



**Muotia t/a Nairobi Upperhill Hotel Ltd v National Bank of Kenya Ltd & another
(Land Case E163 of 2024) [2024] KEELC 5265 (KLR) (9 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5265 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E163 OF 2024**

JA MOGENI, J

JULY 9, 2024

BETWEEN

**GEOFFREY WAHOME MUOTIA T/A NAIROBI UPPERHILL HOTEL
LTD PLAINTIFF**

AND

NATIONAL BANK OF KENYA LTD 1ST DEFENDANT

KEYSIAN AUCTIONEERS 2ND DEFENDANT

RULING

1. Before this court is the plaintiff's Notice of Motion dated 20th July 2023 brought under a Certificate of Urgency and pursuant to Sections 1A, 1B, and 3A of the [Civil Procedure Act](#), Order 40 Rules 1 of the [Civil Procedure Rules](#), the application inter alia seeks the following reliefs:
 1. Spent.
 2. That this Honorable Court do temporarily suspend the Defendants/Respondent's Statutory Notice of Sale dated 15th day of February 2023 and the resultant Notice of Sale by Public Auction of the Plaintiff/Applicant's land parcel LR No. 209/12544 (IR 76624) slated for 24th day of April 2024 pending the hearing and determination of the application.
 3. That this Honorable Court do issue a conservatory order against injunction the Defendants/Respondent, their agents, servants and/or assignees from trespassing, accessing, selling, alienating and/or interfering whatsoever in any manner with the Plaintiff/Applicant's quiet enjoyment of land parcel LR No. 209/12544 (IR 76624) pending the hearing and determination of this application.
 4. That this Honorable Court do temporarily suspend the Defendants/Respondents' Statutory Notice of Sale dated 15th day of February 2023 and the resultant Notice of Sale by Public



Auction of the Plaintiff/Applicant's land parcels LR 209/12544 (IR 76624) dated for 24th day of April 2024 pending the hearing and determination of this suit.

5. That this Honorable Court do issue a conservatory order injuncting the Defendants/ Respondent, their agents, servants and/or assignees from trespassing, accessing, selling and/or alienating and/or interfering whatsoever in any manner with the Plaintiff/Applicant's quiet enjoyment of land parcel LR No. 209/12544 (IR 76624).
 6. That this Honorable Court do issue such other and further orders as it deems fit and just to issue.
 7. That costs be provided for.
2. The application was opposed by the 1st respondent through the replying affidavit that was deponed by Samuel K. Kimani on 12/07/2023.
 3. When the parties appeared in court on 16/05/2024 they agreed to canvass the application by way of written submissions.
 4. The 1st respondent states that whereas the plaintiff/applicant through the Notice of Motion application seek to temporarily injunct the 1st and 2nd respondents from selling by public auction or any other manner whatsoever suit property referred to as LR 209/12544 (IR 76624). Notably, the applicant wants to stop the 1st respondent from exercising its statutory power of sale which has been occasioned by the plaintiff's default on the loan facility advanced to him. According to the 1st respondent, the question then is whether such a dispute should be within the purview of the ELC jurisdiction. Section 13 of the *Environment and Land Court Act* clothes this Court with original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of *the Constitution* and with the provisions of the *ELC Act* or any other law applicable in Kenya relating to environment and land. Article 162 (2) (b) of *the Constitution* demarcates the jurisdiction of the ELC Court by enacting that it shall have power to hear and determine the following disputes:
 - a. Relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. Relating to compulsory acquisition of land;
 - c. Relating to land administration and management;
 - d. Relating to public, private, and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. Any other dispute relating to environment and land.
 5. 1st respondent avers that the plaintiff was granted by the defendant bank an overdraft of Ksh 10 million, a commercial mortgage of Ksh. 236 million and a term loan of Ksh. 35 million totaling Ksh. 281 million exclusive of interest and bank charges vide the dated 29/09/2014. However 10 years on the plaintiff has defaulted on repayment leading to an outstanding balance of Ksh. 447,818,282 as per the certificate of balances marked as SKK9.
 6. It is the 1st respondent's contention that this suit is res judicata the plaintiff having approached court on the same issues vide Milimani Hccom E193 of 2023 marked as SKK-1, Hccom E330 of 2023 and there were two rulings delivered one on 15/09/2023 and another on 3/11/2023 marked as SKK-2 a & b where the court declined to restrain the 1st defendant from selling the suit property in exercise of



the chargee statutory power of sale. There is also a Court of Appeal decision of 25/01/2024 marked as SKK-3.

