



**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**COMMERCIAL AND TAX DIVISION**

**CORAM: D. S. MAJANJA J.**

**CIVIL CASE NO. E260 OF 2020**

**BETWEEN**

**KENLINK GLOBAL LIMITED..... 1<sup>ST</sup> PLAINTIFF**

**WINFRED KABURU KINYUA ..... 2<sup>ND</sup> PLAINTIFF**

**YOLETS AGENCIES LIMITED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**PARAMOUNT UNIVERSAL BANK LIMITED ..... DEFENDANT**

**RULING NO. 2**

**Introduction and Background**

1. The Plaintiffs have approached the Court by the Notice of Motion dated 19<sup>th</sup> April 2021 made under **Order 51 Rule 1** of the **Civil Procedure Rules, 2010** (“the **Rules**”) seeking, inter alia, an injunction restraining the Respondent (“the Bank”) from interfering or otherwise selling, auctioning either by private treaty or public auction the property known as FLAT NO. 2E erected upon LR 5/44 NAIROBI (“the Maruti Flat”) pending hearing and determination of the suit. The 2<sup>nd</sup> Plaintiff also seeks an order to be allowed to settle the outstanding loan in monthly installments of KES. 200,000.00 without prejudice to her rights to pursue the claim in this suit or any other suit.
2. The application is supported by the affidavit of Winfred Kaburu Kinyua, the 2<sup>nd</sup> Plaintiff and a Director of the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiff Companies, sworn on 19<sup>th</sup> April 2021. It is opposed by the Bank through the Notice of Preliminary Objection dated 23<sup>rd</sup> April 2021 and the replying affidavit of its Legal Consultant, Timothy Kimani, sworn on 26<sup>th</sup> April 2021. The application was canvassed by way of written submissions which I have considered.
3. The facts giving rise to this application are common ground. By a Letter of Offer dated 12<sup>th</sup> March 2020, the Bank offered the Plaintiffs combined banking facilities amounting to KES. 31,000,000.00 on account of Letters of Credit to import medical disposables and overdraft facilities to expand their business. The facilities were secured by inter alia, the existing First Legal Charge over the Maruti Flat as a continuing security, a First Legal Charge over another property and directors personal guarantees.
4. The facilities were renewed by a Letter of Offer dated 4<sup>th</sup> September 2011 under which the Plaintiffs were granted overdrafts to supplement working capital as follows; the 1<sup>st</sup> Plaintiff KES. 11,000,000.00, the 2<sup>nd</sup> Plaintiff KES. 20,000,000.00 and the 3<sup>rd</sup> Plaintiff KES. 200,000.00. The facilities were secured by, *inter alia*, the existing charges over the suit properties. After the earlier facilities were settled, the Bank advanced Roy Gitonga Kaburu, the 2<sup>nd</sup> Plaintiff’s nephew, a term loan of KES. 6,000,000.00 as evidenced by the Letter of Offer dated 17<sup>th</sup> December 2019 secured by, inter alia, a First Legal Charge dated 24<sup>th</sup> May 2020 over the Maruti Flat.
5. The Plaintiffs filed this suit to restrain the Bank from selling the suit properties in exercise of its statutory power of sale. I heard the Plaintiffs’ application for injunction and dismissed it by a ruling dated 21<sup>st</sup> January 2021. In relation to the Maruti Flat, I held that the debtor, Roy Gitonga Kaburu, was indebted to the Bank and it was entitled to sell it pursuant to its statutory power of sale.

**The Application**

6. The Plaintiffs' application is grounded on the fact that the said facility of KES. 6,000,000.00 was to be repaid through monthly installments of KES. 147,346.00 through the 2<sup>nd</sup> Plaintiff's account number 01\*\*\*\*\*077 and by the time of filing this suit, she had paid KES. 944,756.00 but the Bank has closed the said account. She states that the Bank issued, through its auctioneers, a notice of intention to sell the Maruti Flat within 45 days from 27<sup>th</sup> January 2021 which was the date of service but that the auction date, 12<sup>th</sup> April 2021, was not advertised in the newspaper.

7. The 2<sup>nd</sup> Plaintiff contends that she reached out to the Bank through its advocates on record and offered to settle the outstanding loan through monthly installments of KES. 200,000.00 but that the Bank counter-offered by proposing that she drops all the pending suits filed against it and that she repay the loan in monthly installments of KES. 400,000.00. She communicated to the Bank that the counter-offer was not feasible but it is yet to respond.

8. The 2<sup>nd</sup> Plaintiff seeks the court's indulgence to preserve the Maruti Flat where she currently resides. She is apprehensive that the Bank will proceed to sell it by way of private treaty without her knowledge, notice, information or consent. She therefore seeks to be allowed to settle the debt in the interests of justice and fairness.

### **The Bank's Response**

9. The Bank objects to the application based on a preliminary point of law on the ground that the application is barred by the doctrine of *res judicata* and an abuse of the court process. It submits that this court and the Court of Appeal in **Civil Application E054 of 2021** has heard and dismissed similar applications for injunction between the parties.

