Amendi v Family Bank Limited & another (Civil Case 3 of 2021) [2023] KEHC 20923 (KLR) (24 July 2023) (Ruling)

Neutral citation: [2023] KEHC 20923 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT VIHIGA

CIVIL CASE 3 OF 2021

JN KAMAU, J

JULY 24, 2023

BETWEEN

BILLY AMUGUNE AMENDI ..... PLAINTIFF

AND

FAMILY BANK LIMITED ..... 1ST DEFENDANT

M/S PAWABA AUCTIONEERS ..... 2ND DEFENDANT

RULING

1. In his Notice of Motion dated and filed on 19th August 2021, the Plaintiff herein sought orders that the sale by public auction by the 2nd Defendant of the parcels of land known as Kakamega/Chavakali/1084 and Maragoli/Chavakali/1140 (hereinafter referred to as the "first and second subject properties respectively") scheduled in terms of the advertisement dated 2nd July 2021 be stopped until the hearing and final determination of this suit.

2. He swore an affidavit in support of the said application on 19th August 2021. It was his case that the Defendants had caused notification of sale of the charged subject properties by way of public auction and which notice he received on 19th July 2021 while this case was pending. It was his contention that the conduct and action of the Defendants was in bad faith as they were guilty of lack of disclosure. He added that it was fair and just that this case be heard and determined before the Defendants could have the charged subject properties sold in the event they succeed in the case.

3. In opposition to the Plaintiff's application, Paul Muturi Munene, a Senior Relationship Officer with the 1st Defendant swore a Replying Affidavit on 24th February 2022 on behalf of the Defendants herein.

4. It was the 1st Respondent's case that upon request by one Jeniffer Gesare Miheso (hereinafter referred to as the "borrower") on 4th September 2015, it advanced a financial facility of a sum of Kshs 1,000,000/= to her. The facility was secured by an original Title Deed and legal charge over the second subject

property herein, a personal guarantee and indemnity by the Plaintiff for Kshs 1,000,000/= and Guarantee and Indemnity by the Plaintiff herein, the registered owner of the said subject property.

5. The said facility was to be repaid in thirty six (36) equal monthly instalments of Kshs 37,875/= with effect from the first month of drawndown until payment in full. Under the contract, the borrower had a duty to ensure that there were sufficient funds in her savings/current account to meet the repayment obligations on the due dates. The Borrower accepted the letter of offer and upon the execution of the Charge by the Plaintiff, Legal Charge was perfected.

6. Subsequently, the Borrower defaulted in paying the instalments and despite demand, she failed to make good of the same. The 1st Defendant served the Borrower and the Plaintiff with the three (3) months Statutory Demand Notice dated 22nd August 2016. It also served them with the Notice of Intention to Sell the second subject property vide a letter dated 23rd November 2016. Upon being instructed by the 1st Defendant on 13th March 2017, the 2nd Defendant herein served the Plaintiff with the Notification of Sale and the forty five (45) days Redemption. Despite the issuance of the statutory notices the borrower and the Plaintiff failed to rectify the default.

7. The Defendants pointed out that the Plaintiff had blatantly failed to disclose the multiplicity of suits he had filed with respect to the subject properties with the intent of misleading this court one of which was Kakamega ELC No 135 of 2017 *Billy Amugune Amendi v Family Bank Limited & Another* in which on 8th May 2017, the court issued a limited injunction and directed that the 1st Defendant serve a fresh statutory power of sale which complied with the law and was thereafter at liberty to exercise its statutory power of sale.

8. The Plaintiff did not appeal and/or review the said orders as a result of which the Defendants averred that the instant application was mala fide, res judicata and an abuse of the court by virtue of the aforesaid orders issued.

9. They further asserted that in compliance with the orders issued it proceeded to re-issue and serve the Plaintiff and the borrower with a fresh three (3) months Statutory Demand Notice but that they still failed to make good the demand.

10. On 13th September 2021, the Plaintiff filed suit in Kakamega MCL & E No 144 of 2021 *Billy Amugune Amendi v Family Bank Ltd & Another* seeking permanent injunctive reliefs restraining the 1st Defendant from exercising its statutory power of sale over the subject property and therein filed an application dated 13th September 2021 seeking temporary injunctive reliefs against the 1st Defendant. The said application was still pending hearing and determination as it had been fixed for mention on 16th February 2022 for the purpose of taking directions.

