REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 533 of 2005

PATRICK KIRONO MWAURA…….....
……..PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD…….....……1ST DEFENDANT

ONESMUS MACHARIA WAITHAKA T/A WATTS ENTERPRISES……..2ND DEFENDANT

R U L I N G

On 3rd January 2006, the plaintiff had filed an application, by way of a Chamber Summons dated 19th December 2005. Through the said application, the applicant sought an injunction to restrain the defendants from advertising, selling, transferring, alienating or in any other way whatsoever interfering with the ownership of the plaintiff's property LR. No. MURANG'A/MARAGWA RIDGE/82, (hereinafter cited as "**the suit property**").

Having been served with the application, the 1st defendant filed a Notice of Preliminary objection. This ruling is in relation to the said preliminary objection.

From the outset it is important to set out the full wording of the preliminary objection, as that will enable me to better analyse it. The said objection was in the following terms:-

"**(a) THAT the suit and application herein are *sub judice* the plaintiff's other suit pending in this court, Milimani HCCC No. 1023 of 2002.**

(b) THAT the application herein is *res judicata* a previous application dated 14th August 2000 filed by the plaintiff in Milimani HCCC No. 1023 of 2002 which was heard inter partes on merits and dismissed on 9th May 2003.

(c) THAT the stay of execution orders granted pending appeal in the plaintiff's previous application dated 14th August 2002 filed by the plaintiff in Milimani HCCC No. 1023 of 2002 lapsed automatically after the plaintiff failed to deposit security for costs ordered to be done within 30 days running from 1st August 2003.

(d) THAT the plaintiff's application herein is an abuse of court process since the plaintiff fought another injunction application in another suit, Milimani HCCC No. 1023 of 2002, sought and obtained stay orders pending appeal which lapsed but has not appealed todate.

AND the 1st Defendant shall pray that the plaintiff's application herein be struck out *in limine* and peremptorily with costs and further that the plaintiff's suit be struck out with costs and/or stayed."

When canvassing the preliminary objection, the 1st defendant commenced by submitting that this application is res judicata, as the plaintiff had filed another suit, HCCC No. 1023 of 2002, which is still pending before this court. In that suit, the Hon. Ondeyo J. had delivered a ruling on 9th May 2003, dismissing the plaintiff's application for an injunction.

It was the 1st defendant's contention that the issues raised in the case filed earlier were similar to those raised in the present application. It is said that in both suits, and in the applications made thereunder, the plaintiff had disputed the correctness of the 1st defendant's statements of account.

In the case filed earlier (i.e. HCCC o. 1023 of 2002), the court is said to have held that the plaintiff was not entitled to an injunction, as he had severally admitted being indebted to the 1st defendant.

Following the dismissal of his application, in the said earlier case, the plaintiff sought and was granted an order of stay, pending appeal. The said order for stay was, however, conditional upon the plaintiff depositing Kshs. 30,000/= as security for costs.

It is common ground that the plaintiff failed to deposit the sum of Kshs. 30,000/=.

In the light of those facts, the 1st defendant submits that the plaintiff is now barred, by the doctrine of res judicata, from seeking another injunction either in this suit or in any other suit.

It was further pointed out that the only new thing in the present application was the plaintiff's assertion that the charge was fatally defective, so that it could not give to the 1st defendant, the power to sell the suit property.

The said issue was however unavailable to the plaintiff as it could have been raised in the earlier suit which, in any event, was still subsisting, thus giving rise to a duplicity of suits.

On his part, the plaintiff conceded that he had also filed HCCC No. 1023 of 2002. He also admits that he had failed to pay the sum of Kshs. 30,000/=, which was to have been security for costs, pending the plaintiff's intended appeal from the decision by the Hon. Ondeyo J.

However, the plaintiff categorically denies that this matter is res judicata. He explains that in HCCC No. 1023 of 2002, there are three defendants, including Mr. Joseph Ngutu Kamau, trading as Phtuma Agencies Ltd. That person is not a party to the current application.

It is true that Mr. Joseph Ngutu Kamau, trading as Phtuma Agencies Lmited is not a party to these proceedings. However, it is equally true that the said person had been sued in his capacity as the auctioneer who had been mandated by the 1st defendant, to sell the suit property by public auction.

In the present suit, the 2nd defendant is Mr. Onesmus Macharia Waithaka, trading as Watts Enterprises. Whilst it is obvious that Mr. Onesmus Macharia Waithaka is not the same person as Mr. Joseph Ngutu Kamau, there is no doubt that both of them were auctioneers, and both of them had been sued in that capacity.

To my mind, the fact that the 1st defendant may have changed the auctioneer whom it had instructed to sell the suit property, cannot derogate from the fact that the said persons were both sued in their

capacity of auctioneers. Section 7 of the Civil Procedure Act appears to contemplate such a scenario, for it provides as follows:-

"**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 in which such issue has been raised, and has been heard and finally decided by such court."**

The important consideration in this matter is not the 2nd defendant, in any event. It is the question whether or not, as between the plaintiff and the 1st defendant, who are parties common to the two suits, the court had already heard and determined issues which are directly and substantially in issue.

The plaintiff submits that the issues in this suit are completely different from those in HCCC No. 1023 of 2002 (hereinafter cited as "**the previous suit**"). He points out that in the previous suit, he had intended to stop the registration of the transfer of title to the person who had reportedly bought the suit property. However, when it transpired that the auction sale had aborted, the court held that the plaintiff was not entitled to an injunction. In his view that fact, as well as the fact that in the previous suit there was no prayer for the taking of accounts, makes the two suits completely different.

It is the plaintiff's case that the current application seeks to stop the sale of the suit property, whereas the previous suit sought to stop the transfer of the said suit property.

