



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

PETITION NO. 4 OF 2020

PAMELA OGALO OGUTA.....APPLICANT/PETITIONER

VERSUS

NATIONAL BANK OF KENYA.....RESPONDENT

RULING

The matter for determination is the **Notice of Preliminary Objection** dated **16th October 2020**, brought by the Respondent on grounds that this Honourable Court lacks jurisdiction to hear and determine the matter since there is a clear procedure available to the petitioner herein to secure the reliefs sought in her petition. The Petition herein is res judicata under the provisions of Section 7 of the Civil Procedure Act 2020 as the same was dealt with in Chief Magistrate's Court ELC Case No. 323 of 2018 Pamela Ogalo Oguta vs National Bank of Kenya Limited AND Judgment delivered on 18th June 2019 and as a result this Honourable Court lacks jurisdiction to entertain the present suit.

There is an Appeal concerning the same matter in Kisumu High Court ELC Civil Appeal No. 38 of 2020 in National Bank of Kenya Limited Vs Pamela Ogalo Oguta. Stay of execution was granted to the Respondent on 1/7/2020 against the Judgment delivered on 18/6/2019 in Civil Appeal No. 38 of 2019 in National Bank of Kenya Limited vs Pamela Ogalo Oguta. The entire Petition and Application herewith dated 10th August 2020 is bad in law, incompetent, misconceived and an abuse of the court process and ought to be dismissed with costs to the Respondent. The Notice of Preliminary Objection was canvassed by way of written submissions as discussed below:

Respondent's Written Submissions.

The Applicants filed written submissions on 23rd November 2021 and raised the following issues for determination:

a) Whether the Preliminary Objection herein raises a pure point of law.

The Respondent placed reliance in the case of **Mukisa Biscuit Manufacturing Co. Ltd ...Vs... West End Distributors Ltd (1969) EA 696**, where Law J A stated that;

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

b) Whether the Petition herein is res judicata;

The Respondent submitted that there is a matter concerning the Petitioner and the Respondent in KISUMU HCCC NO. 323 OF 2018-PAMELA OGALO OGUTU VS NATIONAL BANK OF KENYA LIMITED (FORMERLY KISUMU HC NO. 10 OF 1997), where the matter was heard and judgment delivered in favour of the Petitioner on 18th June 2019. In the above matter, there is an Application for review pending Appeal. That the present petition is res judicata and relied on section 7 of the Civil Procedure Act.

The Respondent also placed reliance in the Case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others Nairobi CA Civil Appeal No. 105 OF 2017 (2017) eKLR**, where the court in expounding the provisions of Section 7 of the Civil Procedure Act, Cap 21 and the rationale for the principle of res judicata noted as follows:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectra 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

favourable 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.”

Korir J, in Christopher Orina Kenyariri t/a Kenyariri & Associates advocates v Salama Beach Hotel Limited & 3 Others (2017) eKLR, in support of the decision stated as follows:

“My understanding of the res judicata principle is that it is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. Surely it would be a waste of courts’ valuable time if there was no tool of arresting such mischief. This is the tool the Applicant has deployed through the instant application.”

c) Whether this court lacks jurisdiction by dint that there is a clear procedure available to the Applicant to secure the reliefs sought in her petition.

The Respondent submitted that the Petitioner’s Application dated 10th August 2019 indicates that both of them as drawn and filed are bad in law and abuse of the process of the court for reasons that the Petitioner has failed to adhere to clear procedures available for her to secure the reliefs sought in her petition and this court therefore lacks the jurisdiction to hear and determine the matter.

In **Peter Ochara Anam & 3 Others vs Constituencies Development Fund Board & 4 Others (2011) eKLR, Gabriel Mutava & 2 others vs Managing Director Kenya Ports Authority (2016) eKLR and The Speaker of National Assembly vs James Njenga Karume (1992) eKLR** held as follows:

“where exists sufficient and legal avenue a party ought not trivialize the jurisdiction of the court pursuant to the Constitution; indeed such a party ought to seek redress under relevant statutory provision, otherwise available statutory provisions would be rendered otiose…….”

