



**Mwangi & another (Suing as administrators of the Estate of Wilson Mwangi Karogo - Deceased) v Kenya Commercial Bank Limited (Civil Case 208 of 2019) [2024] KEHC 16688 (KLR) (Civ) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 16688 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL CASE 208 OF 2019**

**AA VISRAM, J  
NOVEMBER 7, 2024**

**BETWEEN**

**JANE NYAMBURA MWANGI ..... 1<sup>ST</sup> PLAINTIFF**

**JANE WAIRIMU MWANGI ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS ADMINISTRATORS OF THE ESTATE OF WILSON MWANGI  
KAROGO - DECEASED**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiffs, as the administrators of the estate of the late Wilson Mwangi Karogo (the deceased), instituted this suit against the Defendant vide a plaint dated 30<sup>th</sup> July, 2019.
2. Their claim was that sometime in 1991, the Defendant offered a loan to a borrower and charged property known as Kajjado/Ololokitosh/Kitengela/185 (the “Suit Property”) owned by Lasset Limited, as security. The borrower defaulted in payment and the Defendant exercised its statutory power of sale.
3. The Plaintiffs stated that their late husband bought the Suit Property in a public auction on 30<sup>th</sup> June, 1992, but did not transfer the property at that time, primarily because the Land Control Board (LCB) had been suspended at the time.
4. The Plaintiffs asserted that after the death of their husband, they obtained letters of administration and pursued the deceased properties. The Plaintiffs obtained the LCB consent on 18<sup>th</sup> April, 2013, and began the process of transferring the property to their names, but their efforts were halted when a suit



- was filed by the registered owner of the Suit Property in Civil Suit No.140 of 2013 challenging the original sale that took place in the year 1992, and seeking to have the same nullified.
5. The sale was eventually nullified by the court vide a judgment dated 4<sup>th</sup> August, 2017, and the Plaintiffs, in the present suit, seek compensation from the Defendant for the value of the Suit Property purchased by the deceased.
  6. The Plaintiffs' claim is that the deceased was a genuine purchaser for value, and the nullification of the sale was based on a Statutory Notice which had not been served by the Bank on the owner of the land.
  7. In support of their case, the Plaintiffs relied on one witness, Jane Nyambura Mwangi ("PW1"). Her witness statement is dated 30<sup>th</sup> July, 2019, and she produced a list and bundle of documents dated 25<sup>th</sup> August, 2022.
  8. During the trial of the suit, PW1, adopted her witness statement as her evidence in chief. Her testimony, in summary, was that her late husband purchased the suit property through public auction in 1992, however, he passed on before he could transfer the property to his name.
  9. She averred that the Plaintiffs obtained letters of administration, and later obtained the consent to transfer the suit property to their names on 10<sup>th</sup> April, 2013, and were in process of doing so, when a suit was filed in High Court Nairobi Case No.140 of 2013 whereby a judgment was delivered nullifying the sale.
  10. PW1 testified that the sale was nullified because the Defendant failed to serve the statutory notice of sale on the registered owner, and she therefore lost the land that her husband had genuinely purchased for value.
  11. She averred that her claim was against the Defendant for compensation in the sum of KShs.80,000,000/= plus interest, which in her opinion was the present value of the land.
  12. During cross examination, PW1 admitted that although the LCB consent was eventually obtained, no extension of time had either been applied for, or granted, at the time of her husband's death. She had not personally taken any steps to file any application in relation to the same.
  13. She further admitted that she did not know if the balance of the purchase price had ever been paid by her late husband after the initial sum was paid at the time of the auction.
  14. During re-examination, PW1 reiterated that after her husband had bought the suit property, he fell sick and was unable to obtain LCB consent on time. She testified that it was not until 2013 when she re-applied and heard back from the Bank in relation to the application. Thereafter, the Plaintiff closed its case.
  15. In opposition to the suit, the Defendant filed its statement of defence dated 24<sup>th</sup> October, 2019.
  16. The Defendant's defence, in summary, was that the Plaintiffs' interest in the suit property had never crystallised, and as such, the prayers sought in the plaint are unmerited.
  17. Additionally, the Defendant submitted that the suit is res judicata, on the basis that the issues have been heard and determined in Nairobi High Court Commercial Case No.140 of 2013, and Machakos High Court Civil Case No.327 of 2011.
  18. At the hearing of the case, the Defendant called one witness, namely Mr. Emmanuel Kyalo Wambua, who adopted his witness statement dated 22<sup>nd</sup> November, 2022, as his evidence in chief.



