



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 406 OF 2018

MALEZI PREPARATORY SCHOOL LTD.....PLAINTIFF/RESPONDENT

VERSUS

ECOBANK KENYA LIMITED.....DEFENDANT/APPLICANT

RULING

1. This ruling relates to two notice motion applications. A notice of motion dated 9th November, 2018 filed by the Plaintiff and a notice of motion dated 21st November 2018, filed by the Defendant. The application dated 9th November 2018, is brought under the provisions of; Order 20, Order 40 Rules 1, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B & 3A of the Civil Procedure Act and all the enabling provisions of the law.

2. The Applicant is seeking for orders that;-

(a) The Honourable court be pleased to grant a temporary injunction restraining the Respondents either by themselves, servants, agents, or any of them from proceeding with the sale of land Title No. Nairobi/Block 71/2915 through private treaty pending the hearing and determination of the suit;

(b) Any sale of land Title No. Nairobi/Block 71/2915 through private treaty is a nullity;

(c) An interlocutory mandatory order do issue compelling the Respondent/Defendant to furnish/supply the statement of accounts;

(d) The Applicant/Plaintiff be allowed to redeem the land Title No. Nairobi/Block 71/2915;

(e) That costs of the application be provided.

3. The application is premised on the grounds on the face of it and an affidavit of the even date sworn by, Abok James Adera, a directors of the Plaintiff, He avers the Honourable court issued an order that, the Defendant could only dispose of land Title No. Nairobi/Block 71/2915 (herein "the suit property"), by public auction and in accordance with the law. However, the Defendant vide an advertisement in the daily nation newspaper dated 5th November 2018, has with ill motive sought to dispose of the suit property, by way of private treaty, thus going against the Honourable court's directions.

4. As the Defendant has not been able to dispose of suit property by public auction, the Plaintiff is entitled to be given an opportunity and time to redeem the same. That, it is trite law that, a borrower should not pay more than double of the amount borrowed. The Plaintiff has to date paid Kshs. 22,000,000 of the loan amounts of; Kshs. 37,000,000, borrowed.

5. It is important for the accounts of the loan be taken to determine how much is remaining; as per the law and the Plaintiff be given opportunity to redeem the suit property. The Plaintiff has a prima facie case with high chance of success. Further, the Defendant has by conduct, acted against the law by exercising its statutory power of sale, against the law, and will not suffer prejudice if orders sought are granted.

6. However, the application was opposed vide, a replying affidavit dated 18th September 2019, sworn by Abok James Adera, the Defendant's director. He de posed that, the application lacks merit, is vexatious, an abuse of the court process, and an afterthought with the intention to defeat justice, as the documents being relied on, do not support the application. It should be dismissed with costs, as it is prejudicial to the

administration of justice.

7. The application by the Defendant is seeking for striking out of the application dated 9th November 2018 with costs, on the ground that, the suit herein is res judicata, as the same subject matter was heard and determined in the suit; HCCC 502 of 2011, being a suit between same parties as herein, litigating over the same title and subject matter. That the said suit, HCCC 502 of 2011, was likewise, dismissed and/or withdrawn for being res judicata. Thus, this suit is frivolous, an abuse of process and meant to frustrate the Defendant's statutory right of sale.

8. I have considered the applications and I find that, it is paramount that the issue of res judicata be dealt with first. In that regard I have considered the submissions by the parties thereto and note that, the Plaintiff argues that, the court is not bound by the res judicata as the issues herein are totally different from the issues in matters; HCCC numbers 520 of 2011 and 506 of 2016. That in the previous matter the subject matter was not sold and in this matter the sale was by private treaty. That the previous suits were challenging the sale by public auction and this matter challenges sale by private treaty and whether it was lawful.

9. That a preliminary objection cannot be raised where there are factual matters to be determined. That the Defendant vide Miscellaneous application number 413 of 2017, sought to be allowed to participate in the auction and it was allowed so long it was a public auction. There are no documents to prove the suit was sold by public auction, the price sold at and/or the reserve price.