The Respondent submitted that the Applicant chose the wrong forum to agitate her claim since her only point to the doors of justice lacks foundation and should not be sustained and relied in the case of **Owners of Motor Vehicle Lillian ‘S’ vs Caltex Oil (Kenya) Limited (1989) KLR 1.**

The Respondent further stated that the Applicant’s misdeeds, ills and defaults in her Application are technicalities that can be cured by the Application of Article 159(2)(d) of the Constitution of Kenya. That the Applicant has approached court through the back door and she must be shown the correct door from which to approach this court and therefor the Application and the accompanying Petition should be dismissed for want of jurisdiction at the earliest opportunity.

Grounds of Opposition

The Petitioner/Applicant filed grounds of opposition to the Notice of Preliminary Objection on 10th June 2021 on grounds that:

1. The Notice of Preliminary Objection is an abuse of the court process, a mere afterthought and meant to delay the conclusion of the matter/petition herein.
2. The Notice of Preliminary Objection is premised on mere allegations and assertions without any supporting evidence and full particulars or points of law thereof.
3. The notice has been brought by way too late and after inordinate delay as the lower court already determined the party in whose favour the discharge of charge should favour.
4. The Notice of Preliminary Objection is unmerited as there is judgment in the Petitioner’s favour emanating from Kisumu CMCC 323 /18 which ordered the Respondent to discharge title Kisumu/Konya/2354 which judgment the Respondent has never appealed to date.
5. The Applicant has Appealed a Ruling on an Application dated 15/10/2019 way after judgment and decree and not the judgment itself and is therefore guilty of laches and indolence and having fully participated in the proceedings to conclusion, it is barred and estopped from negating the same and or vitiating the proceedings of the court as sought hence the court ought not to exercise any such discretion in the Applicant’s favour.
6. The Petitioner has great faith in this ELC court and if the court were to allow the Respondent’s Preliminary Objection, the Petitioner stands to suffer great prejudice as:
 - a. The Proceedings herein stand to be prolonged given that the subject matter herein has been ongoing since the year 1997;
 - b. The Petitioner/ Applicant is being denied the right to enjoy quiet and uninterrupted possession of her property pursuant to Article 40 of the Constitution of Kenya, 2010 despite judgment in her favour.
 - c. The Petitioner/Applicant is unable to enjoy its rights to access justice and fair trial as guaranteed under Article 47, 48 and

50 of the Constitution as it is unable to enjoy a fair trial which is not prolonged and further unable to enjoy fruits and benefits of her judgment and decree thereof due to actions of the Respondent.

d. Title deed is not in doubt as the subject matter Kisumu/Konya/2354 belongs to the Petitioner and the Respondent has frustrated her, albeit her old age and sickly condition for close to 30 years, to the extent that she has suffered irreparable damage and the said land remains undeveloped.

7. The Respondent has not relied on any point of law or on any such grounds of opposition. The ELC court ought to be allowed an opportunity on the merits and demerits of this Petition for the court to make an informed decision.

Applicant's Written Submissions

The Applicant filed her Submission on 10th June 2021 where the Applicant gave a brief history of the matter and submitted that in the present case and as demonstrated during the examination and testimony of the Plaintiff and her witness and through the documents tendered before the court that Plaintiff had cleared and paid off the loan monies. That the Defendant knowingly and fraudulently continued to demand for payments from the Plaintiff and further went on to illegally initiate and advertise for sale the Plaintiff's charged property and placed reliance in the case of **Givan Okallo Ingari & Another vs Housing Finance Co. (K) Ltd Nairobi HCCC No. 79 of 2007 (2007) 2 KLR 232** as was cited with approval in the case of **Francis Joseph Kamau Ichatha vs Housing Finance Company of Kenya Limited, Civil Suit 414 of 2004**.

