



**Shah & another v Bank of Baroda & 3 others (Environment & Land
Case 106 of 2020) [2024] KEELC 464 (KLR) (7 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 464 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 106 OF 2020
SM KIBUNJA, J
FEBRUARY 7, 2024**

BETWEEN

AMEET LALCHAND DEVSHI SHAH 1ST PLAINTIFF

LALCHAND DEVSHI SHAH 2ND PLAINTIFF

AND

BANK OF BARODA 1ST DEFENDANT

SPORTLIGHT INTERCEPTS AUCTIONEERS 2ND DEFENDANT

AND

DILIPKUMAR N.M SHAH 1ST RESPONDENT

NAYNABEN D. N.M SHAH 2ND RESPONDENT

RULING

1. On 9th May 2023 the court directed that the three applications dated 13th February 2023, 13th April 2023 and 26th April 2023 be heard together through submissions.

Notice of Motion Dated 13th February 2023

2. The application was brought under Order 1 Rule 10, Order 8, 40 & 51 of the *Civil Procedure Rules* and Sections 1A, 1B, 3A, 63 (e) and 100 of the *Civil Procedure Act*. The orders sought were *inter alia*:
 1. That a temporary injunction be issued restraining the defendants/respondents and the successful bidders (Dilipjumar Shar and Naynaben D. N. M. Shah) whether by themselves, agents, servants or anyone acting at their behest or otherwise howsoever from in any way evicting, the plaintiffs/applicants from the suit property known as LR No MN/1/1185 CR 10161 pending inter-parties hearing and determination of the main suit.



2. That this court does direct the Directorate of Criminal Investigations Head of Land Fraud Department to provide a report of its findings on the investigation touching on the suit property and copies of statements taken from the witnesses to this the plaintiffs/applicants.
 3. That the applicants be granted leave to amend their plaint dated 17th August 2020 as set out in the draft amended plaint annexed thereto.
 4. That the draft amended plaint attached to the application be deemed as duly filed and served upon payment of requisite court fees.
 5. That this honourable court be pleased to grant such further orders as it may deem fair and just.
 6. That costs of this application be provided for.
3. The application is grounded on eight (8) grounds on its face and supported by the affidavit of Ameet Lalchand Devshi Shah, the 1st plaintiff, sworn on the 13th February 2023, in which he deposed inter alia that the 2nd plaintiff (father to the 1st plaintiff) together with his late wife Pushpa Lalchand Shah (deceased) and mother to the 1st plaintiff are the registered owners of Plot No MN/1/1185 CR 10161, the suit property; that the 1st plaintiff charged the suit property to the 1st defendant for a sum of Kshs 50,000,000/= between 2016 and 2018; that due to harsh economic times, he defaulted in paying the loan, and he sought an extended grace period from the 1st defendant in remitting payments; that on 16th July 2020 the defendants purported to issue a 45-day statutory notice and further set a date for sale of the suit property by public auction on 20th August 2020, which was later amended to 27th August 2020; that the law does not provide for an amendment of a statutory notice and that the 2nd defendant ought to have issued a fresh 45-day notice since the initial one fell shot by seven days; that the actions of the defendants of changing the auction date was a way of denying them a chance to redeem their property and selling it to the alleged successful bidders; that the said auction was said to have been carried out without a valuation report as required by Section 97 of the *Land Act*, which exposed the suit property to being sold at an undervalued cost which is detrimental to its registered owners; that on 26th August 2020, this court issued an injunction stopping the said auction meant for 28th August 2020 on the condition that the plaintiffs would deposit Kshs 10,000,000/= with the court; counsel for the defendants confirmed to the court that the same had been deposited, but the respondents proceeded with the auction at 6 pm; that the said sale was illegal since it was not carried out at the appointed time, thus eliminating potential bidders from the auction; that after the illegal sale, the plaintiffs made a formal complaint to the DCI land fraud department, which investigated and prepared a report dated 26th August 2022; that the defendants carried out an illegal auction despite it being stopped by the court, and the injunction sought should be granted as prayed.
4. The 1st defendant responded to the application vide undated replying affidavit sworn by Neela K. Raj, the 1st defendant's branch manager, Nyali branch, and filed on the 27th February 2023. She deposed inter alia that the 1st defendant secured a charge over the suit property registered in the names of the 1st plaintiff and his late wife; that the 1st plaintiff however failed to service the charge which led to the charge accumulating to Kshs 64,788,767.13 as at 31st March 2018 plus interest at a rate of 8.5% per annum, additional interest of 3% per annum and additional 3% penal interest until payment in full; that the 1st plaintiff was then served with notices but the same were not honored and the 2nd defendant proceeded to advertise the suit property for sale by public auction; that in a bid to stop the sale, the plaintiffs filed CMCC ELC No 190 of 2019 which was subsequently dismissed with costs. The deponent argued that there was no legal requirement under the *Land Act* for the issuance of a fresh 45-day notice after the dismissal of a suit challenging a public auction; that the 2nd defendant went ahead and advertised the suit property for sale by public auction on 27th August 2020; that before the said sale the defendants



