



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 20 OF 2021

PATRICIA MWETHYA.....PLAINTIFF

VERSUS

FIRST COMMUNITY BANK.....1ST DEFENDANT

SAHARA MOHAMMED IBRAHIM.....2ND DEFENDANT

JOSEPH KARIUKI T/A JOSERICK MERCHANTS AUCTIONEERS.....3RD DEFENDANT

THE LANDS REGISTRAR, KAJIADO.....4TH DEFENDANT

RULING

What is before court for determination is the Plaintiff's Notice of Motion application dated the 6th April, 2021 where she seeks a stay of orders issued in Kajiado CMCC Miscellaneous Application No. 17 of 2020 and an injunction to restrain the Defendants including their agents, employees or officials from evicting her from land parcel number Kajiado/ Kaputiei North/ 39930, hereinafter referred to as the 'suit land', pending the hearing and determination of this suit. The Defendants further filed a Preliminary Objection against the entire suit.

The application is premised on the grounds on the face of it and the supporting affidavit of Patricia Mwethya Mutiso. In the said grounds and supporting affidavit, she confirms that the 1st Defendant through the 3rd Defendant offered to sell the suit land which had been charged to it, to the 2nd Defendant. She insists the purported auction was not conducted as the 3rd Defendant fabricated an attendance register. Further, there was a purported Memorandum of Sale signed in favour of the 2nd Defendant. She claims a bank employee Florence Kariuki who was interested in purchasing the suit land did not attend the auction as claimed by the Defendants. She contends that the resultant transfer of title by the 1st Defendant to the 2nd Defendant is irregular, unprocedural and illegal. She reiterates that the Sale was conducted through a private arrangement and in unconscionable terms as it was done secretly. Further, that the statutory power of sale was invoked in an oppressive manner. She confirms the Notice to Evict was served upon her and the same is to lapse on 26th January, 2021. She disputes the value of the suit land that the Defendants relied on. Further, the Sale was predicated on defective/ no statutory notices which introduced a third-party component. She avers that the 2nd Defendant obtained eviction orders in Kajiado CMCC Miscellaneous Application No. 17 of 2020.

The application is opposed by the 1st, 2nd and 3rd Defendants who filed two replying affidavits sworn by Aden Mohamed and Sahara Mohamed Ibrahim where they explained how the auction was undertaken. They further filed a Notice of Preliminary Objection to the entire suit. They insist the same was lawful as it was undertaken after the 1st Defendant's statutory power of sale had crystallized as Plaintiff was duly served with the statutory notices and was well aware of the date of the auction. They contend that the Plaintiff has filed various cases to frustrate the process as she even instituted a suit in the High Court at Kajiado over the same issues. Further, there was a Kajiado CMCC Miscellaneous Application No. 17 of 2020 which had already determined the issues in dispute. They contended that the 2nd Defendant is now registered as the proprietor of the suit land. Further, that eviction orders issued in Kajiado CMCC Miscellaneous Application No. 17 of 2020 have since lapsed. They insist this suit is res judicata and the orders of stay of the judgement from the aforementioned miscellaneous cause is improper as the Plaintiff should have lodged an appeal or sought for review instead.

The Plaintiff filed a further affidavit where she reiterated her claim and insisted the miscellaneous cause sought different orders to the instant suit. Further, the issues raised herein can lead to nullification of 2nd Defendant's title. While the Kajiado HCC No. E 002 of 2012 raises different issues from the suit herein.

The Counsels for the Plaintiff and Defendants' canvassed the instant application and Preliminary Objection through oral submissions.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 6th April, 2021 including the Preliminary Objection, respective affidavits and the annexures thereon as well as the oral submissions, at this juncture, I find that the issues for determination are:

- Whether the Plaintiff is entitled to interim injunction pending the outcome of the suit.
- Whether the suit is res judicata.

