Musanga v Transnational Bank Limited & another (Civil Appeal E087 of 2023) [2023] KEHC 18953 (KLR) (16 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18953 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E087 OF 2023

RN NYAKUNDI, J

JUNE 16, 2023

BETWEEN

FLORENCE KHAYANGA MUSANGA ..... APPELLANT

AND

TRANSNATIONAL BANK LIMITED ..... 1ST RESPONDENT

ISAAC K LAGAT T/A KOLATO AUCTIONEERS ..... 2ND RESPONDENT

RULING

1. The cracks of the matter is based on two applications by the Applicant. The 1st one is dated 2nd May 2023 expressed to be brought under Section 1A 3, 3A and 78G of the *Civil Procedure Act*, cap 21 of the Laws of Kenya and order 42 rule 6 of the Civil Procedure Rules, 2010 together with all other enabling provisions of the law seeking the following orders:
    1. That service of this application be dispensed with in the first instance
    2. That the Honourable court be pleased to extend the time for appealing and admit the appeal filed herein out of time
    3. That an injection do issue against the respondents restraining them whether they themselves, their servants and/or agents from advertising, selling and /or transferring the land parcel known as Uasin Gishu/Kimumu/Scheme/1655 pending the hearing and determination of this application and thereafter pending the hearing and determination of the appeal.
2. In support of the application is an affidavit by an applicant Florence Khayanga Musanga and attendant annextures.
3. The 2nd application is one dated 5th June 2023 expressed to be brought under Article 45 of the Civil Procedure Rules seeking the following orders:-

4. That the Honourable court be pleased to review and vary its orders made on the application dated 2nd May 2023 fixing the said application for hearing on 6th July 2023 and proceed to fix the hearing of the application on an earlier date

4. That the pending the hearing and determination of this and the application dated 22nd May 2023, an injunction do issue against the respondents restraining them whether by themselves, their servants and/or agents form advertising, selling and /or transferring the land parcel known as Uasin Gishu/ Kimumu Scheme/1655.

5. The counter response was filed by the respondents in the form of grounds of opposition and replying affidavit of Vvalance Mmuka the affidavit with annextures gave a chronological history of the litigation between the applicant and the Respondent. The distinct features being the Court of Appeal Ruling Referenced as Civil Appeal No. 45 of 2020 between the same parties to the instant application. The dicta of the Court of Appeal Ruling relying on the case of Ngurumani Limited vs Jan Bonde Nielsen & 2 Others (supra) on the threshold to grant and injunction dismissed the Appeal filed pursuant to a Ruling and Order of the of the High Court of Kenya at Eldoret (H.Omonid, J) dated 11th December, 2019. What comes out very clearly the Applicant has approached the various courts seeking the reliefs of injunction against the respondents asserting the same particulars and material evidence in support of the application. From the record the High Court and the Court of Appeal determined the following issues conclusively:

    i. Whether there is a serious issue to be tried (a real prospect of succeeding of the claim)

    ii. Whether the restrictive covenant creates an inviolable right or an absolute right for all time

    iii. Whether the balance of convenience lies in granting or refusing the interlocutory relief sought: and

    iv. Whether damages are an adequate remedy

6. Likewise, in the Applicants application dated 22nd May 2023 she seeks primarily the following orders:

    1. That the Honourable Court be pleased to extend the time for appealing and admit the appeal filed herein out of time

    2. That an injunction do issue against the respondents restraining them whether by themselves, their servants and/or agents from advertising, selling and/or transferring the land parcel known as Uasin Gishu/Kimumu Scheme/1655 pending the hearing and termination of this application and thereafter pending the hearing and determination of the appeal.

7. From the record the two Superior Courts placed reliance on the well-established principles on grant or refusal of an injunction in the cases of: *Mrao Ltd vs. First American Bank of Kenya Ltd & 2 others* (2003) eKLR and *Giella v: Gassman Brown* (1973) E.A 358 . Against that background, my judgement the Applicant has not adduced sufficiently precise factual evidence to satisfy the court that he has a real prospect of succeeding in her claim for a permanent injunction before any other court or tribunal. The affidavit evidence in support of a motion does not by itself suffice to satisfy this court to grant an injunction against the respondent or their servant from offering for sale LR No, Usain Gishu/ Kimumu Scheme/1655 to secure the mortgage debt. The hypothesis of fact being invented in the new Notice of Motion has no real prospect of Success given the strength and reasoning of the decisions by the two Superior Courts. What is deduced from the affidavit in support of the application and the replying affidavit in opposition to the relief on injunction is that there was a package of contractual rights and obligations freely and voluntarily negotiated between the Applicant and the 1st Respondent.

Accordingly, the commercial expectation of the parties gave rise to the charge instrument in favour of the 1st Respondent to exercise the statutory power of sale in default of payments by the Applicant as provided for in Section 91, 92, 95, 96, and 97 of the *Land Act*. The latest injunction being prayed for in the Notice of Motion dated 22nd May 2023 is cosmetically fashioned as follows: That the injunction to be issued against the conveyance, sale or transfer of the suit property is for pending the hearing and determination of this application and therefore pending the hearing and determination of the appeal. My answer to the Applicant is found in Halsbury's Law England, Volume 24(2004) at paragraph 843, states as follows:

> "an injunction may be refused on the ground of the plaintiff's acquiescence in the defendants' infringement of his right. The principles on which the court will refuse interlocutory of final relief on this ground are the same, but a stronger case is required to support a refusal to grant final relief at the hearing. The fact that a person did not interfere to prevent a small and limited breach does not preclude him for all time in respect of a wider and more important breach. If a person stands by and knowingly, but passively, encourages another to expend money under an erroneous belief as to his rights, and then comes to the court for relief by way of a perpetual injunction, it will be refused and he will be left to his remedy, if any, in damages.