19. Mr. Wambua testified that he is the Assistant Manager of Credit in the Defendant Bank, and that based on his knowledge, the Bank exercised its statutory power of sale, and sold the Suit Property vide an auction on 30<sup>th</sup> June, 1992, to the deceased for the sum of Kshs.180,000/=.
20. He testified that the deceased did not however honour all the various obligations set out in the Certificate of Sale, and that therefore, his interests in the suit property never crystallised, having failed to meet all the conditions of sale.
21. In his view, the Bank's obligations came to an end at the close of the auction, and that thereafter, the burden rested with the deceased, to transfer the title of the property. This burden included ensuring that the deceased had obtained the requisite consents; and taking necessary further action to complete the transfer of the Suit Property to himself, which did not happen.
22. He deposed that the present suit is res judicata because all the issues raised in the present matter are the same or similar to the issues raised in Nairobi High Court Commercial Case No.140 of 2013, which has since been concluded.
23. During cross examination, he averred that he was employed by the Bank in the year 2013. He admitted that he was not therefore an employee of the Bank in the year 1992, which was when the auction took place. His position, however, was that the Bank was not opposed to the transfer of the property to the Plaintiffs for any reason of its own, but rather, that the court had, in Nairobi High Court Commercial Case No.140 of 2013 declared that the original sale to the deceased at the auction was unlawful, and therefore, void.
24. During re-examination, DW1 clarified that although he was not working in the Bank in the year 1992, he is the Bank present representative, and further clarified that the letter sent by the Bank to the Plaintiffs agreeing to the grant of the LCB consent was issued before the sale was annulled by the court.

### **Analysis and determination**

25. I have considered the pleadings, evidence adduced in the form of documents and witness statements, and the written submissions filed by the parties in this suit.
26. It is not in dispute that the Defendant exercised its statutory power of sale over the suit property by carrying out a public auction on 30<sup>th</sup> June, 1992. It is also not in dispute that at that time, the deceased emerged as the successful bidder during the said auction, and agreed to purchase the Suit Property for Kshs. 180,000/=.
27. Based on the facts before me, the deceased paid Kshs. 45,000/= of the purchase price at the fall of the hammer, however, he passed away before perfecting his title to the suit property, which included failing to obtain LCB consent, and failing to transfer and register the Suit Property in his name.
28. Based on the record before me, it is evident that the said sale by way of auction was nullified by the court in Nairobi High Court Commercial Case No.140 of 2013, and the court granted the proprietor of the suit property an opportunity to redeem the same.
29. The question before me is whether or not the Plaintiffs ought to be compensated by the Defendant for their loss? Before addressing this issue, I am bound to consider whether or not the present issue and the suit herein is res judicata, which was pleaded as a defence to the suit.



30. The law pertaining to the doctrine of res judicata is captured under the provision of Section 7 of the *Civil Procedure Act* which provides as follows:-

“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.”

31. It would be appropriate to conclude the issue of res judicata or issue of estoppel are embodied under Section 7 of the *Civil Procedure Act*. The principle of res judicata applies to bar subsequent proceedings when there has been adjudication by a court of competent and concurrent jurisdiction, which conclusively determined the rights of the parties with regard to all or any matters in controversy.

