



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Case 311 of 2000

**ANAJ WAREHOUSING LTD.....
PLAINTIFF**

VERSUS

**1. NATIONAL BANK OF KENYA
2. REGISTRAR OF TITLES.....
DEFENDANTS**

RULING

In its Chamber Summons dated the 22nd November 2004 the plaintiff seeks a temporary injunction to restrain the defendants by themselves their servants or agents from selling or transferring its piece of land known as L.R. No. 3603 Section VI M.N. The application is based on the ground that the proposed sale is pursuant to a purported power of sale contained in a charge that is *void ab initio* for having been prepared and attested by someone who was not an advocate at the material time.

The plaintiff had in its earlier application dated the 10th July 2000 sought a similar order and on the same day obtained an ex-parte order of injunction. However, after the inter-parte hearing the application was on 9th August 2003 dismissed. Its appeal to the Court of Appeal against that dismissal was also dismissed on 18th November 2004.

While the matter was pending before the Court of Appeal the plaintiff had on 24th June 2004 applied to amend its plaint. That application was allowed on the 9th July 2004. In its amended plaint the plaintiff averred that the charge under which the sale of its property had been attempted was illegal and *void ab initio* as it had, contrary to “Section 34(1) of the Law Society of Kenya Act”, (sic) been prepared, attested and registered by one J. W. Kagwe who was an unqualified person as he did not have a practicing certificate from 1990 to 1997. On the basis of that amendment the plaintiff has applied afresh for injunction arguing that if it is not granted this court would be countenancing sale under a void charge and power of sale. In support of this argument the plaintiff relied on the High Court decision in **Wilson Ndolo Ayah – Vs – National Bank of Kenya Ltd, Nairobi HCCC No. 1723 of 1997** and the Court of Appeal decision in **Geoffrey Orai-Obura – Vs – Martha Karambu Koome, Civil Appeal No. 146 of 2000** and others.

The application is strongly opposed. Mr. Lumatete, counsel for the first defendant, submitted that contrary to what is stated in the affidavit of Nilesh Patel in support of the application the allegation that the charge was prepared and attested by an unqualified person is not something new. A copy of the letter dated the 14th July 2000 from the Secretary of the Law Society of Kenya giving that information was

received by the plaintiff's then Advocate on the 25th July 2000 and annexed to the affidavit of Mahesh Patel, a director of the plaintiff sworn on the 21st August 2000. The issue, he said, was a ground of appeal and the letter formed part of the record of appeal.

The plaintiff's application having been dismissed by this court and the appeal to the Court of Appeal having also been dismissed, Mr. Lumatete said the matter is in the circumstances *res judicata* and this application should be rejected. The fact that the issue of the charge being void was not raised in the High Court and the Court of Appeal, he said, does not avail the plaintiff. It had the opportunity to do it but squandered it. In the wider aspect of *res judicata* as stated by the Privy Council in **Yat Tung Investment Company Limited – Vs – Dao Heng Bank Limited and Another [1975] AC 581** quoted with approval by the Court of Appeal in **Pop-In (Kenya) Limited & Others – Vs – Habib Bank A.G. Zurich, Civil Appeal No. 80 of 1988** - the matter, he said, is *res judicata* and this application is therefore untenable.

Mr. Lumatete concluded that even if the plaintiff ultimately succeeds the first defendant is able to pay compensation.

In response Mr. Satchu for the plaintiff submitted that the illegality of the charge was neither argued nor decided by either the High Court or the Court of Appeal. The matter is therefore not *res judicata*. He relied on the Court of Appeal decision in **Kibogi – Vs – Chemweno [1981] KLR 35**. He said that the cases of **Yat Tung Investment Company Limited** and **Pop-In (Kenya) Limited** are distinguishable. In the first case, he said, there was no provision equivalent to Section 7 of the Civil Procedure Act and in the second one there were some admissions made from which the parties could not be allowed to resile. He also said this case having not been decided there is no former suit for the doctrine of *res judicata* to apply.

Mr. Mutungi for the second defendant associated himself with the submissions of Mr. Satchu and had nothing to add.

