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

Civil Case 319 of 2005

NZUKI MWINZI……..……PLAINTIFF/APPLICANT

VERSUS

KENYA NATIONAL ASSURANCE

CO. (2001) LTD.....1ST DEFENDANT/RESPONDENT

DAMARIS WANGUI ELIZABETH…...…...……..2ND DEFENDANT/RESPONDENT

R U L I N G

The suit herein was commenced by way of a Plaint, which was filed in court on 10th June 2005. Simultaneously with the Plaint, the Plaintiff filed an application for injunctive reliefs.

Upon being served with the application, the 2nd Defendasnt issued a Notice of Preliminary Objection, which was set out in the manner following:-

"1. **The suit and the application is bad in law as the same is *RES JUDICATA* and is for dismissal with costs based on the following undisputed and indisputable facts:-**

(i) The matters directly and substantially in issue in this suit are the same as in suit Nairobi HCCC No. 1393 of 1997 and Nairobi CMCC No. 5457 of 2005.

(ii) The suit property is L.R. No. 3994/25.

(iii)(a) That in Nairobi HCCC No. 1393 of 1997, a final consent judgement was recorded which determined the suit.

(b) That in Nairobi CMCC No. 5457 of 2005 an injunction application was dismissed with costs.

(iv) That the Plaintiff/Applicant has not applied for review, or appealed against the decisions of the court in the two other suits.

(2) That in the consent order/judgement dated 30th November 2004 in HCCC No. 1393/97, the Plaintiff was ordered to redeem the loan within sixty (60) days. To that extent, 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 Appellant's various actions are a blatant abuse of process of this Honourable Court.

4. That the Plaintiff/Applicant is guilty of lack of candour for failing to disclose, and in fact concealed material facts as a result of which the court was misled into making an exparte order."

When canvassing the Preliminary Objection, Mr. Letangule, advocate for the 2nd Defendant submitted that the matters in issue in this suit are also directly in issue in Nairobi HCCC No. 1393/97.

In an endeavour to illustrate the point, the 2nd Defendant placed before this court copies of proceedings in HCCC No. 1393 of 1997. She then went on to explain that the prayers in this suit are similar to those in HCCC 1393 of 1997.

A perusal of the prayers in HCCC 1393 of 1997 reveals that the Plaintiff sought the following remedies:-

(a) A declaration that the alleged sale by public auction on 24th May 1997 was irregular and unlawful, and thus a nullity.

(b) The nullification of any action subsequent to the sale, which could lead to the transfer of the suit property to the 2nd Defendant.

(c) An injunction to restrain the Defendants from transferring, disposing of, or interfering with the Plaintiff's peaceful enjoyment and quiet possession of the suit property.

(d) General Damages.

(e) Costs.

Meanwhile, in this suit, the prayers are for the following orders:-

(i) A declaration that the transfer to the 2nd Defendant was null and void.

(ii) An injunction to permanently restrain the Defendants from interfering with the Plaintiff's ownership, possession and occupation of the suit property.

(iii) A permanent injunction to restrain the defendants from selling, alienating disposing or selling by public auction or private treaty, charging or in any way dealing with the Plaintiff's property.

(iv) General and aggravated damages

(v) Costs.

Upon a close scrutiny of the prayers in HCCC No. 1393 of 1997 and this suit, I find and do hold that the substance of the prayers sought in the two suits are similar. As I understand it, the Plaintiff wishes to have the sale of his property annulled. He also wishes to have the Defendants restrained from ever selling the suit property, as well as from interfering with his quiet possession and enjoyment of the same. Then, the Plaintiff is asking for General Damages; and in the current suit he also wishes to be awarded "**aggravated damages**." Finally, the Plaintiff is seeking costs of the suits.

Therefore, if similarities be limited to the prayers in the two suits, there would be no doubt that they are close.

The other suit filed by the Plaintiff is Milimani CMCC No. 5457 of 2005, **NZUKI MWINZI V. DAMARIS WANGUI ELIZABETH & MUTURI KAMANDE t/a CHAKA AGENCIES**.

In that case, the Plaintiff sought a permanent injunction to restrain the Defendants from interfering with his quiet possession of the suit premises. He also sought a declaration that the attempt to evict him was unlawful. Thirdly, he sought costs.

If one peruses the Plaint in this current suit (i.e. HCCC No. 319 of 2005), it becomes clear that the issue of eviction is raised in paragraph 16.

In any event, the exercise of carrying out the eviction of the Plaintiff from the suit property was already contemplated in HCCC No. 1393 of 1997, hence the prayer for the restraint of the Defendants from interfering with the Plaintiff's quiet possession and peaceful enjoyment of the suit property.