32. The test to determine whether a matter is res judicata was well laid in the case of DSV Silo –vs- The Owners of Sennar [1985] 2 All ER 104 and repeated in the Kenyan case of Bernard Mugo Ndegwa – v- James Nderitu Githae and 2 others [2010]eKLR. The party, alleging res judicata, must show that:-

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

33. In *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR), the Court of Appeal expressed the role of the doctrine in the following terms:-

“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 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.”

34. It is also trite that the doctrine of res judicata applies not only to the claims that were raised in the previous proceedings, but all claims that could have been raised or litigated at the time. The bar therefore extends to issues that could reasonably have been raised and litigated at that point in time.

35. Applying the test set out in *DSV Silo (Supra)* above to proceedings between the parties in Nairobi High Court Commercial Case No.140 of 2013, it is evident that the parties to the present suit were parties to the previous action; the issues related to the same property in question; the court dealing with the same was vested with jurisdiction; and the issues were dealt with conclusively. A reading of the judgment reveals that the court nullified the sale by way of auction on the basis that notice of sale had not served on Lasset Limited prior to the auction; and because the requisite LCB consent was not



obtained until 21 years after the sale occurred, which the court concluded was hopelessly out of the period stipulated under section 8 of the Land Control Board Act.

36. Paragraph 26 of the said judgement reads as follows:-

“(26) Granted that the sale by auction was done on 30 June 1992, the Consent ought to have been obtained at the very latest by 30 December 1992 or thereabouts. The same having been procured twenty one years (21) after the purported sale, was hopelessly outside the period stipulated in Section 8 of the Land Control Act aforesaid. Moreover, there was no indication that any effort was made to obtain extension of time from the High Court as recognized by Section 8(1) of the Land Control Act. Clearly, the said consent is ineffectual for the purposes of sale of 30 June 1992.”

37. Paragraph 30 thereto continues as follows:-

“30. In the circumstances the consent obtained by the 2nd Defendant in April 2013 is of no legal effect and consequently the sale by way of public auction conducted on 30/6/1992 is null and void for all purposes. Accordingly, it would be superfluous to consider whether the sale was valid, granted that the purchase price was paid outside the terms set out in the Certificate of sale.”

38. Based on the above, to my mind, the issues concerning that suit involved questions revolving around ownership of the property, and questions concerning the fault of the parties, if any, and or, related compensation for any of the parties arising from contested ownership of the property.

39. In short, the question of whether or not the Plaintiffs ought to have been compensated arising out of the fault of the Bank, if any, was entirely conceivable at that time, and ought to have been ventilated at that time. Based on a reading of the said judgment, it appears to me, that the court considered the question concerning fault, and made a finding to the effect that the deceased was at fault because he did not make payment for the property in accordance with the terms of the certificate of sale. His failure to carry out his end of the bargain resulted in the entire auction being void.

40. To my mind, once the court determined who was at fault, and why, this determination also put to rest the question of whether or not the Plaintiffs are, or ought to be entitled to any compensation. At the very least, the finding implies that either the present matter is res judicata, or, it is not properly grounded in a cause of action.

41. I say so because, once the court determined with finality that no valid sale took place pursuant to the auction, and further, that the failure to perfect the sale was based on the fault of the deceased, to my mind, this finding determined, either conclusively, or in part, the issues relating to compensation. In the event this court were to consider whether or not the Plaintiffs are entitled to compensation, it would have to consider, the same issues that have already been determined by a court of competent, and concurrent jurisdiction. It may not do so.

42. Accordingly, I do not think that the Plaintiffs may file a new suit based on the same cause of action arising from the previous suit as described above. To my mind, the test applicable to section 7 of the Civil Procedure Act has been met, and applies to the present matter. I find and hold that the present suit is res judicata, and the suit is accordingly struck out with costs.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024.**



**ALEEM VISRAM, FCIArb**

**JUDGE**

**In the presence of;**

..... For the Plaintiffs

..... For the Defendant