From these arguments it is clear that the main issue in this application is *res judicata*. The doctrine of *res judicata* is founded on consideration of public policy to achieve two objectives, namely, that there must be an end to litigation and that an individual should not be harassed twice over with the same account of litigation expressed in the maxim of Roman jurisprudence as “*interest reipublicae ut sit finis litium*” (it concerns the state that there should be an end to law suits), and partly on the maxim “*Nemo debet bi vexari pro una at eadam causa*” (no man should be vexed twice over for the same cause. In Section 7 of the Civil Procedure Act the doctrine is stated in the following terms:

“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 subsequently raised, and has been heard and finally decided by such court.”

In this case it is not in dispute that the parties are the same and the issue being litigated upon in this application, that is the prayer for an order of temporary injunction has been litigated upon in an earlier application which as stated ended upon in the Court of Appeal. What is not agreed is whether the basis of

this application, that is the allegation that the charge upon which the threatened sale of the charged property is based is *void ab initio* was before this court and the Court of Appeal and whether it has finally been decided. Before I deal with that issue I need to say something about interlocutory orders.

Although the doctrine of *res judicata* applies to interlocutory orders (see **Kanorero River Farm Limited & Others – Vs – National Bank of Kenya Limited [2002] KLR 207**) in my view it does so to a limited extent and that is where the facts upon which the orders are based have not changed.

Interlocutory orders like temporary injunctions are meant only to preserve the status quo during the pendency of the suit and do not decide the controversy in issue on merits. Such orders are therefore capable of being altered or varied but only on proof of new facts or new situations which have emerged subsequent to the dismissal of the first application. Those facts must be those which the applicant was not aware of. If there is no new fact the matter will of course be *res judicata*. In this case is the allegation that the charge is *void ab initio* for the reason that it was prepared and attested by an unqualified person a new fact? I do not think so.

In his affidavit sworn on the 22nd November 2004 in support of the present application, Nilesh Patel, a director of the plaintiff company alleges in paragraph 3 thereof that he came to realise only in June of that year that the person who prepared the charge was unqualified. That cannot be true. Sight should not be lost of the fact that the Applicant in this application is a limited liability. Knowledge of a fact by one of its directors is deemed to be knowledge of the company. Though the plaintiff did not state the fact in its initial plaint and the first affidavit in support of the application, in his further affidavit sworn on 21st August 2000 in support of the earlier application Mahesh Manubhai Patel, a director of the plaintiff, disclosed that fact and annexed a copy of a letter from the Law Society of Kenya to that effect. It appears to me that that fact came to the knowledge of the plaintiff on the 25th July 2000 when the letter was received by its then Advocates after it had filed this suit and the original application for injunction, but that was before the application was heard.

The allegation that the charge was *void ab initio* for the stated ground was therefore before this court and as stated by the first defendant it was a ground of appeal. Therefore both the parties' allegation that it was not raised before this court and the Court of Appeal is erroneous. Equally erroneous is Mr. Lumatete's reliance on the case of **Yat Tung Investment Company Limited case (supra)**. The authority in that case applies to a case where a party who knows of a fact or ought to know fails to raise it at the earliest opportunity and the matter is decided without it being considered, or taken into account.

The final point that I need to decide and conclude this ruling is whether or not the issue of the charge upon which the threatened sale is based being *void ab initio* for the reason that it was prepared and attested by an unqualified person was decided by this court and the Court of Appeal.

A matter is *res judicata* when it has been heard and finally decided. And a matter is "heard and finally decided" when the court which has heard it has "exercised its judicial mind on" the matter in controversy after it has heard arguments, considered it and come to a decision on it. See **Vol. 1 Mulla on The Code of Procedure, 17th Edition at page 279**. In this case after reading this court's ruling of 9th April 2003 and the Court of Appeal decision on the appeal against that ruling I find that neither of the courts decided on that issue. The earlier application for injunction was dismissed on other grounds and so was the appeal. The matter is therefore not *res judicata* and this application is properly before court and can be considered on its own merits.

On its merits the application in my view should succeed. The allegation that the charge was *void ab initio* is a fundamental one. I do not wish to make any finding or comment on it at this stage as that will prejudice the hearing of this case. Suffice it to say that I am satisfied that the plaintiff has made out a prima facie case with a probability of success.

The first defendant attempted to realise the security but it appears the auction sale was not complete. So the property has not been sold. Given its alleged value and to avoid allegations of the property having been sold at an undervalue I think the status quo should be maintained. I therefore allow the plaintiff's

application dated the 22nd November 2004 in terms of prayer 2 thereof. The costs of the application shall be costs in cause.

DATED and delivered this 12th day of May 2006.

D. K. MARAGA

JUDGE