



Said v Juja Coffee Exporters Limited & another (Environment & Land Case 68 of 2022) [2023] KEELC 15782 (KLR) (1 March 2023) (Ruling)

Neutral citation: [2023] KEELC 15782 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 68 OF 2022**

**SM KIBUNJA, J
MARCH 1, 2023**

BETWEEN

ISHA TAHER SHEIKH SAID PLAINTIFF

AND

JUJA COFFEE EXPORTERS LIMITED 1ST DEFENDANT

BANK OF AFRICA LIMITED 2ND DEFENDANT

RULING

Notice Of Motion Dated June 23, 2022 and July 26, 2022

1. The plaintiff commenced this suit through the plaint dated the June 23, 2022 seeking for inter alia permanent injunction restraining defendants from among others selling by way of auction or private treaty or any other way interfering with Mombasa/Block XXV1/381, declaration that the registered charge in favour of 2nd defendant is illegal, null and illegal and an order to discharge it. The plaint was filed contemporaneously with the notice of motion of even seeking for an injunction restraining the defendants from inter alia selling, advertising for sale, selling by way of auction, leasing, charging, assigning, transferring on in any other manner dealing with LR No Mombasa/Block XXVI/381, located in Kizingo area Mombasa, that is registered in the plaintiff's name pending the hearing and determination of the suit. The application is premised on the twenty-one (21) grounds on its face marked (a) to (u) and supported by the affidavit indicated to have been sworn by Isha Taher Sheikh Said, the plaintiff, on the July 23, 2022, but filed on the June 23, 2022. It is the plaintiff's case that she resides on LR Mombasa/Block/XXVI/381, the suit property, that is registered in the name of her deceased husband, Tahir Sheikh Said. That she and her late husband moved onto the suit property in 1998, and has resided thereon since then. She deposed that the 2nd defendant has initiated the process of illegally and fraudulently realizing the suit property over alleged loan arrears issued to the 1st defendant. That the said charge that was created over the suit property was illegal and unlawful as it was devoid of her spousal consent as required by section 79 of the *Land Act*. That Garam Investement Auctioneers



attempted to conduct an illegal public auction of her suit land on June 13, 2022 but the same was unsuccessful. She maintained that she was neither served with the 45 day-notification of sale nor the statutory notice as required by law. The plaintiff argued that there was no proper valuation that was conducted on the suit property and the one that was carried out was a gross undervaluation. The plaintiff is apprehensive that the 2nd respondent will proceed to exercise its statutory power of sale via private treaty and deprive her and her family of their home. The plaintiff urged the court to stop the said sale least the 2nd defendant proceeds to sell the suit property and deprive the plaintiff and her family of their home despite the illegalities.

