



REPUBLIC OF KENYA



KENYA LAW

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**Mbugua & another v Progressive Credit Limited (Commercial Civil Case E100 of 2021)
[2021] KEHC 215 (KLR) (Commercial and Tax) (11 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 215 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E100 OF 2021**

DAS MAJANJA, J

NOVEMBER 11, 2021

BETWEEN

NGUGI MBUGUA 1ST PLAINTIFF

ESTHER NJERI WAWERU 2ND PLAINTIFF

AND

PROGRESSIVE CREDIT LIMITED DEFENDANT

RULING

1. The Plaintiffs have moved the court by the Notice of Motion dated 14th July 2021 under Order 40 rule 1, 2 and 3 of the [Civil Procedure Rules](#) seeking the following orders:
 - (1) THAT this Application be certified as urgent and the same be heard exparte in the first instance.
 - (2) THAT judgment in default of defence be granted against the Defendant as ordered by this Honourable Court.
 - (3) THAT this Honourable Court be pleased to Order for the maintenance of the status quo of LR NO. SIGONA/1271, Motor Vehicle Registration Number KAL 986L and Household chattels pending hearing and determination of this suit.
 - (4) THAT costs of this application be provided for.
2. The application is supported by the affidavit of the 1st Plaintiff sworn on 14th July 2021. It is opposed by the Defendant through the replying affidavit of its Legal Officer, Collins Muhia, sworn on 9th



March 2021. The Defendant also opposes the application through the Grounds of Opposition dated 6th August 2021. The Advocates made brief oral submissions in support of their respective positions.

3. Before I deal with the substance of the application, it is important to note that by a ruling dated 24th June 2021, Mativo J., dismissed the Plaintiff's application for injunction seeking to restrain the Defendant from exercising its statutory power of sale by selling or otherwise disposing of LR NO. SIGONA/1271 ('the suit property'). This is thus the second application seeking an injunction under the guise of maintaining the status quo. I also note from the record that the Defendant has filed its Statement of Defence as directed by the court in the said ruling.
4. By way of background, the Plaintiffs' case as set out in the Plaint dated 19th February 2020 is that on 27th day of February 2019, they entered into a financing agreement with the Defendant for a loan of KES. 6,000,000.00 repayable by 12 monthly instalments of KES. 776,000.00 inclusive of principal and interests W.E.F. 30th March 2019 to 1st March 2020 ('the Agreement'). Under the Agreement, the facility would attract interest from the date of draw down at a flat rate of 4.6% of the principal amount per month, with the Defendant reserving the right to amend the interests without prior notice to the Plaintiffs.
5. The Plaintiffs aver that the Agreement provided that if the borrowers fail to pay any sum payable under the facility on its due date, the borrowers would pay interest on such sums from the date of such failure to the date of actual payment at the rate of 2% of the principal amount per month. The security for the loan was a legal charge over the suit property and Motor Vehicle KAK 986L and household chattels. The Plaintiffs state that as at 13th October 2020 they had repaid KES. 3,052,000.00.
6. The Plaintiffs contend that the Defendant violated Indiplum Rule under section 44A of the [Banking Act](#) under which a lender cannot recover an amount more than double the outstanding principal. They state that contrary Central Bank Regulations, the Defendant instructed its Auctioneers to issue a 45-days' notice to demanding payment of KES. 12,317,000.00 in default of which the suit property would be auctioned.
7. The Plaintiffs contend that the proposed sale was illegal, unlawful and violated mandatory provisions of the [Banking Act](#) and is likely to cause grave prejudice, massive loss, and loss of the 1st Plaintiff's matrimonial home. As a consequence, the Plaintiffs pray for a declaration that the Agreement is illegal, and unlawful for violates mandatory provisions of section 44A of the [Banking Act](#) which limit interests recoverable on defaulted loans. They also pray for an order directing the Defendant to produce detailed accounts of the disbursement and repayment of the loan facility advanced to the Plaintiffs with effect from 27th February 2019 to date. They also pray for a permanent injunction restraining the defendant, its agents or anyone acting on their behalf from selling, advertising for sale, transferring, evicting, mortgaging, charging or interfering in any manner whatsoever with the suit property and costs of the suit.
8. Turning back to the Plaintiffs' application, the grounds in support thereof are that the Defendant has failed to comply with section 90(3) of the [Land Act](#) as no statutory notice has been served on him and his spouse. Further that the Defendant has proceeded to advertise the suit property for sale on 19th July 2021. The Plaintiffs also state that by Gazette Notice No. 10477 of October 2017, the National Land Commission evinced its intention to acquire a portion of the suit property. They urge that if an injunction is not issued, they will suffer grave loss and damage.
9. In response to the application, the Defendant submits that the application is an abuse of the court process as the court dismissed as similar application by the Plaintiffs. It urges the court to dismiss the application.



10. Without belabouring the point, the Plaintiffs' application is for all intents and purposes barred by the doctrine of res judicata which 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.

11. For the doctrine of res judicata to apply; 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 [Gichuki v Gichuki \[1982\] KLR 285](#), [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 Kibara Mbiyu v Margaret Njeri Mbiyu and 15 Others SCOK Civil Appl. No. 10 of 2018 \[2018\] eKLR](#) and [Uhuru Highway Development Limited v Central Bank of Kenya & 2 others \[1996\] eKLR](#)).
12. In the previous application the Plaintiffs sought an injunction restraining the sale of the suit property on the grounds that it had repaid the full amount of the loan and the amount claimed was in contravention of the induplum rule in section 44 of the [Banking Act](#). They now claim that they were not served with the statutory notice under section 90 of the [Land Act](#) and that the suit property is in the process of being compulsorily acquired. For good measure, the Plaintiffs include Motor Vehicle Registration Number KAK 986L and Household Chattels in the plea for maintenance of the status quo. Although the grounds now advanced were not part of the earlier application, the facts on which the application is grounded were within the knowledge of the Plaintiffs and ought to have been brought before the court when the previous application was filed.
13. The doctrine of res judicata not only covers the matters that are pleaded but also those that ought to have been pleaded or placed before the court. A party is not allowed to litigate piece meal but must bring before the court all the facts and issues in relation to the cause of action known to it. As section 7 of the [Civil Procedure Act](#) shows, res judicata applies not only to decided suits but also to any matters which should have been raised in the previous proceeding. This is clear from Explanation 4 of section 7 aforesaid which states;

Any matter which might and ought to have been made a 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.

In [Henderson v Henderson \[1843\] Hare 100, 115](#), the court held that:

The plea of res judicata applies except in special cases, not only to points upon which the Court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject litigation and which the parties exercising reasonable diligence might have brought forward at the time.

14. In sum, the Plaintiffs ought to have raised the issue of want of service of the statutory notice and compulsory acquisition in their initial application as these matters were known to them. I also note that in fact, the Defendant in the replying affidavit sworn on 9th March 2021 by its Legal Officer, Collins



Muhia, explained that the Defendant served the 90-day statutory notice dated 20th August 2019 at the Plaintiffs' last known address. Likewise, the learned judge was satisfied that Defendant was entitled to exercise its statutory power of sale.

15. For the reasons I have set out above, I dismiss the Notice of Motion dated 14th July 2021. The interim orders in force be and are hereby discharged forthwith.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Wachakana instructed by Wachakana and Company Advocates for the Plaintiff.

Mr instructed by Kiamah Kibathi and Company Advocates LLP for the Defendant.

