



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 248 of 2006

IRENE JOYCE JEPKEMBOI CHUMOPLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED1ST DEFENDANT

DAVID KINGORI KABURU2ND DEFENDANT

RULING

The Plaintiff guaranteed a loan given to a company called Tenluck Travels Services Limited by the 1st Defendant. In so guaranteeing the plaintiff charged her property NAIROBI/BLOCK 62/564 Ayany Estate. The Plaintiff filed the present claim against the 1st Defendant in May, 2006. She pleaded in the Plaintiff that the scheduled sale of her property was illegal for various reasons. Principally the Plaintiff pleaded that the 1st Defendant had failed to follow the principal debtor. The Plaintiff therefore sought an injunction to stop the said sale. Simultaneously when filing the said Plaintiff the Plaintiff filed an application by way of chamber Summons seeking temporary injunction pending the hearing of the suit. That application was heard by the Honourable Justice Ochieng who delivered a ruling on 11th July, 2006. The court in that ruling rejected the Plaintiff's application for temporary injunction. It ought to be noted that when this case was filed the plaintiff was represented by a firm of advocates L. M. Ombete Advocates. It does seem that on 13th July, 2006 there was a notice of change of advocates for the Plaintiff filed by Onesmus Githinji & co. Advocates. Prior to delivery of the aforesaid ruling by the Honourable Justice Ochieng the Judge had given an interim injunction stopping the sale which was due on 25th May, 2006 but that injunction was on condition that the Plaintiff would pay to the Defendant Kshs.150,000/= by the time the said sale was scheduled. It now transpires that the 1st Defendant sold the property to the 2nd Defendant and by that date the plaintiff had not made payments as ordered by the judge. The Plaintiff came to court on certificate of urgency on 26th September, 2006. The Plaintiff made an application by way of chamber summons dated 25th September 2006 where she was seeking to stop both defendants from selling or transferring the property. Additionally the Plaintiff sought to stop the 2nd Defendant from eviction of herself and her tenants from that property. At the time of filing the said application the Plaintiff amended her Plaintiff without seeking leave and it does seem that leave was not required because pleadings had not closed. In the amended plaintiff the Plaintiff added the 2nd Defendant in the pleadings and also accepted that the property had been sold by the 1st Defendant to the 2nd Defendant. In regard to that sale the Plaintiff has pleaded that there was negligence and fraud. She proceeds to enumerate the particulars of the aforesaid. When the court was faced by the application for injunction on 26th September, 2006 the court granted an exparte interim injunction. The matter came for hearing interpartes on 5th October, 2006. The 1st Defendant raised the following preliminary objections:-

1. That the said application and the Amended Plaintiff should be struck out *in limine* for being filed by an Advocate not property on record.

2. That the application for injunction as against the 1st Defendant is *res judicata*.

In support of the first ground of objection the 1st Defendant's counsel stated that the application dated 25th September 2006 filed by the firm of Murage & Mwangi Advocates was not property on record because the said firm of advocates on filing the notice of change served that notice upon the firm of L. M. Ombete Advocates. The counsel brought to the attention of the court that immediately on delivery of the ruling by Honourable Justice Ochieng another firm of advocates namely Onesmus Githinji and company advocates filed a notice of change to represent the Plaintiff which was dated 13th July, 2006. He stated that the present injunction application was filed by Murage & Mwangi and in so doing the said advocate had failed to serve a notice of change on the firm of Onesmus Githinji & Company. Counsel submitted that under Order III Rule 6 of the Civil Procedure Rules the current advocate who is properly on record for the Plaintiff is the firm of Onesmus Githinji & company advocates. On that ground 1st Defendant sought that the Plaintiff's injunction application be struck out. In response to those submissions, Plaintiff's counsel stated that Order III Rule 6 of the Civil Procedure Rules clearly gave a party the liberty to change an advocate. He stated that there was no evidence that the firm of Onesmus Githinji & company advocates had served their notice on L. M. Ombete advocates. For that reason Plaintiff's counsel stated that the first ground of the preliminary objection was not a valid preliminary objection because the 1st Defendant would have to prove by evidence that the firm of Onesmus Githinji & company advocates served the previous advocates on record for the Plaintiff. The Plaintiff's counsel was of the view that this ground on its own cannot determine the subject application. He concluded by saying that even if the firm of Onesmus Githinji & company advocates were the advocates for the Plaintiff the fact remained that the firm of Murage & Mwangi advocates were now representing the Plaintiff. He stated that certainly there was no prejudice even if service had not been effected upon the firm of Onesmus Githinji & company advocates. He requested the court to consider that the present matter being a matter touching on land, that the procedural lapse by the Plaintiff ought to be overlooked because the application and the prayers sought therein outweighed the justice of the case. The 1st Defendant's counsel in support of the second ground of objection stated that the injunction application dated 25th September, 2006 is *res judicata* as against the 1st Defendant. He referred to the application dated 15th May, 2006 where the Plaintiff had sought an order for injunction against the 1st Defendant by seeking to restrain the 1st defendant from selling the property. That application he said was fully argued before the Honourable Justice Ochieng and a ruling was delivered on 11th July, 2006. that ruling he said determined the question of injunction between the Plaintiff and the 1st Defendant. He therefore concluded by saying that this court cannot entertain that application for injunction. The Plaintiff responded to that ground by saying that there are two elements in this matter. He stated that in the present application dated 25th September, 2006 brought out a new cause of action which arose after the ruling of 11th July, 2006. He said that this fresh cause of action was the fraudulent exercise of power of sale by the 1st Defendant. He drew the attention of the court to the amended plaintiff paragraph 9-29 where the particulars of that fraudulent exercise and the alleged negligence was pleaded. He therefore stated that the issues raised in the amended plaintiff were not raised in the previous plaintiff before Honourable Justice Ochieng.