2. The record shows that *ex parte* temporary injunction order pending *inter partes* hearing and determination of the application was granted by the court on the June 23, 2022. The application was then served.
3. On its part, the 2nd defendant filed their application by way of notice of motion dated the July 26, 2022, seeking for *inter alia* stay of the plaintiff's application dated June 23, 2022, the recusal and or disqualification of Justice LL Naikuni from further conduct of this suit, and the setting aside of the interim injunctive orders issued on June 23, 2022. The application is based on the nineteen (19) grounds on its face marked (1) to (19) and supported by the affidavit sworn by Charles Waiyaki, Recoveries Manager of the 2nd defendant. It is the 2nd defendant's case that the learned judge should recuse himself for issuing *ex parte* orders without complying with order 40 rule 4 (2) and (3) of the [Civil Procedure Rules](#). That the judge is biased against the 2nd defendant because in a previous suit, that is ELC No 51 of 2022, Changawa Kazungu Kitsao 7 Another v TSS Investment Limited & 2 Others that affected the bank's statutory power of sale, the learned judge had granted an injunction pending the determination of the suit when the application had not been determined on merit. That the plaintiff is forum shopping for a court that will issue favorable orders, and further to that she is a proxy to the 1st defendant, a sister company to TSS Investment Limited, with several cases before this court. The bank argued that this court has no jurisdiction to hear and determine the suit as the jurisdiction lies with the High Court. The plaintiff is lacking locus to seek relief under section 103 of the [Land Act](#) as she has no legal interest over the suit property. Further the bank claimed the suit herein was *res judicata* to similar applications dismissed by the High Court and Court of Appeal involving the suit property in Bank of Africa v Juja Coffee Exporters Limited & 4 others Civil Appeal No 99 of 2016, Juja Coffee Exporters Limited & 2 others v Bank of Africa Civil Appeal No 158 of 2018 and Juja Coffee Exporters Limited & 2 others v Bank of Africa Limited & 4 others HCCC No 57 of 2016. That on this basis, the court was *functus officio*, and could not issue injunctive orders as it would be sitting on appeal of the Court of Appeal and High Court. In response to the application dated June 23, 2022, the 2nd defendant maintained that the issue of service of notification of sale is *res judicata* in view of the decisions in the above listed cases. The bank insisted that there was proper valuation that was done by Accurate Valuers Limited on April 21, 2021 which placed the open market value of the suit property at Kshs 118 million, and the forced sale value at Kshs 88.5 million. Further the bank argued that the plaintiff has not presented an alternative valuation report, and no evidence has been presented to establish that the suit property was undervalued. The bank argued that no evidence has been presented before court to demonstrate that the suit property is matrimonial property as the charged land is registered in the name of a limited company. That the injunctive orders would subject the 2nd defendant to suffer irreparable loss, as though the chargor had admitted the debt and promised to pay, it has not done so, but instead continues to file multiple suits and applications, making it difficult for the bank to recover the debts due to insufficient securities. The court should find that the bank will suffer irreparable loss on the ground that as at August 14, 2020 the amount owing was Kshs 387,224,719/= while the suit property is valued at Kshs 118,000,000/=, meaning that even after realizing the property, there would be an outstanding balance of Kshs 120,974,719. That the loss to the 2nd defendant cannot be compensated with damages.



4. The learned counsel for the parties appeared before the court on the July 28, 2022 for inter partes hearing of the plaintiff's application and directions referring the matter to this court among others were issued. On the September 28, 2022 the matter was mentioned before this court, then presided over by Justice Sila Munyao, who after hearing the counsel for the parties directed inter alia that the application dated July 26, 2022 be canvassed as a reply to the application dated June 23, 2022. The court also gave directions on filing and exchanging supplementary affidavit, submissions and extended the interim orders. Further directions were issued by this court on the November 8, 2022 and on the January 26, 2023 the ruling date was fixed.
5. The learned counsel for the 2nd defendant filed their written submissions dated the October 15, 2022 on the October 31, 2022 and the court has considered them.
6. The following are the issues for the court's determinations;
 - a. Whether the court has jurisdiction to hear and determine the suit.
 - b. Whether the application herein is *res judicata*.
 - c. Who pays the costs in each of the two applications.
7. The court has after considering the grounds in the applications, affidavit evidence, submissions by the learned counsel, superior courts decisions cited thereon come to the following findings;
 - a. That the jurisdiction of court is the legal authority it has to decide matters that are litigated before it. Jurisdiction must flow from the [Constitution](#) or statute. In the case of [Owners of the Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd \[1989\] KLR 1](#), the court held that;

“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.”

The Supreme Court of Kenya addressed the issue of jurisdiction in the case of [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others \(2012\) eKLR](#), and held that;

