



REPUBLIC OF KENYA



**Gituma v Housing Finance Company Limited & 3 others (Commercial Suit E034 of 2022)
[2023] KEHC 22500 (KLR) (Commercial and Tax) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22500 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E034 OF 2022
FG MUGAMBI, J
SEPTEMBER 22, 2023**

BETWEEN

ROSEMARY KINANU GITUMA PLAINTIFF

AND

HOUSING FINANCE COMPANY LIMITED 1ST DEFENDANT

SAMUEL AYORA SIRINGI 2ND DEFENDANT

GARAM INVESTMENT AUCTIONEER 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

RULING

Background

1. Before the court is an application dated November 11, 2022. It was brought under section 80 and 3A of the [Civil Procedure Act](#), cap 21, article 50 and article 159 of the [Constitution](#) of Kenya 2010.
2. The application seeks the following orders;
 - i. Spent
 - ii. Spent
 - iii. That a temporary order do issue restraining the respondents, their servants, agents and representatives, assigns, relatives or associates together with any other trespassers, their agents, servants, representatives and/or assigns from in any way harassing, entering or transferring the suit property Shanzu Villas No 8 on LR No 1870/II1/450 herein to the 2nd respondent



pursuant to the public auction held on August 23, 2022 pending hearing and determination of this suit.

- iv. That an order do issue restraining the respondents, their servants, agents and representatives, assigns, relatives or associates together with any other trespassers, their agents, servants, representatives and/or assigns from in an way harassing, entering or transferring the suit property Shanzu Villas No 8 on LR No1870/11I/450 herein to the 2nd respondent pursuant to the public auction held on August 23, 2022 pending hearing and determination of this suit.
 - v. That in the alternative, this honourable court does grant an order of status quo pending hearing and determination of this suit to prevent the suit premises from being alienated from the applicant.
 - vi. That the costs of this application be provided for.
3. The application was based on the grounds on the face of it and supported by the affidavit sworn by Dr Rosemary Gituma and written submissions dated April 28, 2023. The applicant takes issue with the 3rd respondent for allegedly conducting an illegal sale of the suit property. She contended that the 1st respondent refused to provide her with a statement of accounts adding that the statement issued was inconsistent. The applicant further states that she alerted the Central Bank who directed the parties to amicably conclude and reconcile the loan differences.
 4. The applicant faulted the 1st respondent for commissioning two valuations on the suit property whereby in February 25, 2015 the value of the property was 70,000,000 and later on November 25, 2021 the same property was again valued at Kshs 43,000,000/=. Counsel submitted that no reasons were advanced by the 1st respondent for the depreciating valuation of the suit property within a period of 6 years.
 5. Further, she submitted that she had paid a total sum of Kshs 32,782,505/= against a loan amount of Kshs 13,700,000/= which she submitted, was against the in duplum rule. On irreparable injury, the applicant pleaded that she stood a risk of losing the property which was her matrimonial home and she would be rendered homeless.
 6. The application was opposed by the 2nd respondent in a replying affidavit dated February 8, 2023 sworn by Samuel Ayora Siringi. He stated that he participated in an auction on August 23, 2022 for the purchase of the land known as LR No 1870/111/450 House No 8 Shanzu Villas Spring Valley Area in Nairobi. That he was the highest bidder and at the fall of the hammer he became the bona fide purchaser. He confirmed having paid 10% deposit of the purchase price and that the remaining amount was cleared within 90 days.
 7. A certificate of sale was issued to him before the transfer was stopped by the court where the court issued status quo orders. He stated that the applicant's suit was res judicata since the applicant and the 1st respondent made a consent in Nairobi High Court civil appeal No 18 of 2018 agreeing to an out of court settlement.
 8. The 3rd respondent opposed the application *vide* a replying affidavit sworn by Joseph M Gikonyo on February 17, 2023. He stated that he received instructions from the 1st respondent to sell the property via public auction. That the property was sold for an amount higher than the forced sale valuation and the full purchase price had been paid in full. He stated that the sale was done in compliance with the law
 9. The 1st respondent opposed the application *vide* a replying affidavit dated February 17, 2022 sworn by Hedaya Malesi and submissions dated April 20, 2023. The 1st respondent stated that the application was *res judicata* because the applicant had sought injunctive orders *vide* CMCC No 468 of 2018 which



application was dismissed by a ruling dated June 7, 2018. When the applicant appealed against the said ruling at the High Court, the parties entered into a consent whereby the suit was marked as withdrawn and the applicant be at liberty to realize the suit property in the event of default of the conditions in the consent.