In **Milimani CMCC No. 5457 of 2005**, the court initially issued an exparte injunction to restrain the Defendants from evicting the Plaintiff. However, after giving the parties a hearing, on the interlocutory application, the court dismissed the application with costs.

Meanwhile, in HCCC No. 1393 of 1997, the parties had filed a consent letter, embodying the terms for the settlement of the whole suit. By the said order, the parties agreed as follows:-

"**1. THAT the Plaintiff undertakes to liquidate the Mortgage over L.R. Number 3994/25 (Original No. 3994/1/1) within sixty days from the date hereof in exercise of his right of Redemption and to indemnify the 1st Defendant upto the sum of Kshs. 4,016,333.30 including costs against any claim that may arise from the second Defendant arising from the suit**.

2. **THAT in default, execution do issue and the injunction granted on 3rd April 1988 and any previous injunctions be vacated without further orders of this court.**

GIVEN under my hand and the Seal of this court at Nairobi this 9th day of March 1999."

In the light of the order dismissing the injunction application in **Milimani CMCC No. 5457 of 2005**, and the consent orders in HCCC No. 1393 of 1997, I now need to determine whether or not this court is barred, by **Res Judicata**, from hearing this application dated 30th June 2005.

Res Judicata

Section 7 of the Civil Procedure Act stipulates 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 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 fully decided by such court**."

From my understanding of the express wording of the said statutory provisions, no court is to try any suit or issue in which the matter directly and substantially in issue was also directly and substantially in issue in a former suit. However, for such a bar to arise the parties to the suits ought to be the same or should be parties under whom they or any of them claim. Also, the parties should be litigating under the same title. And, finally, the issue raised in the subsequent suit should have been heard and finally decided by the court before whom the previous suit was filed.

In **KANORERO RIVER FARM LTD & 3 OTHERS v. NATIONAL BANK OF KENYA LIMITED, Milimani HCCC No. 699 of 2001, Ringera J.** (as he then was) ruled that the doctrine of **res judicata** was applicable to both suits and applications**.** This is what he said (at page 8 of his Ruling):-

"**As I understand the law, the doctrine of *res judicata* applies to both suits and applications, whether they be final or interlocutory. Indeed Section 2 of the Civil Procedure Act defines a suit to mean any civil proceeding commenced in any manner prescribed. And prescribed is defined as**

prescribed by rules. Applications for temporary injunction are prescribed for by Order 39 of the Civil Procedure Rules. It follows that the determination of such an application by a court of competent jurisdiction would in appropriate circumstances operate as a plea in bar called res judicata."

Earlier, the Court of Appeal had emphasized the same point, in **UHURU HIGHWAY DEVELOPMENT LIMITED V. CENTRAL BANK OF KENYA & TWO OTHERS, CIVIL APPEAL NO. 36 of 1996**, wherein it held as follows:-

"**That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of the Civil Procedure Act caters for."**

That section makes it clear that the procedures in the Civil Procedure Act, in regard to suits, shall be followed as far as it may be applicable in all proceedings in any court of civil jurisdiction.

I have deemed it necessary to make the point that the doctrine of **res judicata** is as much applicable to applications as it is to suits, lest anybody labour under the notion that the provisions of Section 7 of the Civil Procedure Act were only applicable to suits.

Now, applying the foregoing decisions to this case, I must first ask myself who the parties in the three suits are. Were they either the same or suing under those whom they or any of them claim? Were they litigating under the same title?

In **HCCC No. 1393 of 1997** the parties were as follows:-

Nzuki Mwinzi, as Plaintiff, Versus Kenya National Assurance Company Limited (In Liquidation), as the 1st Defendant, whilst Hezron Mlali Mwangombe was the 2nd Defendant.

The Plaintiff was suing, in his capacity as the registered owner of the suit property, and as one whose property had been wrongfully sold by the 1st Defendant. The 2nd Defendant was the purchaser of the suit property.

In comparison, the Plaintiff in this suit is the same. He is also suing in the same capacity. Also, the 1st Defendant is **Kenya National Assurance Company (2001) Limited.** The said 1st Defendant is described by the Plaintiff as the successor in title to Kenya National Assurance Company Limited (In Liquidation). In effect, the Plaintiff concedes that the 1st Defendant herein is the same as the 1st Defendant in HCCC No. 1393 of 1997.

Meanwhile, the 2nd Defendant, **Damaris Wangui Elizabeth**, was not a party to the suit in **HCCC No. 1393 of 1997**. However, she is sued in her capacity as the purchaser of the suit property.

