



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

MISCELLANEOUS CIVIL SUIT NO. 501 OF 2016

ABDULLAHI MOHAMED SHEIKH.....PLAINTIFF

V E R S U S

GULF AFRICAN BANK LIMITED.....DEFENDANT

GREENBELT WAREHOUSE LIMITED.....INTERESTED PARTY

RULING

(1) Before this court are two applications for determination. The first is the Notice of Motion dated **16th March 2020** by which **ABDULLAHI MOHAMMED SHEIKH** (the Plaintiff) seeks for orders **THAT:-**

“(i) The Court do stay the execution herein being effected by M/s Base Auctioneers.

(ii) The Proclamation done on 5th March 2020 be lifted.

(iii) The Interested Party and/or its agents be and are hereby restrained from occupying, continued occupation, trespassing onto the suit premises situate on the whole of that land known as Land Reference No. 209/7260/19388 and Land Reference No. 209/7260/19389 pending hearing and determination of this suit.

(iv) The Interested Party be restrained from discontinuing electricity and water to the Plaintiff’s house, in particular House No. D1.

(v) Costs of this application be borne by the Interested Party.

(vi) Such other orders directions do issue as may appear to this Honourable Court just and convenient.

(vii) The Officer Commanding Buruburu Police Division and the Officer Commanding Shauri Moyo Police Station be directed to assist the Court Bailiff in the enforcement of Orders herein above.”

(2) The application was premised upon **Sections 1A, 1B, 3 and 3A** of the **Civil Procedure Act**, and **Order 40 Rule 2** of the **Civil Procedure Rules** and all other enabling provisions of law and was supported by the affidavit of even date sworn by the Plaintiff. The said application was opposed by the Defendant **GULF AFRICAN BANK LIMITED** through the Replying Affidavit dated **10th September 2020** sworn by **LAWI SATO** the Legal Officer of the Defendant Bank whilst the Interested Party **GREEN BELT WAREHOUSE LIMITED** have also opposed the application through the Affidavit dated **2nd June 2020** sworn by **IBRAHIM SATUR** the Director of the Interested Party.

(3) The second application for the consideration of this Court is the Notice of Motion dated **24th March 2020** filed by **GULF AFRICAN BANK LIMITED** (the Defendants) seeking that the Plaintiffs suit against the 1st Defendant be struck out with costs. The application was premised upon **Sections 1A and 1B** of the **Civil Procedure Act**, **Order 2 Rule 15(a) (b) and (d)** and **Order 51 Rule 1** of the **Civil Procedure Rules 2010**, and all other enabling provisions of law and was supported by the Affidavit of even date sworn by **LAWI SATO** the Legal Officer of the Defendant Bank.

(4) The Defendants application was opposed by the Plaintiff through the Replying Affidavit dated **17th September 2020** sworn by

ABDULLAHI MOHAMMED SHEIKH (the Plaintiff). The Interested Party did not file any reply in opposition to the Defendants application.

(5) The two applications were canvassed by way of written submissions. The Plaintiff filed its written submissions dated **14th September 2020** in support of its Notice of Motion dated **16th March 2020**. The Plaintiff also filed written submissions dated **17th September 2020** in opposition to the Notice of Motion dated **24th March 2020**. The Defendant filed its written submissions dated **10th September 2020**, in support of its Notice of Motion dated **24th March 2020**, and in opposition to the Plaintiffs application dated **16th March 2020**. The Interested Party filed submissions dated **13th July 2020** in opposition to the Plaintiffs Notice of Motion dated **16th March 2020**. The Interested Party did not file any written submissions in respect of the application dated **24th March 2020**.

BACKGROUND

(6) Briefly this suit involves a loan facility which was advanced to the Plaintiff/Applicant by the Defendant/Respondent. In order to secure that facility a Charge was created upon **LR. No. 209/260/19388** and **LR 209/7260/19389** (hereinafter jointly referred to as “**the suit properties**”). The Plaintiff/Applicant fell into arrears of the loan facility and the Bank moved to realize its security through the sale by public auction of the suit properties. The Plaintiff/Applicant moved to Court to prevent the sale by auction of the suit properties. In the Ruling delivered on **30th October 2018**, this Court declined to grant an interim stay of the sale and held that the Defendant/Respondent was at liberty to exercise its statutory power of sale through the sale of the suit properties by way of public auction.