8. The Applicant indebtedness to the 1st Defendant has not been discharged. In the instant case, there is no indication in the documents put forward disclosing all material facts relevant for the courts consideration on interim injunction pending the determination of the intended Appeal. An injunction as a equitable remedy can be accessed only if an applicant satisfies the criteria on grant of equitable reliefs. The inequitable contact of the Applicant disqualifies her from receiving the remedy of restraining the 1st Respondent from exercising its power of sale in view of the dismissal of the earlier applications by the High Court and subsequently an Appeal lodged before the court of Appeal.

9. On the other hand, the Applicant is guilty of the principles embedded in our jurisdiction on res-judicata under Section 7 of the *Civil Procedure Act*. In the case of Njugu vs Wambugu and Another Nairobi HCCC No 2340 of 1991(unreported) the court observed as follows:

> " If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lifts on every occasion he comes to court, the I do not see the use of the doctrine of re judicata....
>
> i. What issue were really determined in the previous Application.
>
> ii. Whether they are the same in the subsequent Application and were covered by the Decision
>
> iii. Whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

10. If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he give his case some cosmetic face lift on every occasion he comes to court, they I do not see the use of the doctrine of re judicata...." (See also the court of *Siri Ram Kaura –vs – MJE Morgan* CA 71/1960(1961) EA 462 the then EACA stated as follows:

> "The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...

> The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...
>
> The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.
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> It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

11. By dint of Section 7 of the *Civil Procedure Act* and the above principles, weighed against the Notice of Motion by the Applicant undoubtedly shows that the prayers sought are not tenable for reason of being res-judicata.

12. The other issue for consideration is whether the Applicant is eligible, procedurally to be granted leave to file an Appeal out of time. As far as the time within which a Notice of Appeal must be filed one has to content with the thirty days' period provided in the Act. The Appeal in question is from the decision of the Chief Magistrate's Honourable Mikoyan delivered on 28th January 2022. In that ruling the court held as follows:

> The application is seeking to preserve the subject matter which is a security to a facility advanced by the 1st Respondent. And this would be the 4th attempt that the applicant is seeking such orders. For whatever reasons this court through the ruling of Honourable Obulutsa as he then was, Honorable Justice Omondi on Appeal and the court of Appeal decision declined to preserve the subject matter. There is no new set of facts that would be exercised by this court to rule otherwise. I am of the concurrence with earlier orders issued in favour of the Respondent who has a legitimate expectation to exercise its right of foreclosure. The Notice of Motion dated 25/6/2021 is hereby dismissed with costs and orders earlier issued in respect of the same lifted forthwith

13. The importance of this order being sought to be appealed against by the applicant is that there must be finality in litigation as between the parties. Notwithstanding the legal position taken by the High Court and further the court of Appeal the Applicant is still exacting the Right of reopening proceedings which have gone through the hierarchy of courts and issues in contestation decided with finality. This court has no inherent jurisdiction to reopen the case in terms of the Principles elucidated in *Salat v Independent Electoral & Boundaries Commission & 7 Others* (2014) KLR – SCK on the discretion to extend time for filing an appeal observed as follows:

    1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court

2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court

3. Whether the court ought to exercise the discretion to extend time, is a consideration to be made on a case to case basis

4. Whether there is a reasonable reason for the delay, which ought to be explained to the satisfaction of the court

5. Whether there would be any prejudicial suffered by the respondents if the extension was granted

6. Whether the application has been brought without undue delay, and

7. Whether is certain cases, like election petitions, public interests ought to be a consideration for extending time.

14. The implication of all these is that the applicant has no locus standi for her notice of motion to be entertained by this court for the doctrine of Estoppel restricts the court to exercise jurisdiction over the matter. I consider the process being initiated by this latest application to be an abuse, oppressive, and vexatious against the 1st respondent. The application violates the fundamental principles of justice underlying our legal system sense of fair play and decency. The reopening of the proceedings by the Applicant stand a risk of bringing the administration of justice into disrepute. The court in Williams vs Spaitz.had this in mind when it observed as follows on abuse of the courts process: " The first is that the public interest in the administration of justice requires that the court protect its ability to function as a court of law by ensuring that its processes are used fairly by State and citizen alike. The second is that, unless the court protects its ability so to function in that way, its failure will lead to an erosion of public confidence by reasons of concern that the court's processes may lend themselves to oppression and injustice."

15. In my judgment, having regard to the application, litigation history, and disclosure of evidence by the 1st respondent there is a strong indicator that the Applicant's quest to re-open the proceedings if entertained by this court will produce a risk of miscarriage of justice. The power donated to this court to extend time or grant an injunction pending the hearing and determination of an intended Appeal is denied with costs to the respondents.

DELIVERED, DATED, AND SIGNED AT ELDORET THIS 16TH DAY OF JUNE 2023

In the presence of:

Mr. Atudo Advocate for the Respondent

Mr. Mugambi Advocate for the Applicant

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R. NYAKUNDI

JUDGE