



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. 32 OF 2020**

**SAMUEL KATHURIMA ITEWA .....APPELLANT/APPLICANT**

**VERSUS**

**FAMILY BANK LIMITED .....1<sup>ST</sup> RESPONDENT**

**ZABLON MATHENGE ITEWA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The appellant/applicant has filed an application dated 18.11.2020 seeking injunctive orders against the 1<sup>st</sup> respondent restraining the latter from selling land parcel No. Nyaki/Mulathankari/1768 until the appeal is heard and determined. The 1<sup>st</sup> respondent in turn filed a Preliminary objection dated 22.1.2021 seeking the dismissal of the aforementioned application on the basis that the same is sub-judice to the appellant's application dated 12.9.2019 pending before the magistrates court. On 26.1.2021, this court gave directions for both the application and the preliminary objection to be heard simultaneously, hence this ruling.

Application dated 18.11.2020

2. The application was brought pursuant to provisions of Section 1A, 1B & 3A of the Civil Procedure Act, Order 40 rule 1 & 4 and Order 51 of the Civil Procedure Rules. The applicant seeks the following orders;

a) Spent.

b) That this Honorable Court to issue temporary orders of Injunction restraining the 1<sup>st</sup> respondent and it's agents from selling by way of auction L.R NO. NYAKI/MULATHAKA/1768 on 20<sup>th</sup> November 2020 pending the hearing and determination of this application.

c) That this Honorable Court to issue temporary orders of Injunction restraining the 1<sup>st</sup> respondent and it's agents from selling by way of auction L.R NO. NYAKI/MULATHAKA/1768 on 20<sup>th</sup> November 2020 pending the hearing and determination of this appeal.

d) That cost of this application be provide for.

3. The application is premised on the grounds on the face of it and on the supporting affidavit of Samuel Kathurima Itewa, the applicant. He avers that the suit land was originally registered in the name of their late father Francis M'Itewa and it is their ancestral land. That the 2<sup>nd</sup> respondent without the family's knowledge secretly transferred the land parcel to himself and took out a loan facility from the 1<sup>st</sup> respondent to the tune of Kshs. 20,000,000 without the knowledge of the applicant and his siblings. **The applicant moved the Honorable Court in Meru CM ELC case No. 102 of 2019 where he was granted interlocutory injunctive orders but the same were later discharged upon application by the 1<sup>st</sup> respondent and he has now preferred an appeal against the said ruling.**

4. He avers that his appeal has high chances of success and if the 1<sup>st</sup> respondent is not restrained, they are likely to sell the suit property as they have already advertised the sale by way of public auction vide an advertisement in the Daily Nation on the November 2020. It is in the interest of justice that the application be allowed.

5. The application is opposed by the 1<sup>st</sup> respondent vide a replying affidavit dated 22/01/2021 sworn by Sylvia Wambani a senior legal officer of the 1<sup>st</sup> respondent. The said replying affidavit plus the annexures thereof form a bulky document containing 238 pages! I will endeavour to summarize the contents therein. The deponent has given an account of how on 22/8/2015 upon the request of Zanira Company Limited (herein after the borrower), the 1<sup>st</sup> respondent offered a financial facility of Kshs. 20,000,000 to the directors of the borrower being the 2<sup>nd</sup> respondent and his wife, and the repayment period was 48 months. To this end, a legal charge was created over land parcel no. L.R.

**NYAKI/MULATHANKARI/1768** (the suit land), plus other securities.

6. That the borrowers defaulted in payment, thus the 1<sup>st</sup> respondent set in the motion the process of exercising its statutory power of sale.
7. The borrower however filed the suit **Meru H.C.C.C No. 15 of 2017 Zanira Company Limited V Family Bank Limited** seeking permanent injunctive orders to restrain the 1<sup>st</sup> respondent from exercising its statutory power of sale over the suit property. The parties on 15/02/2018 entered into a consent for the borrower to pay Kshs. 10,000,000 within 90 days and pay Kshs. 300,000 each successive month and in default execution to issue. The borrower defaulted again.
8. The 1<sup>st</sup> respondent contends that there are another multiple suits in regard to the suit property with the applicants' and 2<sup>nd</sup> respondents family members. For instance the applicants nieces and nephews as well as children of 2<sup>nd</sup> respondent filed **Meru CM ELC No. 214 of 2018 Evans Muriungi Mathenge & 2 others V Zablon Mathenge Itewa & Family Bank Limited** seeking permanent injunctive orders to restrain the 1<sup>st</sup> respondent from exercising its statutory power of sale over the suit property. The plaintiff's therein withdrew the suit and instead filed **Meru HCCC No. 33 of 2018 (Meru), Evans Muriungi Mathenge & 2 others V Zablon Mathenge Itewa & Family Bank Limited** seeking permanent injunctive orders to restrain the 1<sup>st</sup> respondent from exercising its statutory power of sale over the suit property and the plaintiffs once again withdrew the suit.
9. The 2<sup>nd</sup> respondent's wife and applicant's sister in law also filed **Meru CM ELC No. 70 of 2019 (Meru) Naomi Mukiri V Family Bank Limited** seeking permanent injunctive orders to restrain the 1<sup>st</sup> respondent from exercising its statutory power of sale over the suit property, which orders were granted pending hearing of the said application and the said application is yet to be heard and determined.
10. **The applicant herein then filed Meru CMCC ELC 102 of 2019 Samuel Kathurima Itewa V Family Bank Limited and sought temporary injunctive orders against the 1<sup>st</sup> respondent pending hearing and determination of the application and suit which orders were granted on 16/09/2019. The 1<sup>st</sup> respondent filed an application seeking stay of the orders and a discharge/setting aside of the orders issued on 16/09/2019 which application was allowed on 13/5/2020.** I have highlighted this particular paragraph as it forms the basis of the proceedings before this court.