were served with a court order issued in this suit on 26th August 2020, stopping the auction on the condition that the plaintiffs pay Kshs 10,000,000/= by close of business on 26th August 2020, failure to which the defendants were at liberty to proceed with the sale on 27th August 2020; that the plaintiffs had not paid the said amount by the close of 26th August 2020, and the defendants were at liberty to proceed with the auction on the 27th August 2020, where Dilipkumar N.M Shah and Naynaben D.N.M Shah were the successful bidders after paying Kshs 65,400,000/; that the amount was above the reserve price of Kshs 65,000,000/=, and the successful bidders were then registered as the proprietors of the suit property on 8th January 2021; that after their registration, the highest bidders filed ELC No 64 of 2021 where it was determined that the defendants had failed to meet the conditional injunction granted to them and hence the said auction could not be stopped; that the court found no illegality or fraud in the said auction and determined that the bidders had acquired good title and ordered the 2nd plaintiff to vacate the suit property in 21 days, failure to which he would be forcibly evicted; that the instant application was only meant to stall the implementation of the said judgment and ought to be dismissed; that the injunction sought is not merited as no evidence has been adduced before the court of how the plaintiffs will suffer irreparable injury that cannot be adequately compensated by an award of damages; that the Plaintiffs were well aware that they had offered the suit property as security and as such, it was a commodity of sale and an injunction should not issued to restrain the defendants from exercising its statutory power of sale.

Notice of Motion dated 13th April 2023

5. The application was brought by the plaintiffs under Section 3A of the [Civil Procedure Act](#), Section 5 (1) of the [Judicature Act](#) and Article 159 of the [Constitution](#) of Kenya. The orders sought were inter alia:
 1. That this court be pleased to hold the 1st, 2nd, 3rd and 4th alleged contemnors in contempt of the orders issued by this court on the 17th of February 2023 and 1st March 2023 and proceed to commit them to civil jail for contempt of court orders.
 2. That this honourable court be pleased to grant such further orders as it may deem fair and just.

The application is premised on eight (8) grounds on its face and supported by the undated affidavit of Ameet Lalchand Devshi Shah, the 1st plaintiff, filed with the said application in which he deposed among others that by the application dated 13th February 2023, the court on 16th February 2023, issued a temporary injunction restraining the defendants herein and the successful bidders from evicting the plaintiffs from the suit property pending inter parties hearing and determination of this application; that the said orders were served upon the advocates of the 3rd and 4th respondents but they claimed not to have any instructions, which prompted the Plaintiffs' advocate to personally serve the 3rd respondent; that on 6th April 2023, a man who claimed to be a court bailiff and some goons in the presence of the 2nd defendant forcefully evicted the 2nd plaintiff from the suit property in total disregard of the orders of this court; that the defendants were at all times aware of the court orders as they were served personally through their WhatsApp numbers; that the court should uphold its authority by reinstating the plaintiffs to possession of the suit property and providing protection to avoid further illegal evictions by the defendants. When the application came up for hearing on 13th April 2023, the court certified it urgent, granted temporary injunction and reinstated the plaintiffs to possession of the suit property.
6. Dilipkumar N.M Shah, the 3rd respondent, filed an affidavit in response to the two applications dated 13th February 2023 and 13th April 2023, deposing inter alia that he and his wife, 4th respondent, are not parties to this suit and further claimed that the two applications are res judicata to Mombasa ELC No



64 of 2021; that they had already demolished the structures on the suit property after taking possession following lawful orders emanating from Mombasa ELC No 64 of 2021; that they had successfully got eviction orders against the plaintiffs and on 28th February 2023, they were put in possession of the suit property according to the orders issued by this court on 17th March 2023; that the plaintiffs were parties to the said suit and were well aware of the eviction orders against them and made no application to have the judgment entered against them, set aside; that the applications dated 13th February 2023 and 13th April 2023 were designed to embarrass the court by giving controversial orders on the same suit property; that this court should not sit on an appeal against the judgement of another judge of the same court and as such the said applications are res judicata, unmerited and an abuse to the court process and ought to be dismissed with costs.

