



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO. 5 OF 2020**

**MICHEAL KIMUTAI NDIWA.....PLAINTIFF/APPLICANT**

**VERSUS**

**NATIONAL HOUSING CORPORATION.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MUGANDA WASULWA T/A KEYSIAN AUCTIONEERS...2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

**The case for the plaintiff/applicant**

Pursuant to the provisions of section 1A, 1B and section 63 (e) of the Civil Procedure Act, Order 40 Rules 1, 2, 3 and 4 and Order 51 Rule 1 of the Civil Procedure Rules, the Practice directions on the Global Corona Virus Pandemic –Gazette Notice No. 3137 and all other enabling provisions of the laws, the applicant seeks the following orders.

1) *Spent*

2) an order of a temporary injunction to restrain the defendants either by themselves, their agents, servants or any other person acting under their authority from conducting a public auction as scheduled disposing of by any other means, transferring evicting the plaintiff or by any other means interfering with the plaintiff's ownership, possession and occupation of title number Kitale Municipality Block 11/179 Milimani estate, Trans Nzoia County measuring 0.418 hectares pending the hearing and determination of this application.

3) an order of a temporary injunction to restrain the defendants either by themselves, their agents, servants or any other person acting under their authority from conducting a public auction as scheduled disposing of by any other means, transferring, evicting the plaintiff or by any other means interfering with the plaintiff's ownership, possession and occupation of title number Kitale Municipality Block 11/179 Milimani estate, Trans Nzoia County measuring 0.418 hectares pending the hearing and determination of this application.

4) An order directing the 1<sup>st</sup> defendant to furnish a statement of accounts in respect of the loan schedule, interest due and repayments made to enable the plaintiff make an informed decision on payments due.

5) An order to make provision for costs.

The application is supported by six (6) grounds that are set out on the face of the notice of motion and a fifteen (15) paragraphs supporting affidavit sworn by the plaintiff; with the following being the major grounds.

First, the applicant took a mortgage loan from the 1<sup>st</sup> defendant/respondent and has been servicing the same. Second, the defendants with an intention of defeating this suit have proceeded to advertise the suit property for sale by auction. Third, the intended sale is illegal and the property to be sold is matrimonial property. The plaintiff and his family will suffer the fate of being denied their constitutional right to shelter. Fourth, unless restrained the plaintiff shall suffer irreparable loss and damage.

In addition to the foregoing, the plaintiff has deposed to the following major averments in his supporting affidavit.

First, the plaintiff borrowed a loan of three million shillings (shs 3,000,000), from the 1<sup>st</sup> defendant and used his title No. Kitale Municipality Block 11/179 Milimani estate, Trans Nzoia County, as security. Second, the plaintiff put up a matrimonial residential house. Third, the plaintiff repaid a substantial sum of money with a deposit of shs 3,000,000/- made before the eruption of the global covid 19 pandemic, but no statements have been issued despite numerous requests having been made. Fourth, there was an initial advertisement to auction, which was stopped upon the filing of the suit.

Furthermore, the plaintiff has averred that thereafter negotiations were commenced by his advocate in respect of payments, but which stalled as a result of the uncertainty of the occurrence and recurrence of the of the global covid -19 pandemic. On 15/1/2021 the second defendant served the plaintiff with a notice of sale which indicated that the property was scheduled for sale on 25/1/2021. The plaintiff has averred that the value of the property has not been taken into account and there is a likelihood that the same may be sold at a throw away price.

The plaintiff has averred that if the property is sold, his family will be rendered homeless. He has therefore averred that the parties be compelled to negotiate and also to work out their accounts.

### **The submissions of the plaintiff.**

Messrs Walter Wanyonyi, counsel for the plaintiff submitted that the plaintiff has made out a case for the grant of their application.

They submitted that the application is not *res judicata* and is not an abuse of the court process.

They cited *Suleiman Said Shabahal v IEBC & 3 OTHERS (2014) e-KLR*, in which the Court of Appeal observed that: “*To constitute res judicata there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.*”

Counsel further submitted based on *Nathiel Ngure Kihiu v Housing Finance [2018] e-KLR*, in which the court observed that although the respondent therein had submitted that section 7 of the Civil Procedure Act is coached in mandatory terms, the appellants case was squarely within the special circumstances enunciated in *HFCK V Captain J.N. Wafula, Court of Appeal Civil Appeal No. 102 of 2013*.