10. The judgment in HCCC 520 of 2011 is not a bar to the current matter as the issues and cause of action are different. Further filing of the suit in the Environment and Land division was not to hide anything as all documents were attached.

11. However, the Defendant submitted that, as aforesaid there have been similar cases and the plaintiff is seeking for similar prayers in respect of the same suit property against the same Defendant.

12. I have considered the arguments advanced and I find that the doctrine of res judicata is governed by the provisions of section 7 of the Civil Procedure Act that states as follows : -

“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.

13. I have considered the pleadings in the previous suits and this suit and I find that: -

a) *The parties are the same as herein;*

b) *The subject matter is the same being, the suit property herein,*

c) *The prayers sought for are substantially the same, for example in; HCCC 520 of 2011, the plaintiff was seeking for inter alia, a permanent injunction to restrain the Defendant from selling and/or disposing of the suit property, general damages and costs, similar prayers are sought for herein.*

14. The principle of res judicata is founded upon the principles of justice, equity, and good conscience. The purpose of this principle is to inculcate finality into litigation, and the rationale behind the principle is that; an **issue or cause of action fully litigated should not be litigated** again.

15. Res judicata includes two concepts of; claim preclusion and issue preclusion. Issue preclusion is also known as collateral estoppel. Parties cannot sue each other again after the final judgment on the basis of merits has reached in civil litigation.

16. Indeed, when addressing a res judicata argument, a court will look at three factors. First, the court will consider whether there was previous litigation in which identical claims were raised, or in which identical claims could have been raised. The second factor to be considered is that the parties must be the same parties as those who litigated the original action. The third factor is that the original action must have received final judgment on the merits.

17. A "transaction or occurrence" test is usually used by the court to determine whether claims could have been raised in previous litigation; that is, if the two claims are based on the same transaction or occurrence, they must be brought in the same action.

18. In the case of; *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313, the English [Court of Chancery](#), confirmed that a party may not raise any claim in subsequent litigation which they ought properly to have raised in a previous action, and in the case of *Mathura Prasad v. Dossibai N.B. Jeejeebhoy* 1971 AIR 2355, 1970 SCR (3) 830, it was held that res judicata constitutes between the parties to the previous case and cannot move again in collateral proceedings. Generally, a decision by a competent court operates as res judicata even on point of law.

19. Based on these guiding principles and taking into account that, the substratum of this matter is purely, the suit property and it has been the subject matter of the previous suit. I do that, the suit herein is res judicata. The argument that, the auction was not conducted via public auction does not arise, as the relevant date and time that gave rise to the application of the doctrine of res judicata, is the final date of judgement delivered on 7th August 2014.

20. Be that as it may, it suffices to note that, the Plaintiff did not even disclose in the affidavit sworn in support of its application that, there were previous suits in relation to the same subject matter and between same parties. In fact, at paragraph 35 of the plaint it is averred "there is no pending suit in any court or past proceedings between the Plaintiff and the Defendant in respect of the same cause of action".

21. Further, the Plaintiff filed this matter in the Environment and Land division, despite having filed the suit, HCCC 502 of 2011, in the Commercial and Tax division of the High Court. What was the motive?

22. In my considered opinion, the non-disclosure of previous suits, is an act of dishonest and is compounded by the filing of the suit in the Environment and Land division. The principles of equity are clear and states inter alia, that he goes to equity must go with clean hands.

23. In conclusion I find and hold that, this suit is res judicata and strike it out with costs to the Defendants. In that case the notice of motion dated 9th November, 2018, falls by the way.

24. It is so ordered

Dated, delivered and signed on this 6th day of May 2020 on line

GRACE L NZIOKA

JUDGE

In the presence of:

No appearance for the Plaintiff/Respondent

Mr. Bundotich for the Defendant/Applicant

Delivered via virtual communication