I have considered the argued that have been raised by counsels in respect of the preliminary objection raised by the 1st Defendant. The first one relate to Order III Rule 6 of Civil Procedure Rules. This rule provides:-

“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 7, the former advocate shall, subject to rules 11 and 12, be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

From that it is clear that a party although given the liberty to change advocates there is a requirement that the new advocate should file and serve the notice of change. Unless that is done the former advocate is considered to be the advocate of that party. Considering the submissions made before me and having in mind the provisions of the aforesaid rule, I am of the view breach of this rule is not fatal to the application. After all what this rule requires is that notice be given both to the court and to the former advocate. My finding on this ground would be that the Plaintiff cannot proceed in this matter any further whilst being represented by Murage & Mwangi advocates unless the said advocates do file and serve a notice of change upon the firm of Onesmus Githinji & co. advocates. In respect of the second ground the Plaintiff says that a new cause of action arose after the ruling of 11th July, 2006. However, in closer examination of the Plaintiff's amended Plaintiff and the injunction application dated 15th September, 2006 one will clearly find that the Plaintiff does accept that the property was sold by the 1st Defendant to the 2nd Defendant. Indeed she does accept that the transfer of the said property has been effected in favour of the 2nd Defendant. That being the case the court is unable to appreciate the plaintiff's argument that it is entitled to an injunction against the 1st Defendant to restrain the 1st Defendant to sell or transfer the property. In the first instance such an order would be in vain but much more than that such an order would be in breach of Section 7 of Civil Procedure Act which forbids the court to try any suit or issue in which the matter directly and substantially has been directly and substantially an issue in a former suit between the same parties. The court has considered the ruling of 11th July, 2006 and that ruling fully determined the issue of an injunction to restrain the sale of the property by the 1st Defendant. I do therefore, find that the Plaintiff's application dated 25th September, 2006 is caught by the rule of res judicata because of that former ruling. In the case **CA No.243 of 2001 Ukay Estate Ltd. & another v Shah Hirji Manek Ltd. & 2 others** the Court of Appeal in deciding on an issue of res judicata quoted from **Mulla on the Code of Civil Procedure Vol 1 1965 p. 58** as follows:-

“For, the essence of the doctrine of *res judicata* is that where a material issue has been tried and determined between the same parties in a proper suit and in a competent court as to the status of one of them, in relation to the other or as to a right or title claimed by either of them against the other, it cannot again be tried in another suit between them.”

In view of what is stated hereinbefore the court's finding is as follows:-

- 1. That the Plaintiff cannot proceed in this matter whilst**
- 2. being represented by the firm of Murage & Mwangi Advocates unless and until the said firm of advocates does file and serve a change of advocates which shall be served on the firm of Onesmus Githinji & company advocates.**
- 3. The Plaintiff's application dated 25th September, 2006 is hereby dismissed in regard to the 1st Defendant for being *res judicata*. The 1st Defendant is awarded costs in that regard.**

Orders accordingly.

MARY KASANGO

JUDGE

Dated and delivered this 13th day of October, 2006.

MARY KASANGO

JUDGE