(7) Consequently on **5th November 2018**, the Defendants Auctioneers advertised the suit properties in the **Daily Nation Newspaper** inviting members of the public to attend the sale by Public Auction. An auction was conducted by **Leakey’s Auctioneers** on **22nd November 2018** at which auction the suit properties were sold to **GREEN BELT WAREHOUSE LIMITED** (the Interested Party for **Kshs. 105,000,000/-**).

I will now proceed to deal with each application individually.

(i) Notice of Motion dated 24th March 2020

(8) In this Application the Defendant sought to have the Plaintiffs suit against it struck out on the basis that the same was “**Res Judicata**”. The Defendant submitted that the issues being raised by the Plaintiff in the present suit were the same issues which were raised, heard and determined by the High Court vide the Ruling dated **6th December 2018** delivered by **Hon. Justice M. Muigai** in **HCCC416 of 2018 ABDULLAHI MOHAMMED SHEIKH –VS- GULF AFRICAN BANK LIMITED AND 2 OTHERS**. That in the said case **Hon. Justice Muigai** found THAT:-

- (i) The Charged properties were lawfully sold on **22nd November 2018** pursuant to an order by this Honourable Court in the case herein.
- (ii) The auction was in compliance with **Section 97(3)** of the **Land Act** and **Rule 11 (b) (x)** of the **Auctioneers Rules**.
- (iii) The advertisement for sale in the Daily Nation of **5th November 2018** was in compliance with **Rule 16** of the **Auctioneers Rules, 1997** inviting members of the public to attend the auction.
- (iv) The said Advertisement indicated the date and time of the auction, the conditions of the sale, and notified the interested purchasers to view the properties, and gave details of its location.
- (v) The charged properties were sold at the best reasonable price of **Kshs. 105,000,000/-** being the Forced Sale Value.
- (vi) Apart from the claim that there were buyers at the designated auction place, no irregularity, illegality or noncompliance of the law was proved.
- (vii) The Plaintiff has acknowledged that the Charged properties have been sold to the Interested Party herein.
- (viii) The Plaintiff has no reasonable cause of action in law against the Bank, as the Bank has already realised its statutory power of sale over the Charged properties.
- (ix) In fact, the Bank still maintains a cause of action against the Plaintiff as the proceeds of sale from the auction did not fully satisfy the outstanding debt owed to the Bank.
- (x) The Bank is entitled to claim for the balance of the outstanding debt of **Kshs. 35,815,499.81** after selling the properties by way of auction.
- (xi) The Plaintiff’s suit in **HCC E416 of 2018** is struck out and Judgment on admission is granted with costs.”

(9) It was contended by the Defendant that the above findings and decision as contained in the Ruling of **6th December 2018** were still valid and enforceable as the Plaintiff had not filed any appeal against said Ruling nor had they applied to have the same set aside. That what the Plaintiff did instead was to file a fresh suit being **HCCC 501 of 2016** and modified the Plaint by seeking to set aside the sale by auction and by seeking an award of damages. The Defendants submit that for this present suit to proceed, would be tantamount to this Court sitting on

appeal over the decision of a Judge of concurrent jurisdiction and that it would be an embarrassment if this Court were to hear the suit and eventually reach different findings and decision from those of **Hon. Justice Muigai**.

(10) The Defendants further submit that the suit ought to be struck out as the same did not disclose any reasonable cause of action against the Bank for the following reasons:-

(a) The properties charged to the Plaintiff were lawfully sold on **22nd November 2018** pursuant to an order by this Honourable court.

(b) The Plaintiff has acknowledged this fact and recorded a consent in this suit on **10th February 2020** to the effect that the orders of injunction dated **1st July 2019** and **30th August 2019** trying to stop the auction and transfer of the suit properties have been overtaken by events since the property has already been sold and transferred.

(c) In addition, this Court in **HCC E416 of 2018: ABDULLAHI MOHAMMEDSHEIKH –VS- GULF AFRICAN BANK LIMITED & 2 OTHERS** struck out a similar suit by the Plaintiff seeking to set aside the auction and damages.

(d) This Court also entered judgment for the Bank for the balance of the loan owed after sale of the said properties whose proceeds could not pay the entire loan.

(e) In view of the foregoing, the Plaintiff has no reasonable cause of action in law against the Bank.