The Plaintiff in her submissions further relied on the cases of **Wairimu Ngure (Suing as administratrix Of the Estate of Peter Tharaon Ngure - Deceased) V National Bank of Kenya Limited & 2 Others (2019) eKLR** and **Maina Wanjigi & another V Bank of Africa Kenya Ltd & 2 Others (2015) eKLR** to buttress her averments.

In line with the principles established in the case of **Giella Vs. Cassman Brown & Co. Ltd (1973) EA 358**, I will proceed to decipher whether the Plaintiff has established a prima facie case with a probability of success.

As per annexure 'PMM 2' the Plaintiff had a loan facility with the 1st Defendant that also held a legal charge over land parcel number Kajiado/ Kapatiei North/ 39930. Further, as per the letter dated the 9th October, 2013, the Plaintiff had accepted the terms of the loan as stated therein. The Plaintiff has not denied that she failed to repay the loan in full and explains that she left employment with the 1st Defendant in February, 2018, while in August, 2019 she made a lumpsum payment of Kshs. 350,000 into the loan account. The 1st to 3rd Defendants insists the Plaintiff was served with statutory notices and the suit land was sold by public auction. I note as per court record, there was indeed a newspaper advertisement on 20th November, 2019 indicating the sale of the suit land would be conducted on 6th December, 2019.

The Plaintiff contends that no auction was done culminating in the transfer of the suit land to the 2nd Defendant. Further, that the Chargee's statutory power of sale had not crystallized and the sale by private treaty was stage managed culminating in the suit land being illegally transferred to the 2nd Defendant. She avers that she has been served with eviction orders and will suffer irreparable harm if the orders sought are not granted. The Defendants insist the Sale was properly done and the 1st Defendant has exercised its statutory power of sale as the Plaintiff defaulted in repaying the loan. I will proceed to make reference to various legal provisions below:

Section 90 (1) of the Land Act stipulates that '**If a chargor is in default of any obligations, fails to pay interest or any other periodic payment or any part thereof due under any charge or in the performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be.**'

Section 90 (3) of the Land Act stipulates that ' if the chargor does not comply within two months after the date of the service of the notice under, subsection (1), the chargee may -

- (a) sue the chargor for any money due and owing under the charge;**
- (b) appoint a receiver of the income of the charge land;**
- (c) lease the charged land, or if the charge is of a lease, sublease the land;**
- (d) enter into possession of the charged land; or**
- (e) sell the charged land.**

While section 99 of the Land Act provides as follows:

(1) This section applies to - (a) a person who purchases charged land from the chargee or receiver, except where the chargee is the purchaser; or (b) a person claiming the charged land through the person who purchases charged land from the chargee or receiver, including a person claiming through the chargee if the chargee and the person so claiming obtained the charged land in good faith and for value.

(2) A person to whom this section applies— (a) is not answerable for the loss, misapplication or non-application of the purchase money paid for the charged land; (b) is not obliged to see to the application of the purchase price; (c) is not obliged to inquire whether there has been a default by the chargor or whether any notice required to be given in connection with the exercise of the power of sale has been duly given or whether the sale is otherwise necessary, proper or regular. (3) A person to whom this section applies is protected even if at any time before the completion of the sale, the person has actual notice that there has not been a default by the chargor, or that a notice has been duly served or that the sale is in some way, unnecessary, improper or irregular, except in the case of fraud, misrepresentation or other dishonest conduct on the part of the chargee, of which that person has actual or constructive notice. (4) A person prejudiced by an unauthorised, improper or irregular exercise of the power of sale shall have a remedy in damages against the person exercising that power.'

In the case of **Bomet Beer Distributors Ltd & Anor. v Kenya Commercial Bank Ltd & 4 Others (2005) eKLR** Kimaru J held as follows: **"What is clear is that once a property has been knocked down and sold in a public auction by a chargee in exercise**

of its statutory power of sale, the equity of redemption of the chargor is extinguished. The only remedy for the chargor who is dissatisfied with the conduct of the sale is to file suit for general or special damages.”