Furthermore, counsel also cited *Uchumi Highway Development Ltd v Central Bank of Kenya [2009] e-KLR*, in which the Court of Appeal pronounce itself in the following terms: “*a similar application cannot brought unless there are new facts not brought before the court after exercise of due diligence which merits a re-hearing and possible departure from previous ruling.*”

It was therefore counsel’s submission that *res judicata* was inapplicable in the instant application for the following reasons. First, the special circumstances are that the pending suit is yet to be finalized and the defendants in this suit have now advertized the subject property for sale by 4/2/2021. Second, counsel has further submitted that they objected to the sale that was due on 11/6/2020 and that after the ruling dated 11/12/2020 was handed down, new developments arose, which were not contemplated. Counsel has particularly pointed out that one of the new developments that triggered this application was the statutory notice of sale dated 15/1/2021.

Furthermore, counsel has also submitted that the other “new” development is that the suit property is not just land but is matrimonial property, wherein the plaintiff and his family have resided from time immemorial.

The other new development is the existence of covid -19, which is a global pandemic that has brought the world to its knees.

Counsel has also submitted that if an injunction is granted the defendant will not suffer any prejudice, since the suit has not been heard and that the plaintiff will not dispose of the suit land since there exists a charge over the title.

Counsel for the plaintiff also submitted that the statutory notice issued by the auctioneer is invalid for it falls short of the 21 days required by law. He cited *Martha Khayanga Simiyu v Housing Finance Co. of Kenya & 2 others [2001] 2 EA 540*, in which this court (Ringera, J) observed that a statutory notice which did not give the plaintiff a period of three months from the date of service to redeem the property as required by section 74 (2) of the RLA is fatally defective. That court further observed that failure to comply with the statutory conditions laid down by the RLA invalidates the statutory power of sale and for that reason it could not be said that the chargor’s equity of redemption has been extinguished. That court further observed that there can be no commodity for sale which cannot be compensated in damages.

Counsel further cited *Paul Gitonga Wanjau v Gathuti Tea Factory Co. Ltd & 2 others*, in which that court cited with approval Halsbury’s Laws of England on what is meant by irreparable loss, wherein it is stated that:

“*first that the injury is irreparable and second, that it is continuous. By the term irreparable injury is meant injury which is substantial and could not be remedied or atoned for damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by injunction, if his rights cannot be adequately protected or vindicated by damages.*”

Counsel for the plaintiff also cited other cases which restate the same principles as in the foregoing other cases.

Counsel has therefore urged the court to grant the application.

### **The case for defendants/respondents**

The defendant’s counsel (Caroline Mufutu) has deposed to a thirteen (13) paragraphs replying affidavit in opposition to the application dated 20/1/2021; whose major averments are as follows.

She has averred that she is versed with this matter; being the counsel who has been prosecuting this matter. She has further averred that the application dated 20/1/2021 amounts to a flagrant abuse of the court process and should be struck out with costs.

She has also averred that the matter is *res judicata*.

She has further averred that the plaintiff had earlier on made a similar application dated 3/6/2020 in which he sought the same prayers as in the present application and in which an interim order of injunction was granted ex parte pending the inter partes hearing, in respect of which she has annexed a copy of the said application marked as annex "CNM1."

Following a contested inter partes hearing by way of written submissions, this court (Chemitei, J) on 11/12/2020 dismissed the application with costs for lack of merit, in respect of which she has annexed a copy of the said ruling marked as "CNM2."

She has further deposed that the plaintiff is guilty of material disclosure and concealment of material that is within his knowledge.

Finally, she has deposed that the property is already advertised for sale on 4/02/2021.

### **The submissions of the defendants/respondents**

Mesrs Kiarie & Co. advocates for the respondent have submitted that the matter is *res judicata*. They have submitted that the plaintiff's application dated 3/6/2020 sought the same orders/prayers that were rejected as in the present instant application.

Counsel cited section 7 of the Civil Procedure Act and submitted that the said provisions spell out the test to be applied in determining the application of *res judicata*. Counsel then cited *IEBC V Maina Kiai & 5 others [2017] e-KLR*, in which the Supreme Court held that all the elements set out in section 7 of the Civil Procedure Act must be satisfied conjunctively for *res judicata* to apply. Those elements are as follows.

- 1 The suit or issue was directly and substantially in issue in the former suit.
- 2 That former suit was between the same parties or under whom the parties or any one of them claim.
- 3 Those parties were litigating under the same title.
- 4 The issue was heard and finally determined in the former suit.