7. At the time of writing this ruling neither the plaintiff nor the respondents had filed any written submissions.

Analysis and Determination

8. The applicant has conceded that he was duly served with a statutory notification for sale and 45-day Redemptive notice by the 2nd respondent. The issue before this Court therefore revolves around the issuance of the statutory notice and the exercise of the 1st respondent's statutory power of sale. From the 1st respondent's foregoing arguments, the 1st respondent submits that the applicant has approached the wrong Court. The dispute as captured in the applicant's pleadings ought to have been placed before the High Court for determination. The 1st respondent therefore avers that it is correctly exercising its accrued statutory power of sale given the inequitable way the applicant has behaved.
9. At the same time the 1st respondent filed Grounds of Opposition on legal issues. The 1st respondent contends that following the Court of Appeal decision referred to hereinabove, then this Honorable Court had no jurisdiction to determine the issues in the suit since it is a commercial dispute where the issue is whether the 1st defendant is entitled to realize a chargee's security for repayment of a banking facility. Further the 1st respondent referred to the two cases decided in the High Court, Hccomm E193 of 2023 and Hccomm E330 of 2023 and stated that the current suit remains res judicata since it offends Section 6 of the [CPA](#).
10. The plaintiff/applicant did not file any response to rebut these claims of the suit being res judicata nor the claim of this court lacking jurisdiction.
11. From the materials placed before me, the issue that fall for the determination of this Court is whether this Court has jurisdiction to entertain the current suit in the form and manner it has been filed. And who should bear the costs of these proceedings?
12. Of res judicata, sub judice and jurisdiction.
13. The objections raised by the defendants is based on section 6 and 7 of the [Civil Procedure Act](#) and the issues therein concern matters of res judicata and jurisdiction of the court.
14. The court is precluded from proceeding '... with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed'. Section 6 of the [Civil Procedure Act](#).
15. In considering res judicata, it is imperative that; 'Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action but a plaintiff may relinquish any portion of his claim". Order 11 Rule 1 (1) of the [Civil Procedure Rules](#).
16. It has been claimed by the 1st respondent that the plaintiff has been filing multiplicity of suits aimed at frustrating their effort to recover the its interest as a chargee. The plaintiff on the other hand claim that they are simply seeking to pay up its loan facility through redevelopment arrangement instead of it being sold via public auction.
17. Kimaru J (as he then was) observed that; 'The plaintiff has filed suits left, right and centre to achieve only one purpose: to frustrate the 1st defendant from realizing the security that the plaintiff had charged



to it. The plaintiff does seem to care if by filing multifarious suits means that he is breaching the same laws that he is seeking to have enforced and protect him'. Nakuru Hccc No239/2004 *Abdi Hashi Duale v. National Bank of Kenya & 2 others.*