(f) This is because the Bank has already realised its statutory power of sale over the charged properties and is even claiming a balance through a lawful decree issued by this Honourable Court.

(g) The said lawful decree was issued by this Honourable Court in **HCC E416 OF 2018: ABDULLAH MOHAMMEDSHEIKH – VS- GULF AFRICAN BANK LIMITED & 2 OTHERS** in a Ruling dated **6th December 2019** for the sum of **Kshs. 35,815,499.81**.

(11) The Defendant finally urged the Court to dismiss the present suit as the same is frivolous, vexatious and amounts to an abuse of Court process. The Defendant points to the fact that in the application dated **16th March 2020**, the Plaintiff is still seeking injunctive orders yet the suit property has already been transferred to the Interested Party. That the Plaintiff has filed several applications seeking injunctive orders all of which have been dismissed.

(12) The Defendants assert that the purpose of the present suit is not for genuine litigation but that the aim is merely to frustrate the banks rights to realize its security and to harass the Interested Party who has purchased the suit property and whose purchase of the same was upheld as lawful and proper by the High Court.

(13) The Plaintiff in opposing the application to have the suit struck out contends that the same is not **'Res Judicata'** as the issues raised in his suit are yet to be determined. Finally the Plaintiff seeks to distinguish between this case and **HCCC E416 of 2018** stating that the latter case was filed purely for the purposes of stopping his pending evicting from the suit premises. The Plaintiff states that he is entitled to quiet enjoyment and exclusive occupation of the suit property whilst the matter is being canvassed in the Courts. That if the present suit is declared to be **'Res Judicata'** then he will have been condemned unheard. The Plaintiff insists that there has been a breach of contract by the Bank resulting in the unlawful auction of the suit property which he is entitled to ventilate in the courts of law.

(14) The principal of **Res Judicata** finds statutory basis in **Section 7 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which provides as follows:-

"7. 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 the 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."

Explanation 4 of **Section 7 of the Civil Procedure Act** also provides:-

"Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to be a matter directly and substantially in issue in such suit."

(15) The Court of Appeal in **KENYA COMMERCIAL BANK LIMITED –VS- BENJOH AMALGAMATED LIMITED [2017]eKLR** in discussing the principle of **'Res Judicata'** held as follows:-

"The elements of Res Judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed Res Judicata on account of a former suit;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The Court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

(16) In the present suit vide the Amended Complaint dated 5th March 2020 the Plaintiff seeks the following orders:-

(1) A declaration that the Defendant has acted in contravention of the Banking Act (Cap 488 Laws of Kenya) and that the Defendant applied interest rates on the Plaintiff's facility in breach of the specific terms of the contractual documents governing the facility.

(2) In view of the mathematical nature and foundation of the dispute herein accounts be taken of the loan amount herein due by the Department of Mathematics of the University of Nairobi or such other expert as the Court may deem appropriate in accordance with the banking facility contracts between the Plaintiff and the Defendant taking into account the proceeds of the sale and the Plaintiff's indebtedness, if any, be adjusted in accordance with the findings of such an expert opinion.

(3) A Declaration that the suit properties were sold below market value and hence the public auction was null and void.

(4) A Declaration that the transfer and registration of the suit properties to the Interested Party was illegal and therefore the Title Deeds to be revoked.

(5) General Damages as pecuniary compensation be granted to the Plaintiff and the compensation be based on the true market value.

(6) Costs of the suit together with interest thereon at such rate and for such period as this Honourable Court may deem fit to grant.

(7) Any other relief this Honourable Court may deem just to grant.”

(17) I have carefully perused the Ruling delivered by Hon. Justice Muigai on 6th December 2019 in HCCC E416 of 2018. It is clear that the parties in that suit were the same as the parties in the present suit. In HCCC E416 of 2018 the Hon. Judge found and held that the Plaintiff had failed to disclose to the court that he had filed the instant suit and Civil Application No. 121 of 2018 in the Court of Appeal and that in both cases the Plaintiff had admitted the debt owed to the Bank. It was noted that in the instant suit the Court on 2nd November 2018 granted the Defendant liberty to exercise its statutory power of sale. The Hon. Judge noted further that in a Ruling delivered on 22nd December 2017 Hon. Lady Justice Sewe dismissed the Plaintiffs application for injunction and that similarly three other applications made by the Plaintiff seeking to restrain the auction of the suit property were also dismissed.

