REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT NO. 10 OF 2019

PANNA DILIP CHAUHAN.....PLAINTIFF

-VERSUS-

BANK OF AFRICA KENYA LIMITED.....1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEER.....2ND DEFENDANT

RULING

[1] The Plaintiff filed this suit before the Environment and Land Court on **11 April 2018**, seeking to forestall the sale of several pieces of land that she had charged to the 1st defendant, **Bank of Africa Kenya Limited**, as security for a loan of **Kshs. 540,000,000/=**, advanced **Turbo Highway Eldoret Limited.** Along with her Plaint, the plaintiff filed an interlocutory application for temporary injunction, vide the Notice of Motion dated **10 April 2018**. The suit was thereafter transferred from the Environment and Land Court to this Court for hearing and determination, pursuant to the ruling dated **20 December 2018.**

[2] The record further shows that it was not until **17 September 2019**, almost one year later, that the firm of **Walker Kontos Advocates** filed a Notice of Appointment to act for the two defendants in this matter. Along with the Notice of Appointment, counsel filed a Notice of Preliminary Objection dated **17 September 2019**, contending that:

> **[a]** The application is *res judicata* per the Ruling of **Hon. Munyao Sila, J**. dated **18 February 2016** in **Nakuru ELC No. 363 of 2014: Turbo Highway Eldoret Limited & Panna Dilip Chauhan vs. Bank of Africa Ltd** as consolidated with **Nakuru ELC No. 364 of 2014: Turbo Highway Eldoret Limited & Amit Aggarwal vs. Bank of Africa.**
>
> **[b]** The application offends **Section 6** of the **Civil Procedure Act**.
>
> **[c]** There exists **Nakuru ELC No. 363 of 2014: Turbo Highway Eldoret Limited & Panna Dilip Chauhan vs. Bank of Africa** involving the same parties and in relation to the same subject matter; which suit is yet to be determined on merits.
>
> **[d]** The entire suit on which the application is premised offends **Section 7** of the **Civil Procedure Act.**
>
> **[e]** This Court lacks jurisdiction to determine the present application and suit.
>
> **[f]** This suit is grossly incompetent, and is a blatant abuse of the process of the Court; and therefore ought to be struck out.

[3] In the premises, directions were given herein on **18 September 2019** that the Preliminary Objection be canvassed by way of written submissions; to which end counsel for the defendant filed written submissions filed herein on **2 October 2019**, proposing the following issues for determination:

> **[a]** Whether the plaintiff's application dated **10 April 2018** is *res judicata;*
>
> **[b]** Whether the suit herein offends **Section 7** of the **Civil Procedure Act;** and,
>
> **[c]** What orders ought to issue in this matter.

[4] According to counsel for the defendant, it is not in dispute that the plaintiff herein filed an injunction application in **Nakuru ELC No. 363 of 2014**; which was determined vide the ruling dated **18 February 2016.** A copy thereof was annexed to the defendants' written submissions. He therefore submitted that the rights of the parties herein in relation to the suit properties have been determined conclusively; and that since the said ruling has not been appealed or set aside, the plaintiff's application dated **10 April 2018** is *res judicata*. While conceding that plant and machinery, including storage tanks, regulators and a generator, which form part of the application herein, were not the subject of the Nakuru matter, counsel was of the view, on the authority of **Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited** [2017] eKLR, that the plaintiff ought to have put forward his entire case in the Nakuru matter; and therefore that the *res judicata* principle still applies.

[5] It was further the submission of **Mr. Wafula** for the defendants that the suit offends **Section 6** of the **Civil Procedure Act** in so far as it involves the same parties and the same subject matter in **Nakuru ELC No. 363 of 2014**, which is pending hearing and determination. He accordingly urged the Court to allow the preliminary objection and strike out the entire suit along with the application dated **10 April 2018**.

[6] Mr. Mutiso for the plaintiff, on his part, referred the Court to the cases of **Mukisa Biscuits Manufacturing Company Limited vs. West End Distributors Limited** [1969] EA and **Oraro vs. Mbaja** [2005] 1 KLR 141 as to what ought to form the subject of a preliminary objection. His submission was that it is curious that the defendants have, in the same breath, alleged both *sub judice* (in Ground 3) and *res judicata* (in Ground 4). He added that, in so far as the Court would have to dig deeper and ascertain the facts to determine whether this suit is either *res judicata* or *sub judice*, the decision to raise a Notice of Preliminary Objection was ill-advised. Counsel further underscored the plaintiff's assertion that this suit is not only about immovable property, but also the fixtures that did not form part of the subject Charge. He concluded his submissions by citing **A K N vs. J N M,** Nairobi HCCC No. 58 of 2014 (OS) and **Litein Tea Factory Company Limited & Another vs. Davis Kiplangat Mutai & 5 Others** [2015] eKLR in support of the proposition that a preliminary objection would not lie where it is based on disputed questions of fact.

