



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. E003 OF 2021

JANE NJERI JAMES.....APPLICANT

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST RESPONDENT

GREAT RIFT INVESTMENTS LIMITED.....2ND RESPONDENT

RULING

1. The Notice of Motion by the applicant dated 1st March 2021 prays for orders that;

a) This court does issue temporary injunction restraining the 1st defendant its servants and or agents from receiving payments of purchase price from the 2nd respondent or transferring to it land parcel number Nakuru Municipality Block 20/111 pending the hearing and determination of this application and thereafter the main suit.

b) this court does issue orders of inhibition inhibiting registration of any disposition in the register of land parcel number Nakuru Municipality Block 20 /111 pending the hearing and determination of this suit.

2. The application is supported by the grounds on the face of the application and the supporting affidavit of the applicant sworn on the same date.

3. The facts and issues herein are clear to understand. The applicant sought and obtained a mortgage facility from the 1st defendant sometime in the year 2014 which amounted to about **Kshs. 29 million** which was for purchase of the land parcel number **Nakuru Municipality Block 20/111** and the developments thereon. The said title acted as a collateral.

4. The said facility was processed and in the course of time the applicant was unable to service the loan and the security was advertised for sale. Indeed, the same was sold via a public auction and the 2nd respondent purchased it. This action forced the applicant to file three suits namely **NAKURU ELC NO. 163 OF 2014, NAKURU ELC NO. E10 OF 2020** and this suit.

5. It appears that the applicant was unable to obtain orders to stop the said auction and hence the subsequent sale of the security to the 2nd respondent.

6. When this matter was filed, this court at the first instance issued some temporary orders in favour of the applicant which stopped the dealings of the said security in any way by the respondents. The parties thereafter filed their respective responses and written submissions as directed by the court.

7. The 2nd respondent has filed a notice of preliminary objection on a point of law to the effect that;

“The application is res judicata as the issues being raised in the said application were directly and substantially in issue in the plaintiff’s application filed in Nakuru ELC NO. E10 of 2020 which was determined in a ruling dated 28th January 2021.”

8. The court directed the parties that the preliminary objection above shall be determined simultaneously with the main application and thus the parties ought to submit over the same as well.

9. Taking cue from the now famous case of **OWNERS OF THE MOTOR VESSEL LILIAN S VS. CALTEX OIL KENYA LIMITED**

(1989) KLR 1 which states that.

'I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

I find that it is necessary to look at the above preliminary objection as a matter of priority.

10. Section 7 of the Civil Procedure Act has defined res judicata as hereunder;

“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.

Explanation. — (1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

11. The prayers in suit number E10 OF 2020 were literally word for word with the current application. The same were as hereunder;

“(b) THAT this honourable court be pleased to issue an order of inhibition, inhibiting the registration of any disposition, in the register of land parcel Nakuru Municipality/ Block 20/111 pending the hearing and determination of this suit

(d) THAT this honourable court be pleased to issue a temporary permanent injunction restraining the 1st Defendant either by itself, its agents, servants, employees or otherwise howsoever from receiving payment of purchase price from the 2nd Defendant, transferring, registering any dealings in all that parcel of land known as Nakuru Municipality Block 20/111 pending the hearing and determination of this suit

(f) THAT this honourable court be pleased to issue a temporary permanent injunction restraining the Defendant either by itself, its agents, servants, employees, or otherwise howsoever from advertising for sale, offering for sale, by public auction or dealing with in way prejudicial to the interests of the Plaintiff or otherwise howsoever all that parcel of land known as Nakuru Municipality Block 20/111 pending the hearing and determination of this suit.”

12. Honourable **Ohungo J on 28th January 2021** dismissed the said application. This I think forced the applicant to seek recourse in this court by filing the suit herein.

13. A Preliminary Objection was ably defined in the leading case of **Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A. 696**. In the celebrated case Law J.A. stated a preliminary objection to be thus: -

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point 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.”

13. Sir Charles Newbold, President stated in the same judgment as follows: -

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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. In her further affidavit sworn on **28th April 2021** the applicant at paragraph 10 thereof deponed that the issue of res judicata does not apply as the court in **ELC E10 OF 2021** did not have jurisdiction on commercial matters. I think this was a clear way of evading the real issue. The applicant having subjected herself to the jurisdiction of that court and the court having denied her the orders cannot turn around and plead jurisdiction. Suppose she had been granted the orders, would she have filed the current suit? I highly doubt.

15. This court for all intent and purposes agrees with the second respondent that the application whichever way ones looks at it was dealt with by the Environment and Land Court to its logical conclusion. The parties, the subject matter, the prayers and the issues raised are similar word for word. The court declined to grant the applicant her request for she did not establish that she had serviced the loan among other reasons.

16. Even for argument sake and were this court to proceed on merit on the application the applicant has not demonstrated that she has repaid the loan despite the three suits. Needless to state that i do not intent to interrogate that for now as a competent court has dealt with it. Even if the applicant has since withdrawn the said suit at ELC, it came too late in the day as the court had already made a determination.

17. In the premises, this court finds merit in the preliminary objection. The same is clear to the extent that it is not necessary to look for any iota of evidence to proof.

18. The preliminary objection is hereby allowed, the orders earlier issued are hereby discharged. The application dated 2nd March 2021 is dismissed with costs to the respondents.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 22ND DAY OF JULY 2021.

H K CHEMITEI

JUDGE