Further in the case of **David Mburu Githere V Jamii Bora Bank Ltd (2017) eKLR** the court favourably cited the Court of Appeal in the case **Riscillah Krobought Grant V Kenya Commercial Bank** where it held that: **“Where a chargee had exercised its statutory power of sale and caused the property to be sold by public auction, the remedy of the chargor was a claim for damages if she would prove that there was improper or irregular exercise of the statutory power of sale.”**

In associating myself with these two decisions including the legal provisions I have cited as well as my analysis above, I find that the issues raised by the Plaintiff that the sale was not properly conducted has been overtaken by events since the 2nd Defendant is now the registered proprietor of the suit land which he purchased through the public auction. I opine that the Plaintiff has a remedy to seek for damages against the 1st Defendant to compensate her in case the auction was not properly done. Further, from the averments in the respective affidavits, it has emerged that eviction orders had already been issued against the Plaintiff vide judgment in Kajiado Miscellaneous Application CMCC No. 17 of 2020 on 29th October, 2020. Since she never appealed nor sought to review the said orders, I find that the orders are still valid as they were issued by a court of competent jurisdiction. It is my considered view that she cannot lodge a fresh suit seeking to stay the said orders. Based on the facts as presented by the Plaintiff and Defendants while relying on the two cited decisions, I find that the Plaintiff has failed to establish a prima facie case to warrant the grant of the orders sought. In referring to the case of **Case of Nguruman Ltd. Vs. Jan Bonde Nielsen CA No. 77 of 2012**, where the Court of Appeal held that if one party fails to prove a prima facie case, the Court need not proceed to deal with the remaining two limbs. I will hence decline to do so.

As to whether this suit is res judicata.

I will proceed to make reference to section 7 of the Civil Procedure Act, which stipulates 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.’**

In the case of **Stephen Wanganga Njoroge Vs Stanley Ngugi Njoroge & Another (2017) eKLR** it referred to the case of **Uhuru Highway Development Ltd V Central Bank & Others, CA No. 36 of 1996** where the Court of Appeal stated that :-

‘ in order to rely on the defence of res judicata, there must be a previous suit in which the matter was in issue; the parties must have been the same or litigating under the same title; a competent court must have heard the matter in issue and the issue is raised once again in the fresh suit.’

Further in the case **Nancy Mwangi T/A Worthlin Marketers V Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others (2014) eKLR, J Gikonyo** states thus:

‘ The Courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and others 92001)EA 177, the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In that case the court quoted Kuloba J.. in the case of Njangu Vs Wambugu and another Nairobi HCCC No. 2340 of 1991 (unreported) where he stated, if parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata..’

Upon perusal of the Kajiado CMCC Miscellaneous Application No. 17 of 2020, I note the issues the Plaintiff is raising were already dealt with in the said proceedings and judgement delivered on 29th October, 2020 by a court of competent jurisdiction. It is against the foregoing while relying on the above cited legal provisions as well as associating myself with the quoted judicial authorities that I find the title to the suit land which was an issue in the miscellaneous cause is still substantially the same issue in the instant suit. It is worth noting that the Plaintiff has not controverted the fact that an eviction order had already issued against her, in the miscellaneous cause. I further find that the Plaintiff’s claim that the auction was not done and statutory notices not issued were also determined in the aforementioned miscellaneous cause, but the only thing she has done is to cloth the cause of action in a different apparel, however, if the same is dissected it remains one and the same. I hence find that this suit is res judicata

It is against the foregoing that I find the Notice of Motion application dated the 6th April, 2021 unmerited and will proceed to dismiss it with costs.

I further find the Preliminary Objection merited and will allow it.

In the circumstances, I proceed to dismiss this suit with costs.

Dated Signed and Delivered Virtually at Kajiado this 27th Day of May, 2021.

CHRISTINE OCHIENG

JUDGE