“A court's jurisdiction flows from either the [Constitution](#) of legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the [Constitution](#) or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively.”
 - b. The jurisdiction of this court over disputes concerning a legal charge was an issue for determination by the Court of Appeal in the case of [Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others \[2017\] eKLR](#). The Court of Appeal found that the definition of land in article 260 of the [Constitution](#), which echoes the *cujus est solum, ejus*



est usque ad coelum doctrine restricts the definition of land to necessary and ordinary use and enjoyment of the land and structures upon it. The Court of Appeal concluded that the relationship created when a person acquires rights over the land of another as security in exchange for financial facility, had nothing to do with the use of land since the relationship was limited to ensuring the chargee is assured of the repayment of the money he advanced to the chargor. That decision of the Court of Appeal led to the majority of disputes relating to charges being transferred from this court into the High Court for determination on the ground that the Environment and Land Court has no jurisdiction to hear and determine disputes arising from charges. The said decision has been a subject of debate among legal practitioners and has been interpreted and applied differently by courts over the years. The Court of Appeal had in the said case further held that;

“To the appellant, the charge was an instrument granting an interest in the land, hence jurisdiction in the matter lay with the ELC. However, under section 2 of the said act, an instrument is a writing or enactment which creates or affects legal or equitable rights and liabilities. For the purposes of this suit, that instrument was the charge. However, it bears repeating that the cause of action herein was never the charge (instrument) but the amounts due and owing thereunder. Neither the charge instrument nor the creation of an enforceable interest thereunder, were disputed. The main questions to be determined were the tabulation of the sums owing and whether statutory notices had issued prior to the attempted statutory sale.” [underlining added].

In my view, what the Court of Appeal meant was that, the issue before it was predominately a dispute on the tabulations of the money owed by the chargor, as opposed to the validity of the charge as a contract securing interest in land, hence suitable to be handled by the High Court.

- c. The Co-operative Bank of Kenya case [*supra*] was a case involving mixed issues that could not be separated to be heard by different courts. Some of the issues fell within the jurisdiction of this court and others to the High Court. In an earlier case of *Suzanne Achieng Butler & 4 others v Redhill Heights Investments Limited & another [2016] eKLR*, where the dispute arose from a transaction involving both the sale of land, and the construction of townhouses and ancillary infrastructures, the court relied on the pre-dominant purpose test to determine the issue of jurisdiction. Other than an examination of the pleadings, the court outlined the factors that are significant in determining the nature of contract, and held that;

“The court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse. ordinarily, the pleadings give the court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other courts have done and therefore lends predictability to the issue.

In my view, the following factors are significant in determining the nature of the contract:

- a. The language of the contract;
- b. The nature of the business of the vendor;



- c. If the contract is mixed, the intrinsic worth of the two parts – land acquisition and other services or provision of materials;
- d. The gravamen of the dispute – whether rooted in contests about ownership, deficiency in title, occupation or use of the land or whether the genesis of the dispute is something else like the quality of services offered, construction, works and so forth; and
- e. The remedies sought by the plaintiff”

In a subsequent case of *Lydia Nyambura Mbugua v Diamond Trust Bank Kenya Limited & another* [2018] eKLR, the court was of the view that when determining whether the court has jurisdiction, it is more about the subject matter or issue before court rather than the purpose of the transaction. The court stated that;

“Going back to the issue at hand, in cases revolving around a charge, and the chargee’s exercise of its power of sale, where the predominant issue is whether the statutory right of sale has arisen; or whether a statutory notice was issued; or whether the property has properly been advertised; or whether generally, the process of sale is in accordance with the provisions of the *Land Act* and *Land Registration Act*, then the matter would fall under the jurisdiction of the ELC, for these processes are laid down in the *Land Act* and *Land Registration Act*, for which it is the ELC which is the court with jurisdiction. It should also not be forgotten that this is a process of acquisition of title to land. However, if the predominant complaint is whether the bank has properly calculated its figures, and not how the bank is proceeding to sell the property, then this could be a High Court matter, but again, as I have stated above, if this issue is collateral to the process of sale, and not severable, the ELC would still have jurisdiction to hear the whole of the dispute including related issues such as the amounts payable, where these cannot be severed from the dominant issue.”

- d. That having considered the above decisions, I now turn to article 162 (2) (b) of the *Constitution* that establishes and outlines this court with jurisdiction in the following words;

“162. Parliament shall establish courts with the same status of the High Court to hear and determine disputes relating to –

- (b) the environment and the use and occupation of, and title to land.”