[7] From the foregoing, it is manifest that the 6 grounds set out in the Notice of Preliminary Objection dated **17 September 2019** can be condensed into the single question, namely, whether this Court has jurisdiction to hear and determine the application dated **10 April 2018**, granted the existence and pendency of **Nakuru ELC No. 363 of 2015** and the ruling delivered therein by **Hon. Munyao Sila, J.** dated **18 February 2016**. With that issue in mind, I have carefully considered the written submissions filed herein by learned counsel, including the authorities relied on by them.

[8] In the case of **Mukisa Biscuits Manufacturers Ltd vs. West End Distributors Ltd** [1969] E.A 696, it was well-stated that a preliminary objection consists of:

> **"…a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."**

[9] In the instant matter, the defendants are yet to file their Defence; and therefore it cannot be said that the preliminary objection has been pleaded or arises by implication out of the pleadings. As to whether the application is *res judicata*, the allegation is that there is in existence **Nakuru ELC No. 363 of 2014** between the same parties in which a ruling was delivered by **Hon. Munyao Sila, J.** on **18 February 2016**. Hence, the defendants urged the court to give effect to the provisions of **Section 7** of the **Civil Procedure Act** in that regard, which states 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 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."**

[10] It is noted however that, at paragraphs 7, 8, 9 and 10 of her written submissions, the plaintiff has contested the assertion that she is the plaintiff in the Nakuru matter; or that the subject matter in the two suits is the same. She posited, and rightly so in my view, that the Court would have to examine factual evidence to determine the defendants' allegations. In the premises, even the allegation that the suit is *sub judice* for purposes of **Section 6** of the **Civil Procedure Act**, is similarly untenable.

[11] I note that, in paragraph 8 of the plaintiff's written submission, the argument was raised that it is impermissible to raise both *sub-judice* and *res judicata* in the same vein because they are mutually exclusive. According to counsel, the provisions of **Sections 6 and 7** of the **Civil Procedure Act** provide for different criteria in each case; and therefore to raise both issues in the same application amounts to a misapprehension of the law. I however find no merit in that argument. It would have been attractive had the two points of res judicata and *sub judice* been targeted at the same object. In this instance, it is manifest at Ground 1 of the Notice of Preliminary Objection dated **17 September 2019** that the *res judicata* point has been raised in respect of the application dated **10 April 2018**. It is for that reason that reliance was placed on the ruling in **Nakuru ELC No. 363 of 2015**. The *sub judice* point, on the other hand, was raised in respect of the suit itself. Indeed, **Section 6** of the **Civil Procedure Act** is explicit that:

> **"No court shall proceed with the trial of any suit or proceedings 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."**

[12] It is instructive that, for the purposes of the **Civil Procedure Act**, a "suit" is defined in **Section 2** to mean **"all civil proceedings commenced in any manner prescribed**." Needless to say, therefore, that the doctrine of *res judicata* applies not only to substantive suits but also to applications. This was made clear by the Court of Appeal in **Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2**

Others, Civil Appeal No. 36 of 1996, thus:

> **"There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of a similar nature; that is to say further, wider principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation..."**

[13] The foregoing notwithstanding, it is plain that the defendants' preliminary objection was improperly taken in so far as it was not pleaded or borne out of the pleadings herein. Moreover, the preliminary objection was premised on assertions that require further investigation by the Court to ascertain; for which reason, the words of Sir Newbold, P. in the Mukisa Biscuits Case are apt:

> **"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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."**

[14] Similar expressions were made in Oraro vs. Mbaja [2005] 1 KLR 141 by **Hon. Ojwang, J.** (as he then was) thus:

> **"...The principle is abundantly clear. A "preliminary objection" correctly understood, is now well defined 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 processes of evidence. Any assertion, which claims to be a preliminary objection, 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...Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..."**

[15] Similar viewpoints were expressed in **A K N vs. J N M** (supra) and **Litein Tea Factory Company Limited & Another vs. Davis Kiplangat Mutai & 5 Others** (supra). In the result therefore, it is my considered finding that the defendants' preliminary objection is entirely misconceived. The same is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 18TH DAY OF MAY 2021

OLGA SEWE

JUDGE