Moving on to **Milimani CMCC No. 5457 of 2005**, the Plaintiff and the 2nd Defendant herein are both parties. The said two parties are suing or being sued in the same capacities as in this suit. In other words, the Plaintiff is claiming ownership of the suit property, which he alleges was unlawfully being forcibly taken away by **Damaris Wangui Elizabeth.**

The Plaintiff's attempt to stop **Damaris Wangui Elizabeth** from taking over possession of the suit property was dismissed by the Court, in **Milimani CMCC No. 5457 of 2005**. Accordingly, in my considered view, it would be wrong to permit the Plaintiff herein to canvass the same point of law, in this suit.

It is instructive that this suit was filed on 10th June 2005, whilst the **Milimani CMCC No. 5457 of**

2005 was filed on 20th May 2005. Therefore, even though the advocates representing the Plaintiff in the two suits were different, the Plaintiff himself must be deemed to be fully aware of the fact that in the two cases, he was, inter alia, seeking to have **Damaris Wangui Elizabeth** restrained from taking over possession of the suit property. Now that that attempt has failed, in the case which is before the magistrate's court, the Plaintiff cannot be permitted to pursue the same issue, in this suit. I believe that his only remedies, as against the 2nd Defendant herein, would be either an appeal against the dismissal of the interlocutory application, or an application for review.

However, as regards the other case (i.e **HCCC 1393 of 1997**), I hold the considered view that although the matters directly and substantially in issue appear to be similar, from the legal perspective, the cases arise from different facts.

One of the facts that is different is the persons who are the 2nd Defendants in this case, as compared to **HCCC No. 1393 of 1997.** The purchaser in the former suit was **Hezron Mlali Mwango'mbe**, whilst the purchaser in this case is **Damaris Wangui Elizabeth**.

However, it is not the difference in names which is significant in itself. That fact is merely indicative of a more substantial difference; the fact that the circumstances preceding the sales, which are being challenged, were different. In **HCCC No. 1393 of 1997** (hereinafter called the "first suit"), the Plaintiff was challenging a sale which was conducted on 24th May 1997. The said challenge was founded on the premise that the sale had been conducted in violation of an express order issued by Ringera J. (as he then was) in **NBI Winding-Up Cause No. 18 of 1996**, which allegedly prohibited the sale of any properties belonging to the 1st Defendant.

In contrast to that suit, the present claim is challenging a sale which purportedly took place on 24th September 2004. Therefore, in my considered view, the facts leading up to the two sales are not only about seven years apart; they are completely different.

In **KANORERO RIVER FARM LIMITED & 3 OTHERS V NATIONAL BANK OF KENYA LIMITED** (supra), Ringera J. held as follows:-

"**In my judgement, provided the fresh application is grounded on new facts which could not have been relied on in the earlier application, it would not be precluded by the doctrine of *res judicata.* That is precisely the case here. The consent order allowed the defendant to serve fresh statutory notices. A new factual situation was created. It could not have been the intention of the parties when they recorded the consent, and law itself could not possibly contemplate that those fresh notices and other consequential steps taken pursuant to them could not be challenged on proper legal grounds."**

In similar vein, I find and do hold that the consent order in **HCCC No. 1393 of 1997** could not have been intended to preclude the Plaintiff herein from challenging any subsequent efforts by the 1st Defendant to sell the charged property, even if the Plaintiff did fail to liquidate the mortgage within 60 days of that order.

If the Plaintiff has a proper legal basis for challenging the sale which took place on 24th September 2004, he cannot be precluded from prosecuting such an application simply because on a previous occasion he had compromised a suit in which he had challenged a previous sale. The only time when a party would be precluded from prosecuting new applications is if the new suit or application could be properly barred by the doctrine of res judicata. But in this instance, the facts leading to the application are new and different from those in the previous application. Therefore, the doctrine does not come into play, as between the Plaintiff and the 1st Defendant

The offshoot of this finding is significant, for although, I already held that the Plaintiff may not prosecute his application against the 2nd Defendant, (on the grounds that the issue has already been

decided in Milimani CMCC No. 5457 of 2005) I nonetheless hold that the 2nd Defendant should not be permitted to evict the Plaintiff from the suit premises, for now. My decision is informed by the fact that if the Plaintiff's challenge to the sale itself were to succeed ultimately, such an outcome would then have been defeated by an eviction of the Plaintiff. However, this decision is not by any means an indication as to what is or is not the likely finding on the substantive application.

Finally, I direct that the application dated 10th June, 2005 be heard and determined as soon as possible. The parties will therefore be required to fix dates soonest. Meanwhile, the interim orders issued on 10th June 2005 are extended until further orders. However, each party shall have liberty to apply.

Dated and Delivered at Nairobi this 3rd day of October 2005.

FRED A. OCHIENG

JUDGE