Furthermore, the plaintiff submits that the new matters which he had raised in the current suit only arose after the 1st defendant had provided accounts, in response to earlier orders of the court, in the previous suit.

In any event, the plaintiff believes that in any suits between a mortgagor and a mortgagee, the issue of accounts would always feature. Therefore, in his view, the fact that the said issue is common to both suits is not a basis to hold that the current suit is barred by the doctrine of res judicata.

In **UHURU HIGHWAY DEVELOPMENT LIMITED V. CENTRAL BANK OF KENYA & 2 OTHERS, CIVIL APPEAL NO. 36 of 1996**, the Court of Appeal held as follows, at page 31 of their judgement:-

"**The long and short in all this is that once an application for injunction within a suit has been heard and determined under the principles laid down in *Giella v. Cassman-Brown*, a similar application cannot be brought unless there are new facts, not brought before the court earlier after exercise of due diligence, which merit a re-hearing and possible departure from the previous ruling."**

Bearing that in mind, I noted that in the previous suit, the application for an injunction was founded on the following four grounds:-

(a) That the auction held on 2nd August 2002 was tainted with irregularities as the Auctioneers rules had been disregarded both before and after the auction.

When elaborating about the said failure to observe the rules, the plaintiff gave details of late commencement of the auction, inadequate set-up for the same, and the failure to obtain the 25% deposit immediately after declaring the highest bidder.

(b) The process leading to, and the actual auction were fraudulent. In that regard, the plaintiff reiterated the facts cited in (a) above.

(c) The advertisements were inadequate and misleading, as they were said to have omitted the fact that the property had a borehole.

Also, the handbills were only distributed to two people.

(d) The defendant did not owe any money to the 1st defendant in his personal capacity. He was only the guarantor to M/s Protein and Fruits Processors Limited.

In her ruling, the Hon. Ondeyo J. noted that the plaintiff did abandon the first three grounds cited as (a) (b) and (c), above. Therefore, the only ground upon which the plaintiff prosecuted his application in the previous suit was that he did not owe any money to the 1st defendant. At page 3 of her Ruling, the Hon. Ondeyo J. expressed herself thus:-

"**The Plaintiff's case as I understand it from the plaint is that the principal debtor is M/s Protein and Fruits Processors Limited. The 1st defendant granted the principal debtor a financial facility amounting to Kshs. 500,000/= secured by a charge over the suit land which is the property of the plaintiff. The principal debtor, for the reasons set out in the plaint, was unable to service the loan and the 1st defendant in exercising its statutory powers of sale, instructed the 3rd defendant to sell the suit property. That is what led to the filing of this suit. The plaintiff also complains of exorbitant interest rates and the introduction of punitive penalties and charges by the 1st defendant. He seeks an order for accounts to be taken."**

From my reading of the foregoing words, it is clear that even in the previous suit, the plaintiff had already raised the issue of

"**exorbitant interest rates and the introduction of punitive penalties and charges by the 1st defendant**."

It is therefore my understanding that if the plaintiff had wanted to challenge the 1st defendant's accounts, for whatever reasons, he could have, and should have done so in the previous suit. The charge document was at all material times available to the plaintiff even prior to the institution of the previous suit. Therefore, he could easily have challenged its validity in the previous suit.

Secondly, the plaintiff did seek, in the previous suit, for an order that accounts to be taken. If, as he now says, the 1st defendant has contemptuously refused or failed to provide the said accounts, that would not be a legitimate basis for instituting new proceedings. The plaintiff could always seek appropriate orders to compel the 1st defendant to comply. And, if there was no compliance by the 1st defendant, the plaintiff could be entitled to ask the court for further appropriate orders, in the same case. He would certainly not have needed to file a separate suit simply because the 1st defendant had declined to provide particulars of his indebtedness.

I therefore hold that it is not open to the plaintiff to re-open any of the issues which he had raised in the previous suit, and which had been adjudicated upon. Those issues include the finding by the Hon. Ondeyo J. that the plaintiff had severally acknowledged his indebtedness to the 1st defendant. At this interlocutory stage of these proceedings, it is not open to him to cast doubt on that finding. To that extent, it is clear that the plaintiff is barred by the doctrine of **res judicata**, from re-agitating those issues.

However, I also note that the plaintiff has asserted that there has been no compliance with the Auctioneers Rules, 1997. When responding to the preliminary objection the plaintiff explained further, that the notification of sale was wrongful.

To my mind, the plaintiff's challenge to the notification of sale would constitute a new issue, arising out of new facts, as envisaged by the Court of Appeal in the case of **UHURU HIGHWAY DEVELOPMENT LIMITED V CENTRAL BANK OF KENYA & 2 OTHERS** (supra). I say so because whenever an auctioneer has been instructed to sell a charged property by public auction, he is required, by law to take specified steps. One of the said steps is to serve the chargor with a Notification of Sale, giving him not less than 45 days to redeem the charge.

The fact that an auctioneer who had been previously instructed had probably issued an appropriate notification of sale would not excuse another auctioneer who may be instructed later. Therefore, if the auctioneer failed to comply with the law, on this occasion, that would be a new fact, which could not have been determined in the previous suit. To that extent, this suit is not barred by the doctrine of res judicata.

Accordingly, the preliminary objection herein has succeeded to a large degree. I therefore award the costs thereof to the 1st defendant.

Finally, the plaintiff is directed to elect which of the two suits he wants to prosecute. As both suits raise substantially the same issues of fact and law, it is only fair to the 1st defendant and the court that the two parties should have the said issues resolved in one suit. Therefore, if the plaintiff does not wish to carry out an election between the two cases, he ought to have the suits consolidated, if he so wishes. But, there cannot be any justification for the two suits running parallel to each other.

Dated and Delivered at Nairobi this 9th day of February 2006.

FRED A. OCHIENG

JUDGE