



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. E213 OF 2020

BETWEEN

VILLAGE AUTO BAZAAR LIMITED.....PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED.....DEFENDANT

RULING

1. The application for consideration in this ruling is the Defendant's ("the Bank") Notice of Motion dated 14th August 2020 made, inter alia, under **Order 2 rule 15(1)(d)** of the *Civil Procedure Rules* and **section 3A and 63** of the *Civil Procedure Act (Chapter 21 of the Laws of Kenya)* seeking an order that, "*the Plaintiff's Plaint dated 23rd June 2020 and the Notice of Motion dated 23rd June 2020 be struck out.*"

2. The application was supported by the supporting and supplementary affidavits of Bonny Okumu, the Bank's Director of Legal Services, sworn on 14th August 2020 and 31st August 2020. The thrust of the Bank application is that prior to the present suit, the Plaintiff had filed a previous suit, **HCCC No. 228 of 2017 (Village Auto Bazaar Limited v KCB Bank Limited and Another)** seeking an order of injunction against the Bank restraining it from the selling its properties ("the suit properties") which had been used to secure loan facilities amongst other orders. An application for an interlocutory injunction was filed alongside the suit and the same was dismissed by a ruling delivered on 27th May 2018.

3. After the ruling, the suit was compromised by a consent adopted by the court on 27th June 2018 ("the Consent") stating as follows:

BY CONSENT

1. The Plaintiff shall pay the 1st Defendant Kenya Shillings Ten Million (Kshs. 10,000,000/=) hereinafter the "the Initial Deposit" within fifteen days (15) from the date of the execution of this consent.

2. The Defendant upon receipt of the Initial Deposit above shall restructure the Plaintiff's account to reflect the payment made in 1 above and allow for equal monthly installments over a period of 24 months until payment in full.

3. In the event of default, each party shall be at liberty to execute.

4. This suit be marked as settled.

5. The Plaintiff has settled the 1st Defendant's costs.

4. According to the Bank, the Consent was clear that in the event of default, the parties were at liberty to execute. Consequently, upon the default in the loan repayment obligations by the Plaintiff, the Bank reinstated loan recovery measures by issuing the requisite 90-day statutory notice dated 13th June 2019 and a 40-day notification of sale dated 30th April 2019 all geared toward realizing the securities held over the suit properties. The Bank contended that following dismissal of the Plaintiff's application for injunction in the previous suit and the Consent recorded, there is no legal basis for this suit and that it is *res judicata* and an abuse of the court process and should be struck out.

5. The Plaintiff does not deny the Consent. It opposed the application through the replying affidavit of its director, Francis Nganga Mundia,

sworn on 24th August 2020. He reiterated the contents of the Complaint dated 23rd June 2020 and the accompanying Notice of Motion dated 23rd June 2020 made, inter alia, under **Order 40 rule 1** of the **Civil Procedure Rules**, seeking orders of injunction restraining the sale of the suit properties. In summary, the thrust of the Complaint and the application for injunction is that following the Consent, the Bank agreed to restructure the facility and therefore issued a letter of offer dated 12th October 2018 whereupon the Plaintiff commenced repayment. On 5th June 2020, the Plaintiff received from the Bank a demand notice dated 30th April 2020 demanding immediate settlement of arrears amounting to Kshs. 2,292,386.97 failure to which the Bank would sell the charged properties. The letter indicated that the outstanding balance was Kshs. 32,003,885.00 due and owing as at 12th June 2019.

6. The Plaintiff complained that there was a difference of Kshs. 3,692,396.00 between the amount demanded in the notice and that reflected in the statement of account, Kshs. 29,633,216.00 and that the difference was sufficient to settle the arrears. The Plaintiff further alleged that the Bank failed to give credit for payments it had made and that it also failed to charge interest as stated in the letter of offer. It also stated that it had not received the 90 day statutory notice issued under **section 90** of the **Land Act, 2012**. The Plaintiff also claims that the suit properties have been undervalued. The Plaintiff prayed for a permanent injunction restraining the Bank from selling the suit properties, an order directing the Bank to undertake a proper and current valuation and an order for taking accounts.

7. I heard oral submissions from counsel representing the parties which I shall now consider. The question for resolution is whether the filing of this suit is *res judicata* in accordance with **section 7** of the **Civil Procedure Act** which provides as follows;

7. 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 the 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.

8. For the objection of *res judicata* to succeed on account of a former or previous suit, the following elements, read conjunctively, must all be satisfied;

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That the former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) 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.