11. The Defendants averred that the Plaintiff was guilty of material non-disclosure and that his filing of the aforementioned suits was a clear demonstration of the abuse of the process of court and bad faith on his part. They were emphatic that the said suit had been filed in an attempt to restrain the 1st Defendant from exercising its statutory power of sale over the second subject property and which

12. They asserted that they had served all the requisite notices upon the Borrower and the Plaintiff as was required in law to enable it realise the subject property charged and hence the Plaintiff's application did not attain the established threshold for the grant of the orders sought.

13. They added that the application was bereft of merit, was incompetent, misconceived, misinformed and that the orders that the Plaintiff had sought were highly prejudicial and detrimental to the 1st Defendant and its shareholders and were intended to defeat their rights to property safeguarded by the *Constitution* of Kenya 2010.

14. It was their contention that the Plaintiff had not approached the court with clean hands and was guilty of forum shopping and was therefore underserving of any requisite reliefs.

15. When this matter came up for mention on 25th January 2023 to confirm the filing of Written Submissions, the Plaintiff's counsel indicated that they had filed submissions but the court informed him that the same were missing in the court file. When the matter came up for a further mention on1st March 2023, the Plaintiff's counsel was absent.

16. As at the writing of this Ruling, the Plaintiff's Written Submissions, if any had not been placed in the court file. The Defendants' Written Submissions were dated 15th November 2022 and filed on 16th November 2022. This Ruling is therefore based on the Plaintiff's affidavit evidence and the Defendants' Written Submissions only.

Legal Analysis

I. Res Judicata

17. The Defendants submitted that the issues raised by the Plaintiff in his application were res judicata. In this regard, it invoked Section 7 of the *Civil Procedure Act* and placed reliance on the case of *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* [2017] eKLR and *Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited* [2014] eKLR where the principles under the doctrine of res judicata were that litigation had to come to an end at some point by way of finality of judicial decisions and protection of individuals from vexatious multiplication of suits and prosecutions.

18. They reiterated that the instant application was thus res judicata in respect of orders issued on 8th May 2017 in the matter herein as formerly Kakamega ELC No 135 of 2017 *Billy Amugune Amendi v Family Bank & Anor*. They cited the case of *Busia Outgrowers Company Ltd v Nile Hauliers Limited* [2019] eKLR where it was held that it was clear that the application not only lacked merit but also succeeded to dupe the court to extend the time by failure to disclose the existence of the consent order.

19. They asserted that it was trite law that whoever comes to equity must come with clean hands and therefore the material non-disclosure by the Plaintiff made him undeserving of any equitable reliefs.

20. The law pertaining to the doctrine of res judicata is captured under the provisions of Section 7 of the *Civil Procedure Act* Cap 21 (Laws of Kenya) which states that:-

> "No court shall try any suit 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 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."

21. In the case of *E.T v Attorney General & Another* [2012] eKLR, the court stated that courts must be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy. It further held that the test was whether or not the plaintiff in the second suit was trying to bring a new cause of action which had already been resolved by a court of competent jurisdiction in another way.

22. It is trite law that parties cannot evade the doctrine of res judicata merely by adding causes of action in subsequent proceedings. Indeed, the intention of this doctrine is to lock out parties who had had their day in courts of competent jurisdiction from re-litigating the same issues against the same opponents

in the court system. Without it, there would be no end to litigation and the judicial process would be rendered a nuisance and brought to disrepute. The foundation of this doctrine of res judicata therefore thus rests in the public interest for swift, sure and certain justice.

23. From the circumstances of the case herein, it was not in dispute that the subject matter in the previous litigation in *Billy Amugune Amendi v Family Bank Limited* [2017] eKLR and the current application were the same. The issues were the same issues between same parties. However, this court noted that the orders issued by the court indicated that the 1st Defendant was at liberty to realise its statutory power of sale over the subject properties in the event it issued proper statutory notices as in the earlier litigation, it had failed to issue the same.

24. A reading of the said decision indicated that Matheka J rendered herself as follows:

> "I order a limited injunction to the defendant/respondents from realizing its security of parcel numbers N. Maragoli/chavakali 1140 and Kakamega/chavakali 1084. For the avoidance of doubt the defendant/respondent may serve a fresh statutory notice of sale which complies with the law and thereafter may proceed to exercise their statutory power of sale. There will be no order as to costs in respect of this Application."