Notice of Motion dated 26th April 2023

7. The application was brought by Dilipkumar N.M Shah and Naynaben N.M Shah, the 3rd and 4th respondents respectively, under Articles 25 (c), 40, 48, 50 (1) of the Constitution and Section 1A, 1B, 3A & 7 of the Civil Procedure Act, Order 40 (7) of the Civil Procedure Rules. The orders sought were inter alia:
 - a. Pending the hearing and determination of this application all other proceedings and the orders given on 14th February 2023, 1st March 2023 and 13th April 2023 be stayed.
 - b. This application be heard and determined before the hearing of the plaintiff's applications dated 13th February 2023 and 13th April 2023.
 - c. The orders given on 14th February 2023, 1st March 2023 and 13th April 2023 be set aside as a matter of right.
 - d. Costs of this application be provided for.
8. The application is based on the twenty seven (27) grounds and supported by the affidavit of Dilipkumar N.M Shah, the 3rd respondent, sworn on the 26th April 2023, in which he inter alia deposed that the plaintiffs' applications dated 13th February 2023 and 13th April 2023 are res judicata as they are asking the court to sit on appeal against the decision of 21st February 2023 by a judge of concurrent jurisdiction in ELC No 64 of 2021; the deponent reiterated the contents of his affidavit in reply to the plaintiffs' applications dated 13th February 2023 and 13th April 2023, and urged court to find that the plaintiffs were lawfully evicted from the suit property following the judgement delivered in ELC No 64 of 2021 and dismiss the said applications with costs.
9. The following are the issues for the court's determination on the three applications:
 - a. Whether the issues in this suit are res judicata those in Mombasa ELC No 64 of 2021.
 - b. Whether a temporary injunction should be granted restraining the defendants from interfering with the plaintiffs' occupation and possession of Land Parcel No MN/1/1185 CR 10161 pending the hearing and determination of the suit.
 - c. Whether the court ought to grant leave to the plaintiffs to amend their plaint.
 - d. Whether the plaintiffs have proved the defendants are in contempt of the orders issued by this court on 17th February 2021 and 1st March 2023.
 - e. Who pays the costs?



10. The court has carefully considered the grounds on each of the three applications, affidavit evidence, submissions by the learned counsel, superior courts decisions cited, the record and come to the following determinations:

- a. The 1st defendant vide its Replying Affidavit sworn by Neela Raj and the 3rd and 4th respondents/alleged contemnors in their replying affidavit, opposed the plaintiffs' applications, dated 13th February 2023 and 13th April 2023, on the basis that the applications are res judicata to Mombasa ELC No 64 of 2021 and ought to be dismissed with costs. The 3rd and 4th respondents argued that by determining these applications, this court will be sitting on appeal against the decision of a judge of concurrent jurisdiction. The principle of res judicata is entrenched in 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.”

Res judicata bars a litigant from commencing more than one action over a seemingly, similar cause of action. At the same time, it saves judicial time by ensuring that the court avoids a multiplicity of actions. For the court to determine whether the applications herein are res judicata, what ought to be examined is the decision that is said to have settled the issues in question to ascertain whether the issues that were determined in the said decision are similar to the subsequent suit and application; the decision in that other suit; whether the parties herein are the same and litigating under the title in the previous suit that was determined by a court of competent jurisdiction.

- b. Applying the foregoing to the present case, I note that the gist of the plaintiffs' applications dated 13th February 2023 and 13th April 2023 revolves around the sale of LR No MN/1/1185, the suit property, to the 3rd and 4th respondents through the auction following the exercise of the 1st defendant's statutory power of sale. The question therefore before this court is whether that issue was heard and determined by a court of competent jurisdiction in the previous suit. The respondents answer this question in the affirmative and called upon this court to find that issue has been determined and dismiss the said applications. In ELC No 64 of 2021, the 3rd and 4th respondents instituted a suit against the 1st and 2nd plaintiffs through an Originating Summons filed on 6 April 2021 and sought the determination of the following questions:

1. Whether they are the bonafide purchasers of the land parcel LR No Subdivision No 1185 Section 1 Mainland North (the suit property) having purchased it at an auction.
2. Whether the defendants are trespassers on the suit property and should hand over vacant possession to the plaintiffs.
3. Whether the plaintiffs should be allowed to forcefully evict the defendants; and
4. Whether the defendants should compensate the plaintiffs for loss of use of the suit property in form of rent at market rates with effect from 30th March 2021 until they hand over vacant possession to are evicted.



