Njuguna v Eupen Co. Limited & another; Njuma (Interested Party) (Civil Case E010 of 2024) [2025] KEHC 6944 (KLR) (22 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6944 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT THIKA

CIVIL CASE E010 OF 2024

FN MUCHEMI, J

MAY 22, 2025

BETWEEN

NAOMI WANJIRU NJUGUNA ..... APPLICANT

AND

EUPEN CO. LIMITED ..... 1ST RESPONDENT

KINGDOM BANK LTD ..... 2ND RESPONDENT

AND

JAMES MARTIN NJUMA ..... INTERESTED PARTY

RULING

Brief facts

1. The application for determination dated 8th May 2024 seeks for orders of an injunction restraining the defendants, their servants and/or agents from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the plaintiff's property namely LR. No. Ruiru Kiu Block 3/89 pending the hearing and determination of the suit. The applicant further seeks for orders of lifting of the corporate veil of the 1st defendant and issue of summons the interested party to James Martin Njuma and one Leah Wanjiru Njuma, who are directors of the 1st respondent/defendant to show cause why I.R No. 94344, LR No. 7149/51 as delineated on Land Survey Plan Number 227283 should not be charged in substitute of LR No. Ruiru Kiu Block 3/89 as security for the loan advanced to the 2nd respondent.

2. In opposition to the application, the 2nd respondent and interested party filed Replying Affidavits dated 6th December 2024 and 29th November 2024 respectively. Further, the 2nd respondent filed a Notice of Preliminary Objection dated 6th December 2024.

The Applicant's Case.

3. The applicant avers that she is the registered proprietor of LR. No. Ruiru Kiu Block 3/89 measuring approximately 0.09 ha. She further states that the 1st respondent approached her and she agreed to guarantee a loan facility that the 1st respondent was taking up with the 2nd respondent. The applicant states that the 1st respondent later on approached her as they were taking another loan and they created a further charge to the suit property.

4. The applicant avers that the 1st respondent stopped repaying the loan in the year 2022 despite the 2nd respondent writing to the them to clear their outstanding debt.

5. The applicant states that she has received information from the 2nd respondent that they intend to auction the suit property in a bid to recover the loan amount plus interest accrued.

6. The applicant avers that she has tried to negotiate with the bank to allow her to pay the loan instalments of Kshs. 30,000/- per month but the 2nd respondent is adamant that she settles the entire amount. The applicant further states that she is aware that the 1st respondent has other properties that can be used in place of her property as security for the loan that the 1st respondent took up. The applicant states that the 1st respondent's directors are the registered proprietors of all that parcel known as Land Title Number I.R 94344, LR. No. 7149/51 as delineated on Land Survey Plan Number 227283 registered in the names of James Martin Njuma and Leah Wanjiru Njuma, who are the sole directors of the 1st respondent as per the current CR12. The applicant argues that the said properties should be utilised to substitute her charged parcel as security for the said loan that was taken up by the 1st respondent.

7. The applicant further argues that her role as guarantor should not be abused by the 1st respondent as it is still in a position to offset its liabilities through its assets.

8. The applicant is apprehensive that her right to property will be violated if the said statutory power of sale is allowed to proceed. Further, the applicant avers that she stands to suffer irreparable damage and may be left destitute.

The Interested Party's Case

9. The interested party states that he is a co-director of the 1st respondent with his estranged wife Leah Wanjiru Njuma. The interested party states that he is not aware of the alleged loans and in his capacity as director, he has never signed any documents authorizing the company to take out the said loans. Neither has he signed the charge document dated 27th March 2014 registered over all the property known as Ruiru Kiu Block 3/89.

10. The interested party states that he does not know the advocate Anthony Wachira Wairimu who has witnessed his supposed signature on the charge document and neither did he appear before the said advocate on 11th February 2014. In light of the seriousness of the matter, the interested party states that he reported the forgery to Kilimani Police Station under OB Number 19/14/06/2024 and the matter is currently under investigation.

11. The interested party avers that he does not know the applicant and has never approached her on behalf of the 1st respondent to guarantee any loans being taken by the company.

12. The interested party states that a copy of the Board resolution authorizing the loan has not been produced before the court despite it being one of the key documents which should have been provided during the due diligence process. Without the said board resolution, the company lacks the capacity to borrow.

13. On account of his non participation in the fraudulent transaction, the interested party opposes that his land parcels be charged as collateral for securing the loan in place of the applicant's suit property.