The *Environment and Land Court Act* No 19 of 2011 operationalized the court thereby giving effect to article 162 (2) (b) of the *Constitution*, and at section 13 (2)(d) on jurisdiction, it provides that:

“In exercise of its jurisdiction under article 162(2)(b) of the *Constitution*, the court shall have power to hear and determine disputes—

- (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; ...”

A charge as defined by section 2 of the *Land Act* is an interest in land securing the payment of money. A charge is a form of a disposition, which is defined by section 2 of the Act, as



an interest in land where the owner's rights over the land are affected. The issue before court concerns a charge that was created over Mombasa/Block XXVI/381 and the manner in which the bank seeks to exercise its statutory power of sale.

- e. The 1st defendant's claim that the application herein is *res judicata* in view of the following suits;
- a. [Bank of Africa v Juja Coffee Exporters Limited & 4 others Civil Appeal No 99 of 2016,](#)
 - b. [Juja Coffee Exporters Limited & 2 others v Bank of Africa Civil Appeal No 158 of 2018,](#)
 - c. [Juja Coffee Exporters Limited & 2 others v Bank of Africa Limited & 4 others HCCC No 57 of 2016.](#)

In [Bank of Africa v Juja Coffee Exporters Limited, TSS Transporters Limited, TSS Investment Limited, Tahir Sheikh Said, Abdmed and Kaab Investment Limited Civil Appeal No 99 of 2016;](#) the appeal was against the ruling of July 21, 2016 in HCCC No 57 of 2016, granting the respondents a temporary injunction against the bank's exercise of its statutory power of sale. The bank was restrained from dealing with the 1st, 2nd, 3rd and 4th respondents properties, which included the suit property Land Parcel Mombasa/Block XXVI/381. The Court of Appeal set aside the orders issued by the High Court on July 21, 2016. In [Juja Coffee Exporters Limited, TSS Transporters Limited and TSS Investment Limited v Bank of Africa, Civil Appeal No 158 of 2018;](#) the appeal was against a ruling challenging an order of the High Court dated April 5, 2018 in HCCC No 57 of 2016, which held that the appellant's application dated March 7, 2018 seeking injunctive orders to restrain the bank from exercising its statutory power of sale over six charged parcels of land registered in the name of Tahir Sheikh Said Investments Limited was an abuse of the court process by reason of *res judicata*. The Court of Appeal upheld the preliminary objection that the application was *res judicata*. In *Juja Coffee Exporters Limited, TSS Transporters Limited, TSS Investment Limited, Tahir Sheikh Said v Bank of Africa Limited & 4 others*, HCCC No 57 of 2016, the plaintiffs therein made an application dated August 11, 2021 seeking temporary injunction restraining the bank from selling their parcels of land including Mombasa/Block XXVI/381, but the bank opposed the same on the ground that the application was *res judicata*.

- f. 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.”

The objective of the doctrine of *res judicata* is to bar multiplicity of suits through re-litigation and is premised on the principle that litigation must be concluded. From the reading of section 7 of the [Civil Procedure Act](#) the conditions set for doctrine of *res judicata* to exist are:

- a. The matter before court is directly and substantially in issue with the former suit,
- b. The former suit is between the same parties, or between parties under whom they or any of them claim,
- c. The parties must have litigated under the same title in the former suit,