The 3rd and 4th respondent's case was that they purchased the LR No 1185/I/MN CR No 10161, the suit property, in a public auction held on 27th August 2020 by the 2nd respondent after emerging the highest bidders, having placed a bid of Kshs. 65,400,000/=. They paid the purchase price to the chargee, the 1st defendant. The suit property was transferred into their names and were issued with the title deed in their names. The plaintiffs herein, who were defendants in ELC No 64 of 2021, filed a replying affidavit opposing the Originating Summons. They inter alia pleaded that the plaintiffs purchased the suit property at a flawed auction carried out by the 1st respondent through the 2nd respondent. They claimed that the auction was flawed as it was carried out despite the filing of this suit, ELC No 106 of 2020, seeking to stop the sale. They contended that the 1st defendant carried out a private auction without proper notice despite a court order stopping the sale. The court heard the suit and delivered its judgement on 21st February 2023, in which it inter alia found that the 3rd and 4th respondents had duly purchased the suit property in a public auction, and were the duly registered proprietors of the suit property. The court found them to be innocent purchasers of value with no evidence of fraud in the manner in which the auction was conducted, or in the matter in which they purchased the suit property. The court found no evidence of irregularity and that the 3rd and 4th respondents were protected by Section 99 of the *Land Act*. The court further found that the plaintiffs herein had not demonstrated any rights over the suit property, and that they must give vacant possession or be evicted. The court ordered for a permanent injunction against the plaintiffs from entering, remaining on the suit property and for rent payments of Kshs 125,000/= from the time the suit was filed till they vacate the suit property.

- c. The suit herein was filed vide a plaint filed on 17th August 2020, the plaintiffs herein admitted to charging the suit property to the 1st defendant, and defaulting in payments as a result of financial difficulties. They averred that the 1st defendant served them with two notices giving them different figures of outstanding balance, one indicating Kshs 64,788,767.14 and the other dated 16th July 2020 indicating Kshs 51,952,980/=. The plaintiffs maintained that the lack of clarity in outstanding amounts was an indication of malfeasance. The plaintiffs averred that the 1st defendant was adamant in selling the suit property below the forced value which would be detrimental to them and urged the court to stop the said sale by issuing an injunction against the defendants from exercising their statutory power of sale over the suit property. The application dated 13th February 2023 prays for inter alia, a temporary injunction against the defendants from evicting the plaintiffs from the suit property pending the determination of the suit.
- d. The parties in ELC No 64 of 2021 are similar to those in the present suit. The plaintiffs therein are the 3rd and 4th respondents herein, while the defendants therein are plaintiffs herein. The 1st and 2nd defendants herein, though not parties to ELC No 64 of 2021, are adversely mentioned therein as the chargee and auctioneers who carried out the public auction of the suit property. It is important to note that the mere addition or subtraction of parties in a subsequent suit does not inhibit res judicata from operating. This was the finding of the court in *Gladys Nduku Ntbuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR where it was held that,

“However, it is trite that the mere addition of parties in a subsequent suit does not necessarily render the doctrine of res judicata inapplicable since a party cannot escape the said doctrine by simply undertaking a cosmetic surgery to his pleadings. If the added parties peg their claim under the same title as the parties in the earlier suit,



the doctrine will still be invoked since the addition of the party would in that case be for the sole purpose of decoration and dressing and nothing else. Under explanation 6 to section 7 of the *Civil Procedure Act*, where persons litigate bona fide in respect of a public right claimed in common by themselves and others, all persons interested in such right shall, for the purposes of the section, be deemed to claim under the persons so litigating.”

