



Kahumbu & another (Suing as the Administrators Ad Litem of the Estate of John Francis Kahumbu - Deceased) v National Bank of Kenya Ltd (Civil Suit 002 of 2021) [2023] KEHC 1633 (KLR) (Commercial and Tax) (10 March 2023) (Ruling)

Neutral citation: [2023] KEHC 1633 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 002 OF 2021
A MABEYA, J
MARCH 10, 2023**

BETWEEN

SUSAN S.A WARUGURU KAHUMBU 1ST PLAINTIFF

JOHN KAHUMBU MWANGI 2ND PLAINTIFF

SUING AS THE ADMINISTRATORS AD LITEM OF THE ESTATE OF JOHN FRANCIS KAHUMBU - DECEASED

AND

NATIONAL BANK OF KENYA LTD DEFENDANT

RULING

1. Vide a Motion on Notice dated November 25, 2021, the plaintiffs sought a temporary injunction restraining the defendant from advertising for sale, selling, taking possession of or otherwise dealing with or alienating howsoever all that property known as LR No 7583/41 (“the suit property”) pending the determination of this suit.
2. The application was brought inter-alia under Order 40 Rule 1 and Order 51 Rule 3 of the [Civil Procedure Rules 2010](#). The same was supported by the affidavits of Susan S A Waruguru Kahumbu sworn on November 26, 2021 and Dr John Mugalasinga Khaminwa sworn on February 12, 2021.
3. The grounds for the application were that the defendants instructed Garam Auctioneers to schedule the auction of the suit property in exercise of its statutory power of sale under mortgages registered against the property.
4. That the suit property together with LR No7583/2019 were registered in the name of the late John Francis Kahumbu (“the deceased who was married to the late Roseline Mary Kahumbu (‘RMK’). That



- the couple established a matrimonial home on both properties on which they resided with their nine children (“RMK’s home”).
5. That JFK mortgaged the matrimonial homes to the defendant to finance his business. However, in 1980 the couple became estranged and by a judgment in HCC No 3772/1981 (“the 1981 case”), RMK was awarded a half share interest in various properties registered in JFK’s name, including RMK’s home. By a judgment delivered on March 23, 2017, the High Court declared that the defendant’s mortgage over RMK’s home was valid but subject to her equitable interests.
 6. That after the 1981 case, LR No 7853/19(3) that comprised part of RMK’s home was fraudulently sold under private treaty by the defendant without her knowledge and all proceeds applied to reduce JFK’s debt with the defendant. That the plaintiffs as children of the late RMK and beneficiaries of her equitable interest will be deprived of their inheritance, become homeless and without a means to earn a living if the defendant proceeds with the sale of the property.
 7. In the premises, the plaintiffs sought to prevent the defendant from selling by public auction the suit property before the suit is determined.
 8. In opposition, the defendant filed a Preliminary Objection dated December 6, 2021 and a replying affidavit sworn on February 18, 2022.
 9. In the objection, the defendant contended that the application and the entire suit were res judicata as the matter had been directly and substantially in issue in a former suit between the same parties in HCC 1336/2001 where final judgment was entered on March 23, 2017 against the Plaintiffs. Further that the matter was sub-judice as the said HCC 1336/2001 was pending before Majanja J for hearing of post judgment applications.
 10. The defendant therefore contended that the application and the suit are contrary to sections 6 and 7 of the Civil Procedure Act and that the Court was functus officio with no jurisdiction to hear this matter.
 11. I propose to deal with the objection first. *Res Judicata* is provided for under section 7 of the Civil Procedure Act which states: -

“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.”
 12. The defendant submitted that there exists another suit being HCC 1336 of 2001 in which the plaintiffs, as the administrators of RMK, sought inter alia a permanent order of injunction to prevent it from dealing with the suit property and for the mortgage over the suit property to be declared null.
 13. That the judgment in HCC 1336 of 2001 declared the mortgage as valid but was subject to the equitable rights of the plaintiffs in the suit.
 14. The plaintiffs herein did not address the issue of res judicata in their submissions.
 15. I have seen the judgment delivered in HCC 1336 of 2001 produced as ‘SM 6’ in the defendant’s replying affidavit sworn on February 18, 2022. The initial plaintiff in HCC 1336 of 2001 was RMK. However, after she passed away, her personal representatives, Dominic Kahumbu and Paula Kahumbu continued the suit on her behalf.



16. RMK had sought the nullification of the mortgage and a permanent injunction to restrain the defendant from dealing in any way with the suit property.
17. At paragraph 62, the Court found that the mortgage and further mortgage over the suit property was not a nullity but only subject to the plaintiff's equitable rights declared in HCC 3772 of 1981.
18. The plaintiffs in HCC 1336 of 2001, filed an application dated December 19, 2019 seeking an injunction to restrain the defendant from dealing with the suit property while also asking the Court to settle the terms of the decree. The application was dismissed on December 21, 2021. The application and ruling were produced as 'SM9' and 'SM10', respectively in the defendant's replying affidavit sworn on February 18, 2022.
19. In the present suit, the plaintiffs have in the plaint dated February 12, 2021 sought a permanent injunction against the defendant restraining it from dealing with the suit property, the discharge of the mortgage and that the title be conveyed back to the administrators of the estate of RMK.
20. In my view, the issues and subject matter in the instant plaint are similar to those in HCC 1336 of 2001. The subject matter is the suit property, being LR No 7581 which the plaintiffs in both suits seek to shield from sale by the defendant in exercise of its statutory power of sale.
21. In the judgment of HCC 1336 of 2001, the court found that the mortgage and further mortgage over the suit properties were valid subject to the plaintiff's equitable rights. This meant that the defendant had the right to exercise its statutory power of sale over the suit property but had the obligation to respect the plaintiffs' interest in the suit property.
22. It appears that the plaintiffs in this suit have tried to circumvent res judicata by instituting the present suit as administrators of a different estate seeking similar orders drafted differently over the same subject matter but with the same issues that have already been determined.
23. In *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) & another* [2020] eKLR, it was held: -

“Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of res judicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely vide a preliminary objection.”
24. I concur with the above observation. This is a suit and application with different plaintiffs seeking the same reliefs over the same subject matter which have already been determined in HCC 1336 of 2001.
25. Accordingly, I find that preliminary objection is meritorious and strike out the application and suit with costs to the defendant.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH, 2023.

A. MABEYA, FCIArb

JUDGE