14. The interested party further states that the manner in which the loan was processed and disbursed without any proper due diligence reflects negligence on the part of the 2nd respondent for failing to call him to the bank to confirm his awareness of the loan taken, failing to verify whether he had signed a resolution authorizing the company to take out the loan and failing to communicate directly with him as the director of the company supposedly taking the loan.

15. The interested party states that if any loan was advanced by the 2nd respondent, it was received and utilized solely by Leah Wanjiru Njuma in her individual capacity and not on behalf of the 1st respondent. Thus any liability ought to be borne by her without any involvement with himself or the 1st respondent. Further, the correspondence between the applicant and the 2nd respondent were only copied to Leah Wanjiru Njuma and he has not involved at any point. Additionally, the letter dated 20th March 2024 shows that the company account which allegedly received the loan is solely held and operated by Leah Wanjiru Njuma and he is not s signatory of that account.

16. The interested party states that no correspondence has been provided by the 2nd respondent demanding repayment of the money from the principal debtor but has only made demands to the guarantor, the applicant.

17. The interested party states that he is not a signatory to the bank accounts referred to by the 2nd respondent in its letter dated 26th February 2024 and neither was he aware of the existence of those accounts until he saw the letter attached to the applicant's application. The accounts are being falsely represented as the loan accounts of the 1st respondent.

The 2nd Respondent's Case

18. The 2nd respondent has raised a preliminary objection on the grounds that the plaintiff lacks the requisite locus standi to present the suit due to want of privity of the contract to the extent that she seeks relief premised on a contract of lending to which she is not a party to. Further, the plaintiff seeks remedies unavailable at law to a charger under the *Land Act* 2012 or any other statute or written law or common law. Additionally, the plaintiff's suit is incompetent at law as it seeks to re-write the terms of the existing contracts between the parties or create a new contract between the parties vide judicial orders/intervention.

19. It is the 2nd respondent's case that it is vested with contractual rights of a lender in relation to the various contracts of lending between itself and the 1st respondent as follows:- an overdraft facility in the sum of Kshs. 5 million; a term loan facility in the sum of Kshs. 8 million and a top up loan facility in the sum of Kshs. 3 million which would be secured by way of a legal charge registered against the property title number Ruiru Kiu Block 3/89.

20. The 2nd respondent avers that as the applicant is not a party to the said contracts of lending, she lacks the requisite locus standi to seek enforcement thereof and alteration of the security terms in the manner sought.

21. Pursuant to the said contracts of lending, the applicant created a first ranking legal charge instrument dated 14th February 2013 and subsequently a Further Charge dated 27th March 2014 over property LR No. Ruiru Kiu Block 3/89. The 2nd respondent states that the 1st respondent has failed to effect the repayments of the said lendings as per the attendant contractual terms and hence there has been default.

22. The 2nd respondent avers that its statutory power of sale has lawfully accrued and is being legally exercised. Notably, the applicant has not faulted, challenged or otherwise cast aspirations as to the validity of its exercise of statutory power and whether the same has been lawfully accrued.

23. The 2nd respondent avers that the applicant has previously filed three applications seeking similar orders of injunction in an earlier suit having the same parties being Milimani MCCC No. 4929 of 2018 Naomi Wanjiru Njuguna & Eupen Company Limited vs Jamii Bora Bank Limited, which have all been dismissed. Thus the matters in issue in the present application have been substantively determined. Thus, the 2nd respondent states that the instant application is incompetent, mired in mala fides, lacks merit and constitutes an abuse of the court process and ought to be dismissed.

24. Directions were issued that parties put in written submissions and the record shows that the 2nd respondent complied by filing submissions on 19th February 2025. The applicant on the other hand had not filed her submissions by the time of writing this ruling.

The 2nd Defendant's/ 2nd Respondent's Submissions

25. The 1st respondent relies on the case of Kanorero River Farm Ltd & 3 Others vs National Bank of Kenya Ltd [2002] 2 KLR 207 and submits that the instant application is res judicata as on 25th May 2018, the applicant instituted Milimani MCCC No. 4929 of 2018 Naomi Wanjiru Njuguna & Eupen Company Limited vs Jamii Bora Bank Limited in which the parties and the subject matter are the same as is in the present suit. In that suit, the applicant filed three applications dated 24th May 2018, 17th April 2019 and 19th July 2019 seeking similar orders of injunction as sought in the present application. The three applications were heard before the Milimani Commercial Courts and dismissed vide three separate rulings on 21st March 2019, 18th July 2019 and 3rd October 2019.

