**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELCC No. 615 OF 2013**

**NATHAN MUTUA KOLILE.....PLAINTIFF**

**VERSUS**

**EQUITY BANK (K) LIMITED.....1ST DEFENDANT**

**STEPHEN NZULA MULI T/A GENERATION HIGHWAY ENTERPRISES.....2ND DEFENDANT**

**RULING**

1. This ruling is in respect of the plaintiff's Notice of Motion dated the 9th October 2020 which seeks the following orders:

*a) [Spent]*

*b) That a preservation order be issued for stay of sale of the suit premises LR No. Nakuru Municipality Block 21/66 as scheduled on 25th November 2020 or any other date per the Redemption Notice and Notification of sale issued by Antique Auctions Agencies (under instructions from the 1st Respondent herein) pending the inter-partes hearing and determination of this application and thereafter pending the conclusion of the main suit.*

*c) Costs of this application be provided for.*

2. The application is supported by an affidavit sworn by the plaintiff. He deposed that he is the registered owner of land parcel No. Nakuru Municipality Block 21/66 and that he was shocked to be served with a 45 Days Redemption Notice and a Notification of Sale of Immovable Property dated 16th September, 2020 by Antique Auctions Agencies under instructions from the 1st defendant notifying him that the suit property was scheduled to be sold on the 25th November 2020 to recover a loan amount of KShs 20,530,944.44. He also deposed that he was advised by his advocates on record that the sale offends the doctrines/principles of *lis pendens* and *sub judice* and further that the notices offended the *in duplum* rule. He deposed further that his liability as a guarantor has been discharged due to what he termed as full repayment by the principal debtor.

3. The 2nd defendant opposed the application through a replying affidavit in which he deposed that the application is an abuse of the court process as the plaintiff had filed a similar application which was heard on merit and dismissed by the court. He further stated that this court delivered a ruling on 9th November 2017 in Nakuru HCCC No. 24 of 2017 Dorcas Mumo Mutua v Equity Bank Ltd & 3 Others wherein the court held that a similar application for injunction was *res judicata*. He therefore prayed that the application be struck out with costs

4. The 1st defendant opposed the application through grounds of objection in which it stated that the application is an abuse of the court process as similar applications had been made and dismissed by the court. It additionally adopted and relied on the 2nd defendant's aforesaid replying affidavit.

5. The application was canvassed through written submissions. Both the plaintiff and the 1st defendant filed submissions while the 2nd defendant opted to rely entirely on his replying affidavit.

6. The plaintiff relied on the *in duplum rule* and argued that his liability was limited to KShs 1,200,000 and that the principal borrower has repaid KShs 6,036,899.99 thereby discharging his liability. He also relied on **Section 44A** of the **Banking Act** as well as the cases of **Housing Finance Company of Kenya Limited v Scholarstica Nyaguthii Muturi & another [2020] eKLR** and **James Muniu Mucheru v National Bank of Kenya Limited [2019] eKLR**.

7. As to whether the application dated 9th October 2020 is *res judicata*, the plaintiff submitted that in the ruling dated 9th November 2017 the court was dealing with whether an order of injunction could issue for lack of spousal consent unlike the present application which addresses the court on the *in duplum* rule. The plaintiff therefore contended that the application is not *res judicata*.

8. Regarding whether the application is merited the 1st defendant submitted that the plaintiff has made several applications seeking for similar orders which have been dismissed and therefore the application is an abuse of the court process and is *res judicata*. It relied on the case of **Fr. George Mathenge and Fr. Nicholas Onyanch (both suing as officials of Franciscan Family Association of Kenya) vs. Micro Enterprises Support Programme Trust Registered Trustees & Anor [2016] eKLR.** On the issue of the *in duplum rule*, it submitted that the plaintiff by signing the letter of guarantee, subjected himself to all claims made against the principal debtor in the event that he defaulted. It relied on the case of **Mwambeja Ranching Company Limited & Anor vs. Kenya National Capital Corporation [2019] eKLR.**

9. Considering its jurisdictional implication, I will deal first the question of whether the application is *res judicata*. If the answer is in the affirmative then the application will have come to its end. If I however find that *res judicata* is not applicable in the circumstances then I will consider the merits of the application.

