



Maina v KCB Bank Kenya Limited & 2 others (Environment and Land Case Civil Suit E055 of 2023) [2023] KEELC 20688 (KLR) (12 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20688 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E055 OF 2023**

**J OMANGE, J
OCTOBER 12, 2023**

BETWEEN

LUCY WANJIRU MAINA PLAINTIFF

AND

KCB BANK KENYA LIMITED 1ST DEFENDANT

JOYLAND AUCTIONEERS 2ND DEFENDANT

JAMES MAINA THUKU 3RD DEFENDANT

RULING

1. The subject matter of this suit is the exercise of a statutory power of sale in respect of LR No Makuyu/ Makuyu Block 1/2087 Punda Milia area, Nairobi Block 82/1716, Savannah Estate Phase 4, Nairobi Block 119/1838, Githurai 44 (hereinafter referred to as the suit properties).
2. By a Notice of Motion Application dated 14th August, 2023, the Applicant seeks the following reliefs:
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That pending the hearing and determination of the suit, this Honourable Court be pleased to issue an order of preservation in form of a temporary injunction restraining the Defendants/Respondents either by themselves, their servants, agents, or employees from advertising for or selling by public auction, selling, alienating, disposing off, or dealing in any manner with all that land known as LR NO Makuyu/Makuyu Block 1/2087 Punda Milia Area, Makuyu, Murang'a County, Nairobi Block 82/1716, Savanna Estate Phase 4,



Donholm Nairobi City County and Nairobi Block 119/1938, Githurai 44, Nairobi City County and any charges securing the loan to the Borrower.

- e. That this Honourable Court be pleased to issue a mandatory injunction compelling the 1st Defendant/Respondent to provide the Plaintiff/Applicant all documents in relation to the Charges over LR No Makuyu/Makuyu Block 1/2087 Punda Milia Area, Makuyu, Murang'a County, Nairobi Block 82/1716, Savanna Estate Phase 4, Donholm Nairobi City County and Nairobi Block 119/1938, Githurai 44, Nairobi City County and any charges securing the loan to the Borrower.
 - f. That this Honourable Court be pleased to issue a mandatory injunction compelling the 1st Defendant/Respondent to provide the Plaintiff/Applicant with all statutory notice issued to the borrower and 3rd Defendant/Respondent in relation to the charges over LR No Makuyu/Makuyu Block 1/2087 Punda Milia Area, Makuyu, Murang'a County, Nairobi Block 82/1716, Savanna Estate, Phase 4, Donholm Nairobi City County and Nairobi Block 119/1838, Githurai 44, Nairobi City County.
 - g. That the costs of this application be provided for.
3. The application is brought on the grounds that the Applicant is married to the 3rd Defendant and has a beneficial ownership on the suit properties. The Plaintiff contends that the 3rd Defendant in whose names the suit properties are held charged them to the 1st Defendant for a loan facility which has a balance of Ksh.112,199,295.04. The Plaintiff contends that she never willingly consented to the sale of her matrimonial property, the suit properties. The Plaintiff claims that the charging of her matrimonial property, without her consent is discriminatory, fraudulent, illegal and flies in the face of her right to own property.
 4. The Plaintiff in the affidavit in support of the application deponed that she was married to the 3rd Defendant in 1998 and the marriage was solemnized in 2006. She averred that the suit properties are registered in the name of the 3rd Defendant who holds the property in trust for her and the children. That she had cross across Redemption notices and statutory notices of sale issued by the 3rd Defendant in respect of the suit properties. She insisted that she was not previously aware of the 1st and 2nd Defendants dealings on the suit properties. She stated that any documents she signed were signed under duress and after receiving threats from the 3rd Defendant.
 5. The 3rd Defendant filed grounds of opposition and a Replying Affidavit sworn by Elizabeth Ngugi, the branch manager at Sarit Center. In the grounds of opposition, the 3rd Defendant deponed that the application is Res Judicata as the issues therein were addressed in HCC COMM E 312 of 2022. She further states that the matter is Sub Judice as HCC COMM E 312 of 2022 is addressing the same issue. She further averred that the 3rd Defendant charged the suit properties as security for various loan facilities. It was her evidence that the Plaintiff consented to the charging of the suit properties.
 6. On the 19th September, 2023 the court gave directions that the application was to be canvassed by way of written submissions. As at the date of writing this ruling none of the parties had complied with the courts directions on filing of written submissions. As such the court has not taken any into account.
 7. The issues that arise for the courts determination are; Whether the application is Res Judicata? Whether the suit is subjudice? Whether there are sufficient grounds for the court to grant an injunction?



8. On the question of Res Judicata the 3rd Defendant contends that the application is Res Judicata as the issues were addressed in HCC COMME 312 of 2022 vide a Ruling by Justice Majanja delivered on 10th March, 2023. The Principles that should guide a court in determining whether a suit or application is Res Judicata is well laid out in Section 6 of the Civil Procedure Act which provides

“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”.

9. Flowing from this provision a court in determining the issue of Res Judicata the court is called upon to determine the following issues;

- a. Whether the issue was directly and substantially in issue in the former suit.
- b. Whether suit was between the same parties or parties claiming under them.
- c. The parties were litigating under the same title.
- d. The issues were 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 was raised.

10. The issues in this application are substantially the same as the earlier application as the Plaintiff seeks an injunction against the 1st Defendant exercising its statutory right to sale. The application was heard and determined in the earlier case which is still seized of the matter. The next issue the court must grapple with is whether the parties are litigating under the same title. The Plaintiffs husband is a party in the earlier application. Black’s Law Dictionary refer to a husband and wife as privies in law. By virtue of being the spouse of the 3rd Defendant, it could be assumed that the 3rd Defendant is claiming under the same title as the Plaintiff.

11. The Plaintiff has brought this suit on the basis that she did not willingly give consent to the 3rd Defendant who is her husband to charge the properties. In view of this contention by the Applicant I am at this interlocutory stage reluctant to find that the 3rd Defendant is appearing on her behalf in the other suit. As such I will not strike out the application on this ground.

12. On the question of sub-judice Section 6 of the Civil Procedure Act provides as hereunder:

“No court shall proceed 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.”

13. The Supreme Court of Kenya in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) had occasion to pronounce itself on the subject of sub-judice. The apex court stated: -

The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a



multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

14. The issues herein are substantially the same issues raised in the earlier suit save that the Plaintiff has brought in a new angle that of not having consented to the charging of the properties. I find that if the two matters proceed before the two courts there is a real likelihood of conflicting decisions which would undermine the Rule of Law and confidence in the courts. Consequently, I hereby stay these proceedings to await determination of HCC COMM E 312 of 2022.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 12TH DAY OF OCTOBER 2023.

**JUDY OMANGE
JUDGE**