11. The 1<sup>st</sup> respondent avers that the instant appeal is without merit and constitutes blatant abuse of the process of the court, that it is *mala fides sub judice* to the extent it seeks injunctive reliefs similar to the reliefs sought in the applicants application dated 12/09/2019 which is still pending hearing and determination.

The preliminary Objection dated 22.1.2021

12. The 1<sup>st</sup> respondent has raised the following grounds in their preliminary objection;

- a) *The Notice of motion dated 18/11/2020 is sub judice to the applicant/appellant's chamber summons application dated 12/09/2019 filed in CMCC ELC No. 102 of 2019 (Meru) being Samuel Kathurima Itewa V Family Bank Limited*
- b) *The Notice of motion dated 18/11/2020 lacks merit is misconceived, frivolous, embarrassing, scandalous, vexatious, an abuse of the process of this court and ought to be dismissed with costs.*

13. In light of the directions given by the court on 26.1.2021, the parties rendered their submissions on the application alongside the preliminary objection.

Case for the Applicant/Appellant

14. The applicant/appellant relied on his submissions dated 17<sup>th</sup> February 2021. With regard to the P.O, it was submitted that the application herein is not sub judice as it is not addressing the same matter directly and substantially in issue in the previously instituted application **CM ELC NO. 102 of 2019**. That a preliminary objection should be capable of disposing of a matter without the court having to ascertain the facts from elsewhere apart from the pleadings and must be based on pure points of law. That in the instant application, the court will have to result to ascertaining the facts from elsewhere and urged the court to find that the preliminary objection is unmerited and ought to be dismissed with costs to the applicant.

15. As far as the application is concerned, the applicant contends that he has satisfied the 3 principles of granting injunction orders and it would be unjust and unfair for the 1<sup>st</sup> respondent to auction off the suit land which is ancestral property and which ought to be shared among the family members.

16. In support of his case, the applicant relied on the following authorities; **Paul Gitonga Wanjau V Gathuthi Tea Factory Company Limited & 2 Others [2016]eKLR, Moses C. Muhia Njoroge & 2 Others V Jane W. Lesaloi & 5 Others [2014]eKLR, John Maina Ngunjiri V Esther Waceke Kimani (sued as the administrator of the estate of Harun Kimani Musa-deceased) & Another [2020]eKLR.**

Case for the 1<sup>st</sup> respondent

17. In relation to the preliminary objection, it was argued that the the appeal and application were sub judice as the application mirrors what was before the trial court. That the two applications seek injunctive orders and the grounds are the same, hence the preliminary objection should be allowed.

18. In so far as the application is concerned, it was argued that the applicant has not met the three criteria of prima facie case, irreparable injury and the balance of convenience to warrant the issuance of the orders sought. That the claim by the applicant that the land is ancestral, which was fraudulently charged is a matter which requires prove. The 1<sup>st</sup> respondent further states that as set out in their replying affidavit, they have demonstrated that this is the 6<sup>th</sup> suit by the same family members. There should be finality to judicial process.

19. In support of their case, the 1<sup>st</sup> respondent relied on the following authorities; **Mesgo Limited & Another V National Bank Of Kenya Limited [2020]eKLR, Fernandah Wangechi Muriuki V Family Bank Limited & Another [2019]eKLR, Kenya Commercial Bank Limited V Benjoh Amalgamated Limited [2017]eKLR, Catherine Njeri Maranga V Serah Chege & Another [2017]eKLR, John Murigi V Josphat Muiruri & 2 Others [2015]eKLR, Hanniel Gichina Mwangi V Joe Mwaniki Mwangi & 2 Other [2018]eKLR, James Kipruto Langat & Another V Family Bank Limited & Another [2016]eKLR.**

#### **Analysis and determination**

20. I will first deal with the issues raised in the preliminary objection. To this end, this court will consider whether the application before this court dated 18.11.2020 is sub-judice to the appellant's application dated 12/09/2019 filed in **Meru CM ELC No. 102 of 2019.**