(18) In this regard Hon. Justice Muigai in her Ruling of 6th December 2018 stated:-

“This Court notes with concern that the Plaintiff/Applicant failed to disclose material facts of previous litigation on the same subject matter. Whereas the Defendant is at liberty to pursue perjury proceedings, from the disclosure and annexed Rulings of the Courts by the respondents and in the absence of any plausible explanation by the Plaintiff/Applicant of why the previous litigation was not disclosed, the Plaintiff/Applicant is deemed to have come to Court with unclean hands by virtue of non-disclosure of pertinent and material facts The Plaintiff/Applicant failed to disclose material facts that having been brought to the attention of this Court by the Defendant confirm that the auction was Court sanctioned contrary to the Plaintiff/Applicants claim that it was an illegal auction. Furthermore, in the said Rulings of the Court are detailed excerpts confirming the Plaintiff/Applicants admission of indebtedness to the Defendant ...” [own emphasis]

The Court found and held that the suit property as sold at the best obtainable price being Kshs. 105,000,000/-.

(19) The Court went on to note that in Civil Application No. 121 of 2008 the Court of Appeal declined to grant a stay of execution and in effect allowed the auction to proceed. Hon. Justice Muigai further found and held that the suit before her was Res Judicata as the issues raised therein had already been determined by this Court and by the Court of Appeal.

(20) A comparison between the instant suit and HCCC E416 of 2018 reveals that the cause of action in both suits is basically the same. In both suits the subject matter is the facility of Kshs. 80,000,000/- advanced to the Plaintiff by the Bank, and the charge over the suit properties. In both suits the Plaintiff is questioning the proprietary of the sale by auction of the suit properties. I find that all these issues were considered and determined in HCCC No. E416 of 2018. A finding has been made in that case that the Plaintiff was truly indebted to the Defendant, that the Defendant right of sale over the suit properties had crystallised and finally it was held that the sale of the suit properties to the Interested Party was indeed valid.

(21) In light of the above there can be no doubt that this present suit is indeed ‘Res Judicata’. The High Court has already found that the Plaintiff no longer holds any proprietary rights over the suit property. In filing this suit the Plaintiff is asking the Court to answer questions which have already been asked and answered by a Court of concurrent jurisdiction. This in my view amounts to an abuse of the Court process.

(22) The Plaintiffs appears to be relying on the Ruling of this Court dated **1st July 2019** in which Ruling the Court granted a temporary injunction preventing the transfer and/or registration of the suit properties to the Interested Party. However the Plaintiff conveniently ignores the existence of the consent order dated **10th February 2020** in which consent **all** parties agreed as follows:-

“(d) Parties herein agree that the orders dated 1st July 2019 and 30th August 2019 have been overtaken by events.”

(23) The Plaintiff through his advocate appended his signature to that consent. The Plaintiff has not applied to have the said consent reviewed and/or set aside. The consent which was duly adopted by the Court, is binding on the Plaintiff. Having by that consent conceded that the orders dated **1st July 2019** have been overtaken by events, he cannot by this suit seek to resurrect the same issues again. Thus I find that the Ruling of **1st July 2019** having been compromised by way of the consent order of **10th February 2020** can no longer be relied upon by the Plaintiff.

(24) Accordingly I find and hold that the present suit is indeed **Res Judicata**. The Plaintiff cannot by this present suit purport to re-litigate the issue of the sale of the suit properties by Public Auction and the subsequent transfer of the same to the Interested Party as those issues were determined in **HCCC E416 of 2018** which held that the said sale and transfer were legal and valid. I am in agreement with the findings by **Justice Muigai** in her Ruling dated **6th December 2018** thus:-

“From the outline above this Court finds that the matter at hand has been canvassed in the High Court and the Court of Appeal. These Rulings are valid, regular and legal orders of the Court. Further this Court is bound by the decisions of the Court of Appeal upholding the High Court Rulings. This Court lacks jurisdiction to re-open matters already heard and determined by similar Court of equal and competent jurisdiction”

The above sentiments are equally applicable in the present suit. That Ruling of **Justice Muigai** of **6th December 2019** has not been suspended or set aside.

