



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL SUIT NO. 3 OF 2020

NELSON OMWEGA OISEBE.....PLAINTIFF

VERSUS

KENYA WOMEN MICROFINANCE BANK.....1ST DEFENDANT

KENNEDY MOKUA T/A/ MOCO AUCTIONEERS ...2ND DEFENDANT

RULING

1. By a plaint dated 25th June 2020 **Nelson Omwega Oisebe** the plaintiff/ applicant seeks the following orders;

- a) A declaration that the amount advanced to the plaintiff has been promptly paid and the loan agreement has not expired.
- b) A declaration the 1st defendant do release the title documents to the plaintiff as the loan and interest have been cleared in full and there are no outstanding amounts.
- c) A declaration that the acts of the 1st and 2nd defendants' instructions of advertising for sale of land parcels numbers **KISII Wanjare / Bomorenda/2280** and land parcel number **Wanjare/Bomorenda/2598** without issuance of a notice is null and void abinito and illegal respectively and seeks general and special damages.
- d) Costs of the suit
- e) Interest on (a) and (c) at court rates.

2. Concurrently the applicant filed a notice of motion dated the 25th June 2020 seeking the following orders;

1. Spent
2. That pending the hearing and determination of the application interpartes the honourable court be pleased to order the 1st respondent by herself and or through her agents and more specifically the 2nd respondent from selling and advertising for sale through public auction parcel number **Kisii/ Wanjare/Bomorenda/ 2598** and land parcel number **Wanjare/ Bomorenda/ 2280** pending the hearing of the application interpartes.
3. That pending the hearing and determination of the suit the honourable court be pleased to issue a temporary order of injunction restraining the 1st respondent/ defendant by herself and through her agents/ servants from selling parcel numbers **Kisii/ Wanjare/Bomorenda/ 2598** and land parcel number **Wanjare/ Bomorenda/ 2280**.
4. That the honourable court be pleased to issue an order restraining the 2nd respondent/defendant from advertising parcel number **Kisii/Wanjare/Bomorenda/ 2598** and land parcel number **Wanjare/Bomorenda/ 2280** from public auction and stay the same.
5. Costs of this application be borne by the respondents.

3. The subject of this ruling is a preliminary objection raised by the respondents/ defendants filed on the 1st July 2020. The preliminary objection is that the suit is res judicata. That the plaintiff's plaint herein filed deliberately lack's strict compliance with the provisions of

Order 4 rule 1(1) f. That the application and the suit is an abuse of the court process and that this Court lacks the jurisdiction to entertain this suit.

4. The preliminary objection was canvassed by way of oral submissions. Mr. Ocharo for the respondent submitted that the suit is res judicata as the plaintiff had filed a similar suit in High Court Civil Case no. 19 of 2017 and that the main issue in the said suit was accounts which is the same issue in the current suit. That this court has no jurisdiction to hear the matter as a court of competent jurisdiction heard the previous suit and delivered a judgment. Further that the plaintiff has failed to disclose that there is a pending suit in HCC No. 19 of 2017 (see Order 4 rule 1 (f). That the plaintiff has also filed another suit in the Chief Magistrate's court Civil Suit No. 155 of 2020 which he withdrew when he was faced with a similar preliminary objection. That the provisions of Order 4 are coached in mandatory terms so as to prevent an abuse of court process. That the plaintiff has abused the court process by filing this current suit. The respondent sought to have this suit dismissed. The respondent relied on the following cases; *Kisii HCCC No. 19 of 2017 Nelson Omwega Oisebe vs Kenya Women Microfinance Ltd, Alliance Media and Azarel Investment vs City Council of Nairobi (2012) eKLR, Nakuru Machinery Services Ltd and 2 Others vs Ecobank Kenya Ltd Nakuru ELC No. 440 of 2017, M. Nagabhushana vs State of Kantaka & Others (2011) INSC88 and Chairman District Alcoholic Drinks Regulations Committee & 4 ORD and 2 Ex-parte Detlet heier & Another (2013) eKLR.*

5. In response M/s Nduhukire submitted that the plaintiff relies on provisions of sections 1A, 1B of the Civil Procedure Act. That there was a consent by the parties in civil suit no. 19 of 2017 that the suit had been concluded and that the plaintiff had paid the loan and interest. That the court has a duty to give a fair and just decision. She submitted that if the preliminary objection is upheld then the respondent should be awarded costs of Kshs. 10,000/-.Mr. Ocharo opposed this argument and submitted that section 1A, 1B does not come to the aid of the plaintiff and that the plaintiff's actions are against the said sections and that they will operate against the plaintiff. He sought costs of Kshs. 60,000/-.

6. Section 7 of the Civil Procedure Act provides 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.”

7. The respondent has referred to High Court Civil Suit No. 19 of 2017. The parties in the said suit are *Nelson Omwega Oisebe vs Kenya Women Micro Bank Limited*. The parties are the same parties as in the current suit no. 3 of 2020. In civil suit no. 19 of 2017 the plaintiff sought judgment against the defendant who are the respondents for an order of accounts, a declaration that the intended sale or auction of the plaintiff's property land parcel No. Kisii/ Wanjare/Bomorenda/2598 and 2280 as per the notification dated 2nd October 2017 by Moco Auctioneers was illegal unconstitutional null and void. In the said suit the defendant was claiming a sum of Kshs. 6,089, 134/- from the plaintiff as the outstanding amount due from the plaintiff to the defendant on account of a loan. In civil suit no. 3 of 2020 the plaintiff states he took a loan of 5 million from the 1st defendant which was repayable in 5 years and that he deposited title deeds numbers Kisii Wanjare/ Bomorenda/ 2280 and 2598. This is the same loan referred to in civil suit no. 9 of 2017. He claims that he has repaid the loan plus interest of Kshs. 2,275,000/- as interest. He also claims that he was served with a notification of sale yet he has paid the loan. This is the same issue that was the subject of Civil case no. 19 of 2017.

8. The plaintiff has come to this court again after being served with a notification of sale of the same two parcels of land which he offered as security. In civil case no. 19 of 2017 which is the *former suit* the plaintiff's claim was dismissed after a hearing. The court held that he was indebted to the respondent and that it could not rewrite the agreement between the parties. Counsel for the applicant claims that the loan was repaid by a consent dated the 3rd July 2019. The wording of the said consent was as follows, “By consent the application dated 6th July 2019 is hereby marked as withdrawn with no order as to costs.” The said consent does not state that the applicant paid the sum owing. Based on my above findings I uphold the preliminary objection that the suit is res judicata.

9. The applicant is seeking aid from section 1A and 1B of the Civil Procedure Act. Section 1A deals with the objectives of the Act and 1B deals with the duty of the court. The 2 sections cannot aid the applicant. They are not meant to aid a party who is out to abuse court process. A court of competent jurisdiction made a determination on the issue of the applicant's indebtedness. There is no indication that the applicant appealed against the said decision. In my view the current suit is another suit between the same parties seeking the similar reliefs. The 2nd

respondent the auctioneer is an agent of the 1st respondent. The applicant has also failed to disclose that there was another suit that he had filed. This is being dishonest. The suit is res judicata, it is an abuse of the court process and is struck out with costs to the respondent.

Dated, signed and delivered at KISII this 9th day of July 2020.

R.E. OUGO

JUDGE

In the presence of:

Miss Ndubukire For the plaintiff/ applicant

Mr. Ocharo For the Defendant/ respondent

Ms. Rael Court Assistant