25. It was evident from the aforesaid Ruling that the 1st Defendant could only proceed to realise its security only after issuing the Plaintiff and the Borrower fresh statutory notices that complied with the provisions of the law. This did not bar the Plaintiff from filing a fresh application seeking orders restraining the action of the 1st Defendant in the event the fresh notices issued did not comply with the law.

26. This court did not therefore find that the Plaintiff's instant application to have been res judicata as had been alleged by the 1st Defendant. The same was properly before this court. However, whether or not the Plaintiff had demonstrated that the statutory notices were invalid was a different matter altogether.

II. Validity Of Statutory Notices

27. The Defendants submitted that the 1st Defendant issued the Plaintiff and the Borrower the requisite notices under Section 90(1) and 96(2) of the *Land Act* No 6 of 2012. They added that the 2nd Defendant issued the Plaintiff and the Borrower with the forty five (45) days Notification of sale.

28. They relied on the case of *Lameck Mbaka Motegi v Bank of Baroda (Kenya) Limited and Another* where the court quoted the case of *Turbo Highway Eldoret Ltd & 2 Others v Bank of Africa Ltd* [2016] eKLR where it was held that the only way the applicant could get relief from the sale of his property was to demonstrate that the notices were not served.

29. They further placed reliance on the case of *Giella v Cassman Brown* [1973] EA 358 where it was held that the conditions for the grant of an interlocutory injunction were that first an applicant must show a prima facie case with a probability of success, that he would suffer irreparable injury which would not adequately be compensated by an award of damages and that if the court was in doubt, it would decide on the balance of convenience. It was their contention that the orders sought in the application herein could not issue as it failed to meet the requisite threshold.

30. They further submitted that by virtue of the Charge instrument, the 1st Defendant acquired a valid legal interest in the subject property which interest could only be extinguished upon the Plaintiff fulfilling its obligations under the agreement and that having failed to fulfil the same, it was justified in exercising its statutory power of sale. It was their contention therefore that the Plaintiff had failed to establish a prima facie case.

31. In this regard, they relied on the case of *Mrao v First Community Bank of Kenya & 2 Others* (eKLR citation not given) where it was held that the evidence must show an infringement of a right and the probability of success of the applicant's case upon trial.

32. They further submitted that apart from alleging that he would suffer irreparable loss, the Plaintiff failed to disclose and/or demonstrate the loss he would suffer if the orders he had sought were denied. They referred to the case of *James Kipruto Lagat & Another v Family Bank Limited & Another*(eKLR citation not given) where it was held that the burden of proof that the plaintiffs was likely to suffer irreparable harm that could not be compensated by way of damages lay on them and not the defendants and the case of *Lameck Mbaka Motegi v Bank of Baroda (Kenya) Limited and Another* (*Supra*) where it was held that the bank's interest would supersede the applicant's undisclosed loss that would in any event if proved, be compensated by an award of damages.

33. They pointed out that the balance of convenience tilted towards denying the application as the debt owed was likely to outstrip the value of the subject properties. They added that granting the orders sought had the effect of increasing the 1st Defendant's non-performing loan portfolios which was detrimental to it, its depositors and shareholders.

34. To buttress its argument that the Plaintiff was guilty of unclean hands by forum shopping which was an abuse of the court process, they relied on the cases of *Joseph B. Onguti & 5 others v Hotel Span Limited & 2 others* [2006] eKLR and *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR where the common thread was that multiplicity of actions on the same matter where there existed a right to bring the action was regarded as an abuse.

35. It was not in dispute that the Plaintiff charged his subject properties in favour of the 1st Defendant to secure a loan for the borrower. It was also not disputed that the Borrower had defaulted in payment of the facility and hence the 1st Defendant's statutory power of sale had now crystallised. Having said so, the Defendants could not realise the securities unless they issued the Plaintiff and the Borrower statutory notices that strictly complied with the law.

36. A notice that is issued pursuant to the provisions of section 90(1) and (2) of the *Land Act* 2012 is intended to inform the chargor of their rights and extent of the default as was held in the case of *Patrick Maguta Mwangi & Another v Consolidated Bank Ltd* [2012] eKLR.

37. Notably, Section 90(1) of the *Land Act* provides that:-

> "if the chargor is in default of any obligation, fails to pay interest or any other periodic payment or any part thereof due under any charge or in performance or observation of any covenant, express or implied, in any charge, and continues to be in default for one month, the chargee may serve the chargor a notice, in writing, to pay the money owing or to perform and observe the agreement as the case may be."