9. The Bank argued that both suits, between the same parties, revolved around the sale of the suit properties held as securities by the Bank in the exercise of its statutory power of sale. That the application for injunction was dismissed in the former suit and the matter determined when the parties recorded the Consent. In the circumstances, Counsel for the Bank submitted that the Bank had satisfied the conditions for application of the principle of *res judicata*.

10. The Plaintiff took the position that its claim was a fresh cause of action which resulted from the Bank exercising its statutory power of sale after the Consent had been executed. It argued that the principle of *res judicata* under **section 7** of the **Civil Procedure Act** presupposes that a matter substantially in issue in the former suit between the same parties which issue was heard and finally determined by Court. It submitted that **Civil Suit No.228 of 2017 (Village Auto Bazaar Vs. Kenya Commercial Bank & Another)** was never heard and determined by Court but was compromised by a consent. Moreover, the issues in that suit are substantially different from the issues raised in the instant suit. It pointed out that the issues in this suit relate to actions and omissions by the Bank after the Consent. Those issues, it submitted, could not have been decided in the previous suit and that all actions taken by the Bank and which are now the subject of the present suit took place in **2019** and **2020** and could not be the subject of the Consent.

11. The Plaintiff further submitted that the Consent did not permit the Bank to auction the securities without following the laid down law and procedure and or permit it to sell even when its power of sale had not crystallized. It urged that the application should be dismissed and the matter proceed for determination on merit.

12. Whether the Bank has satisfied the elements of the principle of *res judicata* depends on whether the Plaintiff's cause of action was available at the time the Consent was recorded. The Plaintiff would be debarred from litigating this matter if the matters raised would have been a ground of attack as stated in **Explanation 4** under **section 7** of the **Civil Procedure Act** which states as follows:

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.

13. It is not disputed that after the Consent was recorded, the Bank restructured the loan facilities by issuing a fresh letter of offer. These were new terms which, under the Consent, the parties agreed that in the event the Plaintiff default's, the Bank could proceed to realise the securities. Whether the Bank properly exercised its statutory power of sale, is a new and different matter not covered by the doctrine of *res-judicata*. Since the matters complained arose after the Consent, I hold that the Plaintiff is not precluded from challenging the Banks actions based on the new facts which were not available at the time the Consent was recorded. A contrary holding would amount to conferring on the Bank legal immunity from actions taken after the Consent which was clearly not the intention of the parties in the circumstances of this case.

14. A situation similar to the present case arose in *Kanorero River Farm Ltd. & 3 Others v National Bank of Kenya Limited* [2002] 2 KLR 207 where the plaintiffs challenged the Bank's exercise of its statutory power of sale on the ground that the statutory notices were invalid. The parties recorded a consent by which they agreed to settle the application for injunction with the condition that the defendant would be at liberty to issue fresh statutory notices. The bank issued fresh statutory notices causing the plaintiffs to file suit challenging the validity of those notices. The Bank opposed the application on the grounds, inter alia, that the issue was *res judicata*. Ringera J., (as he then was) held as follows:

The question is whether in those circumstances the plaintiffs could institute a fresh application for interlocutory relief. In the Court's judgement provided the fresh application is grounded on new facts, which could not have been relied on in the earlier application, it would not be precluded by the doctrine of res judicata. That is precisely the case here. The consent order allowed the defendant to serve fresh statutory notices... A new factual situation was created. It could not have been the intention of the parties when they recorded the consent and the law itself could not possibly contemplate that those fresh notices and other consequential steps taken pursuant to them could not be challenged on proper legal grounds. If the opposite were the case, the defendant would have in effect been given carte blanche to realise its security without necessarily complying with all the necessary and pertinent legal requirements provided it had issued fresh notices. It would have been permissible for it, for example, to issue defective notices or flout with impunity the provisions of the Auctioneers Rules, 1997. No court of equity would countenance that. A fundamental assumption of the consent order was that competent statutory notices would be served and the defendant would comply with the law. In the circumstances of this case, the doctrine of res judicata does not preclude the application now before the court. [Emphasis mine]

15. I agree with the holding in the aforesaid case. The Plaintiff is entitled to challenge the manner in which the statutory power of sale is being exercised and that issue, being subsequent to the Consent, and one that raises new facts is not *res judicata*.

16. It must now be clear that the Notice of Motion dated 14th August 2020 is for dismissal. It is dismissed with costs to the Plaintiff.

DATED and DELIVERED at NAIROBI this 2nd day of NOVEMBER 2020.

D. S. MAJANJA

JUDGE

Mr Juma instructed by Murage Juma and Company Advocates for the Plaintiff.

Ms Mathenge instructed by Kale Maina and Bundotich Advocates for the Defendant.