10. The doctrine of res judicata has found statutory expression at **Section 7** of the **Civil Procedure Act** 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 subsequently raised, and has been heard and finally decided by such court***.

11. As to the nuts and bolts of the application of the doctrine, it suffices to restate what the Court of Appeal had to say in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR**:

> ***… for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;***
>
> ***(a) The suit or issue was directly and substantially in issue in the former suit.***
>
> ***(b) That former suit was between the same parties or parties under whom they or any of them claim.***
>
> ***(c) Those parties were litigating under the same title.***
>
> ***(d) The issue was heard and finally determined in the former suit.***
>
> ***(e)The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.***
>
> **…**
>
> ***The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.***
>
> **…**
>
> ***The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit***.

12. When considering whether an issue raised in an application is *res judicata*, it is crucial to restate that pursuant to **Section 2** of the **Civil Procedure Act**, "suit" is defined to mean all civil proceedings commenced in any manner prescribed, thereby including applications.

13. The present application essentially seeks to stop sale of the parcel of land known as LR No. Nakuru Municipality Block 21/66 (the suit property) pending the hearing and determination of this suit.

14. A perusal of the record herein shows that the plaintiff has previously filed two applications seeking to stop sale of the suit property. The first application was Chamber Summons dated 7th May 2009 which was filed while the matter was still in the High Court as **HCCC No. 172 of 2009**. Upon considering the application, the court rendered a ruling dated the 10th December 2010 in which it found that the plaintiff had no *prima facie* case. The application was dismissed with costs**.**

15. Undeterred, the applicant later filed Notice of Motion dated 20th February 2018 seeking among others an order "*to prohibit the 1st*

*defendant/respondent either by itself, its servants and/or agents from disposing off, transferring, alienating, developing or in whatsoever manner interfering with*" the suit property. The feeble attempt at giving the matter a desperate facelift so as to get another bite at the cherry did not help. The application was considered and in a ruling delivered on 16th March 2018, this court found it not only *res judicata* but also an abuse of the court's process. The court unmasked the plaintiff's conduct as follows:

> ***Clearly, the plaintiff herein and his wife have been engaging the defendants and courts in a plethora of litigation over the same issue. That must stop. As can be seen above, this court had to stay Nakuru ELC Case No. 24 of 2017 on 9th November 2017 pending hearing and determination of this particular case and Nakuru CMCC No. 1025 of 2011. On that occasion, the court also declined to grant an injunction to stop an auction sale of the suit property. Barely three months later, the plaintiff filed the present application. I do not think that was a coincidence.***

16. In the present application, the plaintiff has introduced a new twist in his argument so as to evade the doctrine of *res judicata*: the *in duplum rule*. The simple answer to that venture is that it is nothing new. He ought to have raised it in his very first application. That indeed is what **explanation (4)** of **section 7** of the **Civil Procedure Act** anticipates when it states:

> ***Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit***.

17. It is noteworthy that the *in duplum rule* which is grounded on **Section 44A** of the **Banking Act** came into operation in our jurisdiction on the 1st May 2007 while the plaintiff's first application for injunction was drafted much later, on 7th May 2009. Clearly, the plaintiff had every opportunity to raise the *in duplum rule* from the onset.

18. In view of the foregoing discourse, I have no doubt in my mind that Notice of Motion dated the 9th October 2020 is *res judicata*. I strike it out with costs to the defendants.

**Dated, signed and delivered at Nakuru this 18th day of March 2021.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr Njuguna for the plaintiff/applicant

No appearance for the 1st defendant/respondent

Mr Karanja Mbugua for the 2nd defendant/respondent

xx for the interested party

Court Assistants: B. Jelimo & J. Lotkomoi