5 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.

Based on the foregoing authority counsel submitted that the instant application is a replica of the earlier application dated 3/6/2020, except for the dates of the public auction which are different. Additionally, counsel has submitted that the parties, the subject matter and the prayers sought are the same and that the previous application was finally determined.

Counsel further submitted based on the Supreme Court decision in *Commercial Bank Ltd v Muiri Coffee Estates Ltd & Another [2016] e-KLR*, that the doctrine of *res judicata*, is based on public policy and is aimed at achieving two objectives namely ensuring finality to litigation and it also ensures that an individual litigant is not harassed twice with the same litigation.

Furthermore, counsel submitted that the plaintiff is guilty of material non-disclosure and concealment in that he did not disclose that he had earlier on filed a similar application; which was dismissed with costs and that the public auction was scheduled for 4/2/2021. Counsel further submitted that the order of an injunction that is sought is an equitable remedy. And for that reason the plaintiff should have come to court with clean hands.

Finally, counsel has submitted that the application is *res judicata*. Counsel therefore submitted that there is no need to waste the time of the court in considering the many issues raised by the plaintiff in his application. Among the issues raised by the plaintiff is whether the issuance of the second statutory notice was proper or not.

Counsel has urged court to dismiss the application with costs, for it is an abuse of the court process.

### **Issues for determination.**

I have considered the affidavits of the parties. I have also considered their submissions and the authorities cited. As a result, I find that the following are the issues for determination.

- 1) Whether the instant application is *res judicata*?
- 2) Who bears the costs of this application?

I find as persuasive the decision of the Supreme Court in *IEBC v Maina Kiai & 5 others, supra*, in which the constituent elements of *res judicata* were set out and are as follows.

- 1 The suit or issue was directly and substantially in issue in the former suit.
- 2 that former suit was between the same parties or under whom the parties or any one of them claim.
- 3 those parties were litigating under the same title.

4 The issue was heard and finally determined in the former suit.

5 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.

I find that the foregoing elements were proved in the instant application. I further find that the issues raised in the current application were raised in the previous application. The court in that previous application heard and determined that application by dismissing it. The plaintiff/applicant did not appeal or apply for review of that decision, with the result that the plaintiff/applicant is still bound by that decision.

The contention of the plaintiff/applicant is that there are special circumstances that constitute exceptions to the rule of *res judicata* in the instant application. Those circumstances include the filing of a suit to challenge the issuance and service of the statutory notice of sale and that the suit property is matrimonial property. In the suit filed, the plaintiff has asserted that the issuance and service of the said notice of sale is invalid for the defendant failed to give a notice of 21 days to enable the plaintiff to redeem his property.

I find that the foregoing submissions are not sound in law for the following reasons. First, the filing of a suit to challenge the issuance and service of the second notice of sale is not an exception to the rule of *res judicata* in the circumstances of this application.

Second, I find that the chargor's (plaintiff's) equity of redemption was extinguished when the plaintiff failed to redeem his property after the defendants issued and served upon the chargor (the plaintiff) the first statutory notice of sale. Thereafter his equity of redemption ceased to exist. The filing of the suit to challenge the issuance of the second notice cannot in law operate to constitute special circumstances within the meaning of the decision in enunciated in *HFCK V Captain J.N. Wafula, supra*. I therefore find that the filing of the instant application is an abuse of the court process.

Furthermore, the contention that the suit property is matrimonial does not in itself also constitute special circumstances. The reason, being that the plaintiff offered the said property as security for the advancement of a loan facility in his favour. In doing so, the plaintiff placed his property in the kingdom of market forces with its attendant contractual obligations, which must be honoured. The law does not seem to address the issue of emotional stresses that follow the sale of the matrimonial property which has been charged.

Issue 2.

The plaintiff has failed in his application. I find no good reasons to deprive the defendants the costs of this application.

In the circumstances, I hereby award the costs of this application to the defendants.

**RULING SIGNED, DATED THIS 10TH DAY OF JUNE, 2021 AND DELIVERED IN OPEN COURT AT KAPENGURIA.**

**J M BWONWONG'A**

**JUDGE**

In the presence of

Mr. Juma - court assistant

Mr. Kandie holding brief for Mr. Wanyonyi for the plaintiff/applicant.

Ms. Sugut holding brief for Mr. Kiarie for the defendants/respondents.