38. According to Section 90(2) of the said *Act*, the notice to be served shall adequately advise the chargor of:-

    a. The nature and extent of the default by the chargor;

    b. If the default consists of the non-payment of any money due under the charge, the amount that must be paid to rectify the default and the time, being not less than three (3) months, by the end of which the payment in default must have been completed.

c. If the default consists of the failure to perform or observe any covenant, express or implied, in the charge, the thing the charger must do or desist from doing so as to rectify the default and the time, being not less than two months, by the end of which the default must have been rectified

d. The consequence that if the default is not rectified within the time specified in the notice, the chargee will proceed to exercise any of the remedies referred to in this section in accordance with the procedures provided for in this sub-part; and

e. The right of the chargor in respect of certain remedies to apply to the court for relief against those remedies.

39. Further, Section 96(2) of the *Land Act* stipulates that:-

> " Before exercising the power to sell the charged land, the chargee shall serve on the chargor a notice to sell in the prescribed form and shall not proceed to complete any contract for the sale of the charged land until at least forty days have elapsed from the date of the service of that notice to sell (emphasis court)."

40. In addition, Rule 15 (d) of the *Auctioneers Rules*, 1997 provides as follows:-

> " Upon receipt of a court warrant or letter of instruction the auctioneer shall in the case of immovable property—

a. give in writing to the owner of the property a notice of not less than forty-five days within which the owner may redeem the property by payment of the amount set forth in the court warrant or letter of instruction."

41. The auctioneer also has an obligation under Rule 15 (e) not to sell the immovable property earlier than fourteen (14) days after the first advertisement of the sale of the property. It therefore means that beyond the forty five (45) days, the chargor has an advantage of a further fourteen (14) days. Rule 15 (e) of the Auctioneers Rules stipulates that:-

> " on expiry of the period of notice without payment arrange sale of the property not earlier than fourteen days after the first newspaper advertisement."

42. The essence of the Statutory Notice is to accord the debtor all the opportunity to be aware of the exact amount he or she must pay. It must be certain what he or she must do to salvage his charged property. Indeed, a debtor has a right of redemption until the last moment and must be able to ascertain what his or her obligation is to redeem his or her property.

43. A perusal of the Defendants' Affidavit and the annextures thereto showed that they had duly served the Plaintiff with all the Statutory Notices and that the same were in compliance with the above mentioned provisions of law. The plaintiff had argued that the subject properties were the subject matter of the case herein but that alone could not be the reason for restraining the 1st Defendant from realizing its statutory power of sale where proper statutory notices have duly been served.

44. In the absence of any evidence of invalidity of the statutory notices of sale, this court therefore found and held that the 1st Defendant's its statutory power of sale had crystallised and it had subsequently fully complied with the provisions of the law as far as issuing the Statutory Notices was concerned.

45. To that extend, this court came to the firm conclusion that the Plaintiff had not met the threshold for being the granted injunctive orders that he had sought as set out in the case of *Giella v Cassman Brown*

(*Supra*) and the balance of convenience tilted in favour of the 1st Defendant realising its security. In the event, the Plaintiff suffered any loss, which he failed to demonstrate, the bank would be able to compensate him by an award of damages.

46. In addition, an interlocutory injunction is an equitable relief and the court may decline to grant it if it could be shown that the applicant's conduct pertinent to the subject matter of the suit did not meet the approval of a court of equity.

47. It is trite law that courts must never re-write the contracts for parties. Instead, courts must instead let the terms and conditions of a contract run their course and only come in to the aid of any party against whom the other party has flouted the said terms and conditions and within the confines of the law.

48. The Plaintiff herein had filed a multiplicity of court cases seeking to restrain the 1st Defendant from realising its securities. The Borrower could not take a facility, fail to pay and the Plaintiff use the court system to frustrate the 1st Defendant from proceeding as per their contract. It was evident that the multiplicity of courts actions over the said subject properties was an abuse of the court process and hence the Plaintiff had approached this court with unclean hands for which he was not entitled to an equitable relief.

Disposition

49. For the foregoing reasons, the upshot of this court's decision was that the Plaintiff's Notice of Motion application dated and filed on 19th August 2021 was not merited and the same be and is hereby dismissed with costs to the 1st Defendant herein.

50. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 24TH DAY OF JULY 2023

J. KAMAU

JUDGE