



**Ndichu & 2 others v Equity Bank (Kenya) Limited & another (Civil Suit 37 of 2018)  
[2023] KEHC 17807 (KLR) (Commercial and Tax) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17807 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 37 OF 2018**

**A MABEYA, J**

**MAY 19, 2023**

**BETWEEN**

**PATRICK GITHINJI NDICHU ..... 1<sup>ST</sup> PLAINTIFF  
FLORENCE WAITHERERO MAINA ..... 2<sup>ND</sup> PLAINTIFF  
SOLEX BUILDING CONTRACTORS LIMITED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**EQUITY BANK (KENYA) LIMITED ..... 1<sup>ST</sup> DEFENDANT  
ANTIQUA AUCTIONS AGENCIES ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Motion on notice dated October 17, 2022 was brought pursuant to section 63 (c) and (e), Order 40 Rules 1(a) 2, 4 and 10, Order 51 Rule 1 of the *Civil Procedure Rules*, the *Land Act* No 6 of 2012 and *Land Registration Act* No 3 of 2012.
2. The applicant sought a temporary injunction against the 1<sup>st</sup> and 2<sup>nd</sup> defendant restraining them from disposing or transferring by auction or private treaty the property known as LR No 13868/11 (“the suit property”) until a determination is made on when the loan became non performing and the amount recoverable.
3. The applicant also sought that the suit property should not be disposed off at a value less than Kshs 90,000,000/- or as the value of the suit property may be determined from time to time.
4. The application was supported by the grounds on the face of it and by the sworn Affidavit of Patrick Githinji Ndichu dated October 17, 2022. The applicant complained on how the 1<sup>st</sup> defendant had operated the accounts of the 3<sup>rd</sup> defendant. That the defendants had placed the reserve price at Kshs



- 58 million instead of the agreed sum of Kshs 80 million. That the sum last demanded was Kshs 128,292,907/60. The applicant was apprehensive that the suit property was to be sold at an undervalue.
5. The defendants opposed the application vide grounds of opposition dated October 25, 2022. They contended, inter-alia, that by virtue of section 7 as read together with section 89 of the [Civil Procedure Act](#), the application was *res judicata* for all intents and purposes and that Court lacked jurisdiction to hear and determine the same.
  6. The defendants also filed a replying affidavit of Kariuki Kingóri sworn on 3/11/2022. It was deponed that between 2013 and 2016, the 3<sup>rd</sup> defendant took loans from the 1<sup>st</sup> defendant totaling Kshs 87,000,000/-. That the loans were secured by the suit property. That the 3<sup>rd</sup> defendant was in default. That the outstanding amount as at October 25, 2022 was Kshs 122,492,907/60.
  7. That the amount due had surpassed the value of the security. That the forced value of the suit property had been placed at Kshs 57,750,000/- as of May 28, 2022. That there have been a total of 4 rulings all upholding the right of the 1<sup>st</sup> defendant of exercising its statutory power of sale. That the plaintiffs had agreed that the bank sells the suit property by private treaty and the bank had already received 10% of the purchase price of Kshs 58 million. That in the premises, the application was but an abuse of the court process.
  8. The parties filed their respective submissions. It was the applicants' submission that the application was not *res judicata*. That the application was premised on the issue of the intended sale after the parties had agreed on the mode of disposal of the same by private treaty.
  9. Moreover, the twin issues for determination in the application were whether the intended sale was premature for noncompliance with the terms of section 44A of the [Banking Act](#) and whether the defendants can purport to sell the suit property by public auction after parties had agreed on a private treaty and whether such sale can be undertaken at a price lower than the current forced sale price.
  10. It was further submitted for the applicants that the circumstances in the present application are different from the previous application. In the current application, the plaintiffs were challenging the defendants' deviation from the agreed mode of disposal of the suit property which was different from the issues determined in the previous applications.
  11. On the other hand, the respondents submitted that the application raised no new issues. That the court lacked jurisdiction to hear and entertain the same. That in any event, the suit property was sold by public auction on October 12, 2022 hence the substratum of the suit has since disappeared. That therefore, the application was *res judicata* and the applicants' rights over the suit property had been extinguished.
  12. I have considered the rival contestations and the submissions on record. This is an application for an interlocutory injunction. The principles are well known as set out in the *Giella v Cassman Brown* [1973] EA. These are that an applicant has to establish a *prima facie* case with a probability of success, that he will suffer irreparable damage and that if in doubt, the court will determine the matter on a balance of convenience.
  13. It is not in dispute that the 3<sup>rd</sup> applicant applied for and was advanced various banking facilities by the 1<sup>st</sup> respondent which was secured by the suit property. Further, it is not in contention that the 3<sup>rd</sup> applicant has defaulted and the debt is clearly admitted.
  14. I have seen the previous rulings by various courts. The applications were for injunction. The claim by the applicants that the matter is not *res judicata* cannot hold. The issue of the *in duplum* rule under



section 44A of the *Banking Act* could have been raised in the previous applications if the applicants so wished. See section 7 Explanation 4 of the Civil Procedure Rule.

15. In *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties)* [2020] eKLR, the court observed: -

“A close reading of Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine’s five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

- i. The suit or issue raised was directly and substantially in issue in the former suit.
- ii. That the former suit was between the same party or parties under whom they or any of them claim.
- iii. That those parties were litigating under the same title.
- iv. That the issue in question was heard and finally determined in the former suit.
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit”.

16. The Court of Appeal held in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR, that:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

17. It suffices to say that the present application fits within the ambits of the above-mentioned grounds for res judicata. In any event, the issues raised in the present application have been overtaken by events. The issue of whether the sale of the property at Kshs 58 million at a public auction instead of by private treaty is regular or not is no ground for an injunction.

18. In this regard, I find the application to be without merit and I dismiss the same with costs.  
It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 19<sup>TH</sup> DAY OF MAY, 2023.**

**A. MABEYA, FCIArb**

**JUDGE**