21. A preliminary objection should be raised on a pure point of law which has been pleaded, or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit. In the case of: **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd 1969 E.A. 696;** the Court defined a preliminary objection as follows;

***“It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.***

22. **Section 6 of the Civil Procedure Act** provides as that:

***“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”.***

23. The undisputed facts are that the appellant herein filed a suit vide a plaint dated 12.9.2019 in Meru **CM NO. 102 OF 2019.** An application dated the same day was also filed contemporaneously with the aforementioned suit where the applicant was seeking injunctive orders against the respondent. By an order dated 16/09/2019, injunction orders were issued against the 1<sup>st</sup> respondent restraining them from advertising, selling, transferring or howsoever alienating the suit land until the determination of the suit. The 1<sup>st</sup> respondent then filed an application dated 2/10/2019 seeking to set aside the earlier orders of 16.9.2019, which application was allowed vide a ruling dated 13/5/2020. This appeal was filed vide the memorandum of appeal dated 12.6.2020 where the appellant seeks orders for the setting aside the ruling of 13.5.2020

24. When the application dated 18.11.2020 was filed before this court, injunctive orders were granted on temporary basis pending the hearing and determination of the application.

25. I have keenly gone through the two applications. The earlier application dated 12.9.2019 before the trial court is to be found on page 173 of the 1<sup>st</sup> respondents bundle. When compared to the current application before this court, it is quite apparent that they are the same. The only point of divergence is that the orders were sought in the application before the trial court pending the hearing of that suit while in the current matter the orders have been sought pending the appeal. Even the provisions of law relied upon in both applications are the same, and so are the parties.

26. What emerges from the ruling of 13.5.2020 is that the court had directed the application to be heard on merits with the current 1<sup>st</sup> respondent being allowed to file a replying affidavit to the application dated 12.9.2019. Apparently the 1<sup>st</sup> respondent had not participated in the prosecution of the application culminating in the orders of 16.9.2019. In essence, the merits of that application before the trial court are yet to be considered. How then can this court proceed to consider the same application as if this is the court of 1<sup>st</sup> instance?

27. In the Supreme Court of Kenya Case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2015] eKLR,** the court stated that;

***“It is clear from the foregoing account that, at no time were the substantive issues now framed in the application before this Court, ever considered, or determined by the superior Courts. The issues now being associated with “matters of general public importance”, have clearly not evolved through the judicial hierarchy, in the mode contemplated by this Court in the Peter Oduor Ngoge case. Suffice it to say that if this Court were to admit and determine such issues, the Court would be determining them in the first instance which would be contrary to established principle, and to the design of the judicial system”.***

28. Just like in any suit filed before a court of law, there are two scenarios contemplated in this appeal. That it will succeed or it may fail. In the event that the appeal fails, the trial court would still proceed to determine the application dated 12.9.2019. How would the trial court proceed to determine that application when this court has already determined the merits of the same, seeing that the two applications are similar.

29. It is not lost to this court that the 1<sup>st</sup> respondent has given a chronology of litigation relating to the suit land in various forums, of which

the existence of those suits have not been rebutted by the applicant. This court does not wish to perpetuate the conundrum already in the offing by delving into matters which are the subject of contest before the trial court. It is also not lost to this court that the matter before the trial court is at the infancy stage whereby the proceedings revolve around the very initial application for injunction filed contemporaneously with the suit dated 12.9.2019.

30. Further, no orders of stay of proceedings have been sought herein and none have been given. Thus there is no hindrance to the prosecution of the application of 12.9.2019 before the trial court. To this end, I find that the authorities proffered by the 1<sup>st</sup> respondent, particularly the case of **Mesgo Limited & Another V National Bank of Kenya Limited [2020]eKLR (supra)**, **Fernandah Wangechi Muriuki V Family Bank Limited & Another [2019]eKLR (supra)**, **Kenya Commercial Bank Limited V Benjoh Amalgamated Limited [2017]eKLR (supra)**.

31. In the final analysis, I find that the current application dated 18.11.2020 is a proceeding within the meaning of the provisions of **Section 6 of the Civil Procedure Act**, hence sub-judice to the application dated 12.9.2019. In the circumstances, I do find that the preliminary objection is merited and I therefore proceed to give the following orders.

**1) The P.O dated 22.1.2021 is hereby allowed.**

**2) The application dated 18.11.2020 is hereby dismissed with costs to the respondent.**

**3) The earlier orders given on 9.12.2020 are hereby discharged.**

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 12<sup>TH</sup> DAY OF MAY, 2021 IN PRESENCE OF:**

C/A: Kananu

Mrs. Mutegi for appellant

M/s Dande holding brief for Mr. J.B Macharia for 1<sup>st</sup> respondent

**HON. LUCY. N. MBUGUA**

**ELC JUDGE**