10. The Bank states that as the borrower, Roy Gitonga Kaburu, defaulted on repayment, it issued to him and the Chargor with the requisite notices in exercise of its statutory power of sale pursuant to **sections 90 and 96 of the Land Act, 2015**. The Bank avers that the court dismissed the Plaintiffs' application for an interlocutory injunction and the Bank has since instructed its Auctioneers to proceed with the sale of the Maruti Flat and that the Auctioneers have since issued and served the Plaintiffs with a 45-day Redemption Notice.

11. In response to the 2<sup>nd</sup> Plaintiff's proposal to liquidate the debt in monthly instalments, the Bank states that negotiations with the 2<sup>nd</sup> Plaintiff were on a "without prejudice basis". It asserts that it is not under any obligation to accept the offer given by the Plaintiffs. It states that the Plaintiffs' intention of bringing this application while engaging in negotiations is to delay its effort to exercise its statutory power of sale.

12. The Bank accuses the Plaintiffs of material non-disclosure and deliberate misrepresentation of facts to the Court for failing to disclose that it has filed **CA Civil Application E054 of 2021**. It submits that the Plaintiffs are undeserving of the equitable relief, that have not established a prima facie case and that it is only just and fair that the Court sees through the Plaintiffs schemes, balances the same with the interest and rights of the Bank and dismisses their application.

### **Analysis and Determination**

13. The preliminary issue for determination is whether the present application is *res-judicata* in view of the ruling delivered by this court dismissing the Plaintiffs' application for injunction and the subsequent dismissal, by the Court of Appeal, of the Plaintiffs' application seeking an injunction pending appeal from the ruling I had dismissed.

14. The doctrine of *res judicata* is anchored in **section 7 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which provides that, '*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 can 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.*'

15. For the plea to succeed, the following elements must all be satisfied; the issue was directly and substantially in issue in the former suit; the former suit was between the same parties or parties under whom they or any of them claim; the parties were litigating under the same title; the issue was heard and finally determined in the former suit; and the court that previously heard and determined the issue was competent to try the suit in which the issue is raised (see **Independent Electoral and Boundaries Commission v Maina Kiai & 5 others NRB CA Civil Appeal No. 105 of 2017 ([2017] eKLR)**). The same principles apply with equal force to applications (see **George Kihara Mbiyu v Margaret Njeri Mbiyu and 15 Others SCOK Civil Appl. No. 10 of 2018 [2018] eKLR**).

16. In the ruling of 21<sup>st</sup> January 2021, I dismissed the Plaintiffs' application where they had sought an injunction restraining the Bank from selling or otherwise dealing with, inter alia, the Maruti Flat. As regards the Bank's statutory power of sale, I stated as follows:

*[29] I am aware that at this stage I am not required to make conclusive findings of fact but the totality of the evidence is that the borrower, Roy Gitonga Kaburu, remains indebted to the Bank. The Bank has now issued the statutory notices to the 2nd Plaintiff. The Bank's statutory power of sale in respect of the Maruti Flat has now accrued. The Plaintiffs have not established any basis for the court to stop the Bank from exercising its statutory power of sale. They have failed to establish a prima facie case with a probability of success.*

17. The Plaintiffs now seek the same injunctive orders to restrain the Bank from selling or dealing with the Maruti Flat. The court has already determined that the Bank's statutory power of sale over the Maruti Flat has accrued. Although the Plaintiffs have approached the court with a different reason for seeking an injunction, that reason cannot interpose the right of the Bank to realise its security, a matter that has now been settled and which is covered by the doctrine of *res judicata*.

18. The fact that the Chargor seeks to liquidate the outstanding debt in installments is an admission of indebtedness. This position has not changed since the court's ruling of 21<sup>st</sup> January 2021. Even if the court were to go ahead and determine the merits of the application, the outcome would not change as it is not within this court's jurisdiction, at least in this case and circumstances, to vary the terms of payment of the debt due under the charge. In short, the court cannot compel the Bank to accept the Plaintiffs' proposals to restructure the facilities by restraining it from exercising its legal remedies as this would amount to re-writing the parties' bargain (see *Muigai Enterprises Limited v Kenya Commercial Bank Limited* [2016] eKLR and *Elite Intelligent Transport Systems Limited v Gulf Africa Bank Limited & another* ML Civil Case No. E240 of 2020 [2020] eKLR).

19. Let me also add that once the Bank's statutory right of sale has accrued, it need not seek the consent or permission of the Chargor before the sale as contended by the Plaintiffs. All the Bank needs to do is to notify the Chargor and/or borrower, which it has already done. Further, the Bank's statutory right cannot be stopped or postponed merely because the 2<sup>nd</sup> Plaintiff is living in or has some sentimental attachment to the subject property (see *Jimmy Wafula Simiyu v Fidelity Commercial Bank Limited* ML Civil Suit No 658 of 2012 [2016] eKLR).

**Disposition**

20. For the reasons I have set out above, the Notice of Motion dated 19<sup>th</sup> April 2021 is dismissed with costs to the Defendant.

**SIGNED AT NAIROBI**

**D. S. MAJANJA**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MAY 2021.**

**JOHN M. MATIVO**

**JUDGE**

Court of Assistant: Mr M. Onyango

Mr Onyango instructed by Chepkuto Advocates for the Plaintiffs.

Mr Mumia instructed by Mwaniki Gachoka and Company Advocates for the Defendant.