(25) In **INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION –VS- MAINA KIAI & 5 OTHERS [2017]eKLR**, the Court of Appeal expounded on the rationale behind the doctrine of Res Judicata and held as follows:-

“The rule or doctrine of Res Judicata serve 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 common sensical 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 and clumny. The foundations of Res Judicata thus rest in the public interest for swift, sure and certain justice.” [own emphasis]

(26) Likewise in the case of **WILLIAM KOROSS (Legal Personal Representative of ELIJAH C. A. KOROSS) –VS- HEZEKIAH KIPTOO KOMEN & 4 OTHERS [2015]eKLR** the Court of Appeal held as follows:-

“The philosophy behind the principle of Res Judicata is that there has to be finality; Litigation must come to an end. It is a rule to counter the all too human propensity to keep tying until something gives. It is meant to provide rest and closure, for endless litigation and agitation that does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go. Speaking of the bench on the principles that underlie Res Judicata, Y.V. ChandraChud J. in the Indian Supreme Court case of LAL CHAND –VS- RADHA KISHAN. AIR 1977 SC 789 stated and we agree:-

“The principle of Res Judicata is conceived in the larger public interest which requires that all ‘litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.” [own emphasis]

(27) This matter has to come to an end. The Plaintiff has continually engaged the other parties and the Court by filing numerous applications over this matter. He is becoming a vexatious litigant. The Plaintiff must learn to accept the finality of Court decisions. It is time the Plaintiff accepted the fact that following a sale and transfer declared valid by the Courts, the suit properties now belong to the Interested Party. Accordingly I find that the application dated **24th March 2020** is merited. I therefore strike out the Plaintiff’s suit as against the **1st Defendant**.

(ii) Notice of Motion dated 16th March 2020

(28) In view of the above finding that the instant suit is **‘Res Judicata’**, the Plaintiffs application dated **16th March 2020** has no legs upon which to stand. The Plaintiff is no longer the owner of the suit properties and thus he cannot be granted the orders sought in that application. The Interested Party being the legally recognised properties is entitled to levy for rent arrears.

(29) In **PETER MWANGI MBUTHIA & ANOTHER –VS- SAMOW EDIN OSMAN [2014]eKLR** the Court held that”-

“The Applicant [in that case] cased to be the owners of the subject property on the fall of the hammer at the auction and that

upon the Respondent becoming the registered proprietor of the property the Appellants became trespassers. The Court went on to hold thus:

“As to whether circumstances warranted the granting of the order for vacant possession summarily, this is what the learned Judge stated:

“From the facts of this case, it is abundantly clear that the true and valid owner of the suit premises, L.R. No. 36/111/218 SECTION III EASTLEIGH NAIROBI is the Plaintiff/Applicant and that the owner bought his property at a public auction conducted under the instructions of the Kenya Commercial Bank, which Bank, on 25th March 2003, transferred the property to the name of the Plaintiff/Applicant.

The Defendants /Respondents’ attempt to constitute themselves into tenants of the Plaintiff/Applicant, on account of alleged distress for rent levied by the Plaintiff/Applicant will not avail the Defendants/Respondents. The Defendants/Respondents have been requested to vacate the suit premises by the new owners, and the Defendants/Respondents’ continued stay on the suit premises amounts to a trespass. The fact that the Defendants/Respondents have filed a case at the Milimani Commercial Courts (No. 173/2003) has no relevance to the ownership rights of the Plaintiff/Applicant, as under the law, the only remedy available in Suit No. 173/2003 is, in all probability, going to be damages and will not affect the Plaintiff/Applicant’s title rights.”

Accordingly I dismiss the Notice of Motion dated 16th March 2020 entirely.

COST

It is trite that costs follow the event. In the premises the Plaintiff will pay the costs for both the 1st Defendant and the Interested Party.

CONCLUSION

Finally in respect of the two applications this Court’s decision is as follows:-

- (1) The Notice of Motion dated **24th March 2020** is allowed as prayed.
- (2) The Plaintiffs suit against the 1st Defendant is hereby struck out as the same is ‘**Res Judicata.**’
- (3) The Notice of Motion dated **16th March 2020** is dismissed in its entirety.
- (4) Costs are awarded to the 1st Defendant and the Interested Party.

DATED IN NAIROBI THIS 5TH DAY OF MARCH, 2021.

MAUREEN A. ODERO

JUDGE