26. The 2nd respondent further relies on the case of Giella vs Cassman Brown & Co. Ltd [1973] EA 358 and submits that the applicant has not met the threshold for grant of an injunction. The 2nd respondent further submits that an interlocutory relief cannot be granted in a vacuum but must be premised on final prayers sought in the substantive pleadings of a party. In the instant matter, the applicant has not sought for any order of permanent injunction in her plaint dated 8th May 2024. To that extent, the 2nd respondent argues that the prayer for an interlocutory injunction in the present application has been sought in a vacuum and thus there is no proper basis upon which the same can issue.

27. The 2nd respondent submits that the applicant is guilty of inequitable conduct that removes her from the seat of equity by virtue of being in default of repayment obligations owed to it. To support its contentions, the 2nd respondent relies on the case of Daniel Kamau Mugambi vs Housing Finance Company of Kenya Ltd [2006] eKLR.

28. The 2nd respondent refers to the case of Mrao Limited vs First American Bank of Kenya Ltd & 2 Others [2003] KLR 125 and submits that the applicant has failed to show that she has a prima facie case as she has not alleged any right or infringement of rights by itself. The applicant has in fact asserted to facts disclosing that its statutory power of sale has lawfully accrued and does not in ay way claim or intimate the existence of any vitiating factor thereto.

29. The 2nd respondent submits that the applicant does not stand to suffer any irreparable loss should the charged property be sold as damages would be sufficient remedy. The 2nd respondent further relies on the case of Sammy Japheth Kavuku vs Equity Bank Limited & Another [2014] eKLR and submits that when a party offers his property as security, the nature of the property becomes that of a commodity for sale and one of a determinative value.

Issues for determination

30. The main issues for determination are:-

    a. Whether the matter is res judicata.

    b. Whether the preliminary objection is sustainable.

    c. Whether the applicant has met the requisite conditions to warrant the granting of a temporary injunction.

The Law

Whether the matter is res judicata.

31. The doctrine of res judicata is anchored in Section 7 of the *Civil Procedure Act*. It 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 issue has been subsequently raised, and has been heard and finally decided by such court.

32. The Court of Appeal in The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR held:-

> For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. That the former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was 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 is raised.

33. From the foregoing, it is clear that for res judicata to suffice, a court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the court in the former suit.

34. It is not in dispute that the applicant had filed three applications in Milimani Chief Magistrate's Court vide Case No. 4929 of 2018 dated 24th May 2018, 17th April 2019 and 19th July 2019 between Naomi Wanjiru Njuguna & Eupen Company Limited vs Jamii Bora Bank. In the said three applications, the applicant sought for orders of an injunction against the 2nd respondent herein from selling LR. No. Ruiru/Kiu Block 3/89. The applicant raised the issues that the proposed public auction offended

provisions of Section 97 of the *Land Act* as the property was undervalued and that no statutory notices had been served upon her and the 1st respondent. The trial court heard the application on its merits and rendered a ruling on 21st March 2019 dismissing the application on the grounds that the applicant and the 1st respondent herein did not meet the threshold for granting of an injunction.

35. The applicant filed another application in the same case in Milimani seeking for orders to pay the outstanding loan by instalment KSh.500,000 per month. The said application dated May 2018 was dismissed for lack of merit on 3rd October 2019.

36. It is my considered view that this application dated 8th May 2024 before this court raises the same issues as that of Milimani CM Civil Case No.4929 of 2018. The parties are the same and the issues were decided by a competent court. This application dated 8th May 2024 is therefore res judicata.

37. The issues raised in the plaint of substituting the security for the loan to remove the plaintiffs security L.R. Ruiru/Kiu Block 3/89 and in its place substitute it with the Interested Party's land L.R. No. Ruiru/Kiu/7149/51 are orders not know in law given that a valid charge exists binding the plaintiff and the 2nd defendant, Kingdom Bank. This court has no mandate o draw a contract or charge between the parties herein. If the parties so agree, they can do all that they are asking this court to do by themselves outside court.

38. The plaintiff has not joined Leah Wanjiru Njuma as a party, yet she prays for orders against her which is unprocedural.

39. I hereby uphold the Preliminary Objection by the 2nd defendant dated 6th December 2024.

40. The application dated 8th May 2024 is misconceived and is improperly before the court and it is hereby struck out with costs to the respondents and the Interested party.

41. The suit vide plaint dated 8th May 2024 is hereby truck out for being misconceived with costs to the defendants.

42. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 22ND DAY OF MAY 2025.

F. MUCHEMI

JUDGE