- d. The court that determined the former suit was competent to try such subsequent suit, which was heard and finally decided by such court.
- g. It has not been disputed that the Court of Appeal Civil Appeal No 99 of 2016 and Civil Appeal No 158 of 2018 emanated from HCCC No 57 of 2016; which was instituted by Juja Coffee Exporters Limited, TSS Transporters Limited, TSS Investment Limited “referred herein as the companies”, which were the brainchild of the late Tahir Sheikh Said husband, to the plaintiff. The companies made two similar applications to the one before this court before the High Court. The first one is dated June 6, 2016 and the second the March 7, 2018 where they, in two separate instances, sought injunctive orders restraining the Bank, which is the 2nd defendant in this suit, from exercising its statutory power of sale over their charged parcels of land, including the suit property herein. The application dated June 6, 2016 was allowed on July 21, 2016 by the High Court, but was challenged by the Bank in Court of Appeal CACA No 99 of 2016. On January 25, 2018 the Court of Appeal set aside the orders of July 21, 2016 and dismissed the application dated June 6, 2016. The companies made a second application dated March 7, 2018, which was dismissed by the High Court for being *res judicata* to the application dated June 6, 2016. An appeal was filed and on June 18, 2021 the Court of Appeal upheld the ruling of the High Court that the application dated March 7, 2018 was *res judicata* to the one dated June 6, 2016. The companies made another attempt vide an application dated August 11, 2021 seeking injunctive orders to stop the sale of their parcels of land, including the suit property. The application was again found unmerited and dismissed by the High Court on January 25, 2022.
- h. The suit herein was then instituted by Isha Taher Sheikh Said, the plaintiff and the wife to the late Tahir Sheikh Said. It is her case that Mombasa/Block XXVI/381, registered in the name of Tahir Sheikh Said has been her matrimonial home since 1998 when she moved into the suit property with the deceased. I have perused the ruling dated January 25, 2022 in HCCC No 57 of 2016, and it is clear that the companies therein sought to stop the sale of parcels of land, including the suit property, which were charged to the 1st defendant. The plaintiff in my view is litigating under the same title as the companies were in the earlier suit. The plaintiff’s case is that her spousal consent was never sought when charging the suit property. That is a question that goes to the root of the charge, and there is no attempt made to explain why the issue was not canvassed alongside the issues raised by the companies on fraud and collusion in the previous suit.
- i. In litigation parties are required to bring forth their whole case and not in bits. The plaintiff herein, as a widow to the late Tahir Sheikh Said and a beneficiary to his estate, is a part of the companies litigating in HCCC No 57 of 2016, in one way or another. She is therefore not allowed to litigate on a piece of the puzzle (estate), while another suit over the same property and others is being heard and pending determination before the High Court. The issue of whether spousal consent was sought or not, and the perfection of a security can be heard alongside other issues raised in the earlier suit which challenges the legality of the charges created over the parcels of land belonging to the companies.
- j. I am aware that in special circumstances, parties may be permitted to open and litigate on the same subject matter, which has already been brought forward. In *Henderson v Henderson (1843-60) ALL ER 378*) the court held that;
- “Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to



bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

The plaintiff herein has not established the existence of any special circumstances that would allow the parties to re-litigate the issues that may well have been raised in the previously filed suit before the High Court. The plaintiff has been in occupation of the suit property since 1998, and must have been aware and involved in the filing and prosecution of the other litigations and the appeals thereof as particularized above. The plaintiff therefore ought to have sought protection of her spousal rights by litigating in HCCC No 57 of 2016, probably by seeking leave of court to be joined as a plaintiff therein, and front her cause of action against for example, the bank over her claim and what I would now consider the estate of her deceased husband.

- k. In conclusion, I find that the application dated June 23, 2022, is *res judicata* as the issues therein have been determined previously by a court of competent jurisdiction to the appeal level, as between the same parties and or through whom they claim. The 2nd defendant having been successful in opposing the application is entitled to costs under section 27 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya.
8. In view of the foregoing conclusions, the court finds and holds that the plaintiff’s application dated the June 23, 2022 is without merit and is hereby dismissed with costs to the 2nd defendant. That order effectively settles the 2nd defendant’s notice of motion dated July 26, 2022.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 1st DAY OF MARCH 2023.

S M KIBUNJA, J.

In The Presence Of;

Plaintiff: Absent

Defendants : Absent

Counsel: Mr Mulizi for Wawire for 2nd defendant and Mr Wazir for plaintiff.

Wilson – Court Assistant.

S M KIBUNJA, J.

ELC MOMBASA.