- e. From the analysis of this matter and the former suit, it is clear to the court that the same issues herein were directly and substantially in issue in the former suit. The cause of action is the same, that is the sale of the suit property by the 1st defendant through the 2nd defendant, to the 3rd and 4th respondents, through a public auction. In the application dated 13th February 2023, the plaintiffs are referring to the disparity in a 45-day notice dated 16th July 2020, claiming that it was less by 7 days, and that the 2nd defendant ought to have reissued another notice. The plaintiffs also disputed the date and time on the said notice claiming that they were out to deny them a chance to attend the auction. In addition to that, they claimed that there were injunctive orders issued on 26th August 2020 stopping the sale on condition that they deposit Kshs 10 million by close of the said day. That however, the defendants proceeded with the sale despite the amount being deposited. The plaintiffs maintained that the sale was illegal as it was not conducted at the appointed time and that the same ought to have been re-advertised. It is the finding of this court that all the issues raised in the application dated 13th February 2023, seeking injunctive orders as well as in the main suit were not only directly and substantially in issue as those in ELC No 64 of 2021, but the same had been heard and determined by a court of competent jurisdiction.
- f. The court in the former suit heard from the plaintiffs on the issue of the 45-day notice, the conditional injunctive order that required the plaintiffs to deposit Kshs 10 million, the investigation into the auctioneers by the DCI, the absence of the plaintiffs in the said auction, which was allegedly conducted at 6.20 pm by an unlicensed auctioneer. The court went ahead to find and I quote,
- “From the evidence before me, I am persuaded that the plaintiffs (3rd and 4th respondents herein) duly purchased the suit property in a public auction and they are not the duly registered proprietors of the suit property. They are innocent purchasers for value. I have not found any evidence of fraud in the manner in which the auction was conducted or in the manner in which the plaintiffs purchased the suit property. I have also not found any evidence of irregularity. It follows that the plaintiffs are protected by dint of the provisions of Section 99 of the *Land Act*.”
- g. It is clear to the court that the parties herein are not only the same, but are litigating under the same title, over issues that were well considered and determined by this court in ELC No 64 of 2021. The plaintiffs herein are trying to conjure issues, and include parties with the view of giving their case a facelift from the former suit. In the former suit, the plaintiffs herein were directed to give vacant possession of the suit property to the 3rd and 4th respondents lest they be evicted. They were permanently restrained from remaining on the suit property and the 3rd and 4th respondents were given the liberty to enter and inspect the suit property. There is nothing more for this court to determine in this matter, as all issues raised herein were substantially considered, and determined in the former suit.



- h. This suit is res judicata to Mombasa ELC No 64 of 2021 and amounts to an abuse of the court process and a waste of judicial time. Having found the suit is res judicata, it follows that the application dated 13th February 2023 for an injunction, is without a foundation. The application dated 13th April 2023 that seeks to find the 3rd and 4th respondents to be in contempt of court orders issued on 17th February 2023 and 1st March 2023 is also based on quicksand and has no foundation. Had the fact that this suit was res judicata been apparent when the orders of 14th February 2023 granting prayer 2 of the application dated 13th February 2023, and 1st March 2023 extending the order, and granting prayer 2 of the application dated 13th April 2023 on that same date, thereby reinstating the plaintiffs onto the suit premises, the court would probably not have been granted those orders. For avoidance of doubt, the applications dated 13th February 2023 and 13th April 2023 are therefore for dismissal.
- i. It follows therefore that the suit herein commenced through the plaint dated 17th August 2020, and filed on the same day raises issues that have already been determined in ELC No 64 of 2021 and is therefore res judicata.
- j. That as under section 27 of the Civil Procedure Act chapter 21 of Laws of Kenya, costs follow the event unless where for good cause the court orders otherwise. In this case, I find no reason to deviate from that edict and award the defendants costs.
11. Flowing from the foregoing determinations, the court finds and orders as follows:
- a. That the suit herein, commenced through the plaint dated 17th August 2020 is res judicata to ELC No 64 of 2021 as it substantially deals with the same issues already determined and between the same parties.
- b. That the suit herein, having been found to be res judicata, is hereby struck out with costs.
- c. That the 3rd and 4th respondents application dated the 26th April 2023 has merit and is granted with costs and the orders given on 14th February 2023, 1st March 2023 and 13th April 2023 are hereby set aside.
- d. That the plaintiffs' notices of motion dated the 13th February 2023 and 13th April 2023 that were predicated on a suit that has been found to be res judicata, are without merit and are therefore struck out with costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED ON THIS 7TH DAY OF FEBRUARY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiffs : None.

Defendants : Mr. Anangwe for 3rd and 4th Respondents and holding brief for Gathaiya for 1st and 2nd Defendants.

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