10. The 1st respondent stated that the applicant had secured two financial facilities from the 1st respondent and the payment was done by a check off loan. It was contended that when the applicant ceased being an employee of East African Portland Cement Company Limited, her default persisted and the property was advertised for sale and the property was eventually sold for Kshs 32,350,000./=.
11. The 1st and 3rd respondents submitted that the applicant had admitted default and therefore failed to establish a *prima facie* case. Counsel submitted that since the value of the property could be ascertained, the applicant was in a position of being compensated by damages.

Analysis

12. The three conditions for the grant of a temporary injunction are well settled following the celebrated case of *Giella v Cassman Brown & Co Ltd*, (1973) EA 385, at page 360 where Spry J. held that:

“... First, an applicant must show a *prima facie* case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

13. A *prima facie* case was defined by the court in [Mrao Ltd v First American Bank of Kenya Ltd & 2 others](#), [2003] KLR 125 as follows:

“... I would say that in civil cases it is a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter...a *prima facie* case is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.”

14. The applicant seeks a temporary injunction restraining the 1st and 2nd respondents. The respondents in their defence argue that the applicant's claim is *res judicata* and in any case, since the default is admitted the applicant has not established a *prima facie* case.

15. Section 7 of the [Civil Procedure Act](#), 2010 provides the threshold upon which a case can be measured for being *res judicata* where:

“... 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.”

16. For this court to decide on the question, I am again guided by the Court of Appeal in [Independent Electoral & Boundaries Commission v Maina Kiai & 5 others](#), [2017] eKLR. For a matter to succeed as being *res judicata*, the conditions set out in section 7 of the [Civil Procedure Act](#) must be satisfied conjunctive terms.



17. A cursory look at the record before me confirms the existence of a previous suit before this court, being HCCA No 16 of 2018. This was an appeal from the lower Court in CMCC No 468 of 2018. The suit was filed by the applicant against the 1st respondent herein, relating to the suit property herein, No LR 1870/3/460.
18. The parties recorded a consent on August 8, 2018. The terms of the consent were that the applicant would continue remitting monthly installments of Kshs 150,000/= until full redemption of the loan. It was also a term of the consent that the 1st respondent would be at liberty to proceed with the realization of the security in case of default. The applicant does not refute the submissions relating to the previous suit. She instead submits that she filed the present suit arising from the illegal auction on August 23, 2022 and in her view, it is therefore not *res judicata*.
19. From what I see, the issues that the applicant seeks to canvass in this suit and application are substantially the same issues that were before the court in HCCA No 16 of 2018, which is the outstanding loan amount due from the applicant to the 1st respondent in respect of the same suit property. The fact that the present suit brings in the 2nd, 3rd and 4th respondent does not alter this position. The 2nd, 3rd and 4th respondents are joined either as agents of the 1st defendant or claiming under the suit between the applicant and the 1st defendant.
20. The consent filed in HCCA No 16 of 2018 had the effect of effectively determining the issues therein to finality and was binding on the parties, since I do not see anything pointing towards setting aside of the consent. The sale that the applicant questions arose directly from the compromise arrived at in HCCA No 16 of 2018. Even if there was any intervention that the applicant wished to seek from the court, the same ought to have been sought in that suit instead of filing another suit creating a multiplicity of suits.
21. The applicant does not controvert that she was in default of the consent arrangements. I note that she seeks to justify the non-payment of the monies by introducing issues of the in duplum rule, the double valuation of the suit property and the issue of accounts, all of which she was aware of at the point of entering into the consent. This portrays bad faith on her part and I am inclined to agree that the application is therefore *res judicata*.
22. Secondly, also going by the terms agreed upon by the parties, I find that there is nothing limiting the 1st respondent from realizing its security. As such, it is also my finding that the applicant has not established a *prima facie* case. Having so found, this Court need not consider the second and third conditions for the grant of a temporally injunction.

Determination

23. The application lacks merit and is therefore dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 22ND DAY OF SEPTEMBER 2023.

F. MUGAMBI

JUDGE

Delivered in presence of:

Ms. Mugure for the applicant

Ms. Mwangi for the 1st and 3rd respondents

Ms. Mudeizi h/b for Mr. Ratemo for the 2nd respondent

Court Assistant: Ms. Carolyne Kyalo

