



Equip Agencies Limited & 5 others v I & M Bank Limited & another (Commercial Case E943 of 2021) [2024] KEHC 12493 (KLR) (Commercial and Tax) (17 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12493 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E943 OF 2021**

PM MULWA, J

OCTOBER 17, 2024

BETWEEN

**EQUIP AGENCIES LIMITED 1ST PLAINTIFF
DIVYESH INDUBHAI PATEL 2ND PLAINTIFF
VINESH INDUBHAI PATEL 3RD PLAINTIFF
GRISHMA KUMAR INDUBHAI PATEL 4TH PLAINTIFF
UNICOM LIMITED 5TH PLAINTIFF
INTERACTOR COMPANY LIMITED 6TH PLAINTIFF**

AND

**I & M BANK LIMITED 1ST DEFENDANT
GEORGE NJOROGE MUIRURI T/A PHILIPS INTERNATIONAL
AUCTIONEERS 2ND DEFENDANT**

RULING

1. On 4th October 2024, the Plaintiffs moved the Court by way of a Notice of Motion dated 3rd October 2024 seeking inter alia temporary orders of injunction restraining the Defendants from in any manner dealing with parcels of land known as Mainland North/VI/3075 and L.R No. 209/4535, L.R No. 214/172 and L.R No. 209/8755 pending inter partes hearing and determination of the application as well as pending the hearing and determination of Civil Appeal (application) No. E361 of 2022 in the Court of Appeal. The application also sought grant of any other orders adequate to preserve the subject parcels of land. The grounds upon which the application was premised are listed on the face of



it and in the supporting affidavit of the 2nd Plaintiff sworn on 3rd October 2024. The main ground was that if the orders sought are not granted the appeal in CA No. E361 of 2022 will be rendered nugatory.

2. The Defendants have responded to the application by filing a Notice of Preliminary Objection dated 11th October 2024 on the grounds that the Plaintiff's application is res judicata because they had filed a similar application dated 6th June 2022 and which was dismissed vide this Court's Ruling dated 19th September 2024.
3. According to the Defendants, the instant application seeks inter alia similar orders against the 1st Defendant's exercise of statutory power of sale pending the hearing and determination of Civil Appeal (Application) No. E361 of 2022. And that the application is an abuse of the court process and ought to be dismissed with costs.
4. The preliminary objection was heard by oral submissions of learned counsel which I have duly considered.
5. The leading decision on Preliminary Objections is that of the predecessor of the Court of Appeal in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696. The said decision has since been affirmed by the Supreme Court in the case of *Joho and another v Shahbal and 2 others* [2014] KESC 34 (KLR)].
6. In *Mukisa* (supra) Law J.A., and Newbold P. respectively at pages 700 and 701, held as follows:

Law, J.A.:

“ So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit...”

Newbold, P.:

“ A Preliminary Objection is in the nature of what used to be a demurrer. 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...”

7. In summary, for one to succeed in putting up a Preliminary Objection, the facts pleaded by the other party are assumed to be correct; it must be a matter of law which is capable of disposing off the suit; it must not be blurred by factual details calling for evidence; it must not call upon the Court to exercise discretion.
8. For res judicata to be invoked in a civil matter the following elements must be demonstrated, that is; there is a former judgment or order which was final; the judgment or order was on merit; the judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and there must be between the first and the second action identical parties, subject matter and cause of action (see *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others* [2021] KESC 39 KLR).
9. The Defendants have raised the issue that the instant application dated 3rd October 2024 is res judicata the application by Notice of Motion dated 6th June 2022 filed in this matter and determined by this Court by the Ruling of 19th September 2024. I have had the chance to make reference to the earlier application and am inclined to agree with the Defendant's submissions that application had sought similar orders in the application of 6th June 2022 as in the instant application, basically to restrain the



1st Defendant from exercising its statutory power of sale. The Defendants' challenge on the jurisdiction of this court is a point of law.

10. It is indeed correct that similar issues were raised by and between the same parties in the application of 6th June 2022 and a determination was made by this Court on 19th September 2024. It would seem the Plaintiffs were prompted in to filing the instant application by the discharge of the interim injunction orders which had been in place since 2022.
11. A court will use the res judicata principle to deny a party reconsideration of a matter already competently adjudicated. It guards against injustice to parties in a case supposedly concluded and avoids unnecessary waste of judicial resources. A party will be barred from litigating the same dispute again once a final judgment or order has been rendered by a competent court.
12. By the fact that the instant application raised issues similar to the application dated 6th June 2022, issues which involved the same parties and were competently determined by the Court, I find that the said motion is an abuse of the court process and is res judicata.
13. In conclusion and without belaboring the matter any further, the upshot is that the Defendants' Preliminary Objection dated 11th October 2024 is merited and is allowed. I make no orders as to costs.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF OCTOBER 2024.

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P. MULWA

JUDGE

In the presence of:

Mr. Mirie for plaintiffs

Mr. Mutugi h/b for Mr. Wawire for defendants

Court Assistant: Carlos