18. Ultimately, the judge concluded that: 'In the circumstances of this case, I would hold that the plaintiff abused the due process of the court when he filed this suit". I bid.
19. It emerges from the documents filed by the parties herein that the plaintiff/applicant has filed different suits against the 1st respondent/defendant in different courts including a case in the Court of Appeal.
20. It also emerged that the plaintiff, in this case, has filed four other applications on diverse dates where the High Court has pronounced itself on the subject matter at hand. The suits filed by the plaintiff challenge the right of the 1st defendant to exercise its statutory power of sale as a chargee. In a way, Article 162 (2) of *the Constitution* constitute exclusive and inflexible jurisdictional clause, barring litigation of disputes falling within the jurisdiction of Environment and Land Court (ELC) in the High Court. Therefore, this is not a matter of pendency of parallel or competing proceedings in the same dispute but one where the court has absolutely no jurisdiction. As res judicata envisions possession of jurisdiction, it does not arise in a case of lack of jurisdiction. And, this court does not evince any thought that it can issue an injunction to restrain a party from filing disputes relating to a commercial dispute relating to implementation of the statutory power of sale for a chargee to recover their interest in charged property.
21. Thus the Section 7 of the *Civil Procedure Act* under which the doctrine of Res-judicata is founded provides thus:

“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”.
22. The doctrine as it is an estoppel against a party who seeks to re-litigate on an issue which has been litigated upon in a previous suit by a Court of competent jurisdiction.
23. On the issue of jurisdiction I will not beat about the bush by citing many cases I will restate what Nyarangi JA. held in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR: -

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
24. Looking at the pleadings herein from the plaintiff, defence, and the affidavits by parties, it is not disputed that the 1st respondent charged the suit property LR No. 209/12544 (IR 76624) to the 1st respondent to secure an overdraft, commercial mortgage and a term loan. The plaintiff has long defaulted in the repayment of the loan and a 40-day Statutory Notice of sale has been issued. It is this notice when served on the applicant who has also filed suits contemporaneously with this one.
25. The primary issue in this suit initially will be the subsisting legal charge and the subsequent statutory power of sale. This being the case I do agree with the observation by the 1st respondent that the High



Court will be the appropriate forum to ventilate the issues raised herein based on judicial precedents – see Angote J. in *Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) & Another* [2021] eKLR quoted with approval in *Keter v Ecobank Kenya Limited (Civil Case 16 of 2018)* [2022] KEHC 13352 (KLR) (28 September 2022) (Ruling):

“The substratum of the suit relates to the legal charges and the subsequent statutory power of sale. The High Court has jurisdiction to deal with a dispute in which the predominant issue is the exercise of the statutory power of sale by the charge. In *Thomas Mutuku Kasue vs Housing Finance Company Ltd (HFC) & Another* [2021] eKLR the court held; The Court of Appeal, whose decision is binding on this court, has held that where the predominant issue in a suit involves mortgages, charges, collection of dues and rents, it is the High Court, and not the Environment and Land Court, that has jurisdiction to deal with the dispute. That being so, and the predominant issue in this matter being the issuance of the statutory notices by the chargee, it is my finding that this court does not have jurisdiction to hear and determine this suit.”

26. We are primarily dealing with a legal charge here and the subsequent statutory notice of sale, which is what the applicant intends to stop and which cannot be separated from the applicant’s intended action for redevelopment of the suit property. Which in my view can be challenged in the High Court by opposing the sale by public auction and the defendants categorically failing to give a chance to the applicant to make proposals for repayment through redevelopment. Thus all the issues raised by the applicant can be ventilated there.
27. Given the foregoing, I find that this Court based on the reliefs sought, and a red flag having been raised the earliest, that this Court lacks jurisdiction to proceed further to consider the claim as raised in the plaint and, in the same breath deal with the pending application for an injunction, I down tools as Nyarangi JA stated.
28. The effect of downing tools means striking out the entire suit rather than transferring the same as held in the case of *Phoenix of E.A. Assurance Company Limited v M. Thiga t/a Newspaper Service* [2019] eKLR:
29. Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself.

Disposal Order

30. In a nutshell, therefore, the pending application and the entire suit are hereby struck out with costs to the 1st respondent.

It is so ordered.

DATED, SIGNED, AND DELIVERED AT NAIROBI VIRTUALLY ON THIS 9TH DAY OF JULY 2024.

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MOGENI J

JUDGE

In The Presence Of:

Mr. Mutua for Defendants



Sagina - Court Assistant

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MOGENIJ

JUDGE

