st</sup> Defendant the property was transferred unlawfully, the 3<sup>rd</sup> Defendant is an auctioneer. The 3<sup>rd</sup> Defendant has denied the allegation and asserts he gave notice under Auctioneers Rules. In his submissions, Advocate for Applicant stated that he has discontinued all suits except 484 of 2008 and 122 of 2007, therefore there is no *res judicata*.

These two suits are not finally heard and determined. Therefore the issue of *res judicata* does not arise. It is also submitted that there is no concluded sale however, there is evidence of registration of transfer. It is also submitted that undersale is evidence of fraud. From what is stated in the Ruling of Hon. Justice Warsame it is clear that the parties have come from far. I believe all issues between the parties have been raised in one case or the other. What is obvious is that the Plaintiffs are now silent about the payment of the 1<sup>st</sup> Defendants loan.

Money borrowed must be repaid and the sooner the better. Although the property is alleged to be very valuable yet the Plaintiff has not found a way of raising funds to pay off the loan. Having said that the court is mandated to interpret and apply the law.

Regarding this suit the issue of injunction as between Plaintiff and 1<sup>st</sup> defendant is *res judicata* and in any case has been overtaken by events, for the property has been transferred.

However, as between the Plaintiff and Defendants the doctrine of *Lis pendens* applies. Section 52 of I.T.P.A prohibits any alienation of property during the active proceedings of the suit. This issue is not *res judicata* between these parties, the Plaintiff and 4<sup>th</sup> Defendant.

The Preliminary Objection are only upheld in respect of injunctions against the 1s Defendant. The suit should proceed with respect to claims for damages from fraud collusion and other irregularities raised by the Plaintiff

It is my finding therefore that the Preliminary Objection succeeds only in respect of prayer for injunction against 1<sup>st</sup> Defendant but not against the 4<sup>th</sup>.

In view of the above reasons, costs of this Preliminary Objection shall be in the cause.

**DATED** this 18<sup>th</sup> day of November 2008.

**JOYCE N. KHAMINWA**

**JUDGE**