The Applicant stated that it would be difficult to redeem a loan which is loaded with figures at the discretion of one party. That the Defendant did not adduce such evidence as required of it to rebut the Plaintiff's assertions and relied in the case of **Scholastica Nyaguthii Muturi vs Housing Finance Co. of Kenya Ltd & Another, Civil Case No. 10 of 2010**.

That the Honourable court exists for the sole purpose of determining who is entitled to what and as such the Defendant cannot be allowed to engage in acts or omissions which contravenes the law. The Defendant cannot be allowed to breach the terms and conditions of the contractual document and at the same time use the statutory power of sale that emanates from the statute to defeat the rights of the Plaintiff. That the Respondent's intended sale was not only an illegality but also contrary to the provisions of international law in regards to right to owning property as provided for in **Article 40 of the Constitution of Kenya** and **Article 17 of the Universal Declaration of Human Rights**.

Based on the above submissions, the Petitioner prayed for the Notice of Preliminary Objection to be dismissed .

ANALYSIS AND DETERMINATION

On the issue of whether the Preliminary Objection herein raises a pure point of law, this court finds that the Preliminary objection is based on Section 7 of the Civil procedure Act which is on a pure point of law.

Mukisa Biscuit Manufacturing Co. Ltd ...Vs... West End Distributors Ltd (1969) EA 696, where Law J A stated that;

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

Further the Court stated;

“A preliminary objection raises a pure point to 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”.

In the case of **ORARO .V. MBAJA 2005 eKLR, OJWANG J** (as he then was) described it as follows: -

“I think the principle is abundantly clear. A “Preliminary Objection” correctly understood, is now well identified as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the Court should allow to proceed.”

On whether the Petition before this Honourable court is res Judicata;

Section 7 of the Civil Procedure Act provides for the principle of res judicata in the following terms;

‘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.’

In the case of **Nguruman Limited vs Jan Bonde Nelsen & Another (2017) eKLR** the court listed fundamental conditions for a case to be held as *res judicata*. Aburili J quoted with approval the case of **Bernard Mugo Ndegwa v James Githae & 2 Others (2010) eKLR**. At

paragraph 36, the judge observed:

- a) That the matter in issue is identical in both suits;
- b) The parties in the suit are substantially the same;
- c) There is concurrence of jurisdiction of the court;
- d) The subject matter is the same; AND
- e) That there is a final determination as far as the previous decision is concerned.”

In this case, this court finds that the ingredients of res judicata have been satisfied. The Petitioner filed a suit against the Respondent in CHIEF MAGISTRATE COURT AT KISUMU ENVIRONMENT AND LAND CASE NUMBER 323 OF 2018 between PAMELA OGALO OGUTU VS NATIONAL BANK OF KENYA LIMITED for a declaration that there be a discharge on TITLE NO. KISUMU /KONYA/234 where the matter was heard and judgment delivered in favour of the Petitioner. The Respondent being aggrieved by the decision of the lower court appealed to the matter to KISUMU HIGH COURT CIVIL APPEAL NO. 38 OF 2020 between NATIONAL BANK OF KENYA vs PAMELA OGALO OGUTA where stay was granted to the Respondent. The Petitioner proceeded to file this Petition where she seeking same reliefs sought in the Chief Magistrates Court.

The Appeal filed by the Respondents in Civil Appeal No. 38 of 2020 has not been heard and determined.

Section 6 of the Civil Procedure Act provides:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

In Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others [2017] eKLR the court held that:

“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”

It is clear from the pleadings filed and the evidence on record that this Petition filed by the Petitioner offends the provisions of Section 7 of the Civil Procedure Act. Therefore, this court finds this Petition to be *sub judice*. In the upshot, this court finds that the Notice of Preliminary Objection succeeds and this Petition is hereby struck off with costs.

DATED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2021

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE