



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 21 OF 2019

JERINA JEBET SUTER.....PLAINTIFF

-VERSUS-

KCB BANK KENYA LIMITED.....1ST DEFENDANT

HARON KIPSANAI KIPTOO.....2ND DEFENDANT

BRENDA JEPKOECH CHESINGEL.....3RD DEFENDANT

UPSTATE KENYA AUCTIONEERS.....4TH DEFENDANT

RULING

[1] This ruling is in respect of the two applications filed herein, dated **13 May 2019 (hereinafter, “the 1st application”)** and **3 June 2019 (the 2nd application)**. The 1st application was filed under **Sections 3, 3A and 63(e)** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**; and **Order 40 Rules 1-5** of the **Civil Procedure Rules, 2010**. It seeks the following orders:

[a] Spent

[b] Spent

[c] That there be temporary orders of injunction restraining the Defendants/Respondents by themselves, their servants and or agents from trespassing, entering, ploughing, damaging, wasting, alienating or transferring or in any other way interfering with the Plaintiff’s use, possession and ownership of all that parcel of land known as **ELDORET MUNICIPALITY BLOCK 14/1015** pending the hearing and determination of the main suit herein.

[d] That the Plaintiff/Applicant be allowed to liquidate the outstanding balance of the loan by reasonable monthly instalments.

[e] That costs of the application be provided for.

[2] The grounds upon which the application was predicated are that sometime in 2014, the Plaintiff offered her title for **ELDORET MUNICIPALITY BLOCK 14/1015** (hereinafter, “the Suit Property”) as security for a loan to the 2nd Defendant; and that, upon default by the 2nd Defendant, the 1st Defendant instructed the 4th Defendant to sell the charged property in exercise of its statutory power of sale. The Plaintiff contended that she was never served with the requisite statutory notices; and that she was therefore denied an opportunity to redeem the Suit Property. She accordingly filed this suit along with the instant application for temporary injunction pending the hearing and determination of the suit.

[3] In her Supporting Affidavit, sworn on **13 May 2019**, the Plaintiff averred that the property was purportedly sold to the 3rd Defendant by the 4th Defendant; and that the 3rd Defendant then went and maliciously damaged her property on the Suit Property, as demonstrated by the documents marked **Annexure JJC3** to the Supporting Affidavit. She likewise annexed copies of the Title for the Suit Property and the Green Card evidencing the transfer. She asserted that she was neither furnished with accounts prior to the sale, nor served with notice to pay the outstanding sums; and therefore that it was unjust for the Defendants to opt to sell the land before exhausting all measures available for the repayment of the loan.

[4] The application was opposed by the Defendants, and in its Replying Affidavit sworn by its Credit Manager, **Samuel Kipchirchir**, the 1st Defendant averred that a similar application had been filed by the Plaintiff in the Chief Magistrate's Court at Eldoret, being **E & L Suit No. 18 of 2018** and that the application was heard and determined by dismissal vide a ruling delivered on **10 July 2018**. It was therefore the contention of the 1st Defendant that the instant application is *res judicata*. Likewise, the 1st Defendant averred that the suit is incompetent for being *sub-judice*, granted that the lower court matter is still pending hearing and final determination.

[5] According to the 1st Defendant, the Plaintiff undertook to repay the loan in the event of default by the Borrower, the 2nd Defendant herein; and that due to the failure by the 2nd Defendant to honor its obligation to repay the outstanding amount as agreed, it had no alternative but to exercise its statutory power of sale. To demonstrate that all the requisite statutory notices were duly served, not only on the 2nd Defendant, but also on the Plaintiff, the 1st Defendant annexed copies of the said notices, certificates of postage and affidavit of service to its Replying Affidavit as **Annexures SK-4 (a), (b), (c) and (d); Annexure SK-5 (a), (b), and (c)**. Thus, it was confirmed by the 1st Defendant that the Suit Property was auctioned on **8 October 2018** to the 3rd Defendant, who was declared the highest bidder; and that the property was accordingly transferred to her. It was further averred that, on **20 March 2019**, the Plaintiff's account was credited with the balance of the proceeds of the auction, after the bank deducted what was owed to it together with the expenses incurred in exercising its statutory power of sale.

[6] The 1st application was also opposed by the 3rd Defendant, **Brenda Jepkoech Chesingei**. She did so vide her Replying Affidavit sworn on **23 May 2019** in which she averred that the application is a baseless afterthought and should therefore be dismissed with costs. She explained that she learnt about the sale of the Suit Property on or about **22 September 2018** upon reading the Standard Newspaper; and that she thereafter participated in the public auction on **9 October 2018** and was declared the highest bidder at **Kshs. 6,000,000/=**. That, upon paying the full purchase price, part of which was financed by her bank through a loan facility, she was issued with the completion documents. She thereafter perfected her title to the Suit Property by paying all the dues required by law, including registration fees and was accordingly issued with a Certificate of Lease; which she has since charged to her bank, the **Commercial Bank of Africa**. According to her, the Plaintiff's equity of redemption was extinguished when the property was auctioned and a Memorandum of Sale executed between her and the Auctioneer. She annexed several documents to her Replying Affidavit to support her assertions.

[7] On his part, the 4th Defendant filed Grounds of Opposition in respect of the 1st application, contending that:

[a] the said application is frivolous, vexatious, and an abuse of the court's process hence devoid of merit;

[b] the application and suit were brought prematurely as the applicants failed to issue any demand notice and notice of intention to sue the 4th Defendant;

[c] the 4th Defendant has been wrongly enjoined in the proceedings as it did not conduct the auction that resulted in the purchase of the Suit Property by the 3rd Defendant, hence the suit against it ought to be struck out with costs at the earliest opportune moment;

[d] the evidence filed in court by the Plaintiff does not support the averments in the pleadings as against the 4th Defendant;

[e] the Plaintiff's claim as against the 4th Defendant is not founded on any evidence hence untenable in a court of law;

[f] the Plaintiff has not shown any *prima facie* case to warrant the orders sought and the application ought to be dismissed with costs to the Defendants.

[8] The 2nd application was filed by the 1st Defendant pursuant to **Section 6** of the **Civil Procedure Act**, and **Order 51 Rule 1** of the Civil Procedure Rules. It seeks that the Court be pleased to strike out this suit for being offensive to the principle of *sub-judice*; and in the alternative, it is the 1st Defendant's prayer that the Court be pleased to stay this suit pending the hearing and determination of **Eldoret Chief Magistrate's E & L Suit No. 18 of 2018: Jerina Jebet Suter vs. Haron Kipsanai Kiptoo & Kenya Commercial Bank Ltd** (the lower court suit). The 2nd application was premised on the grounds that the instant claim is a disguised attempt by the Plaintiff to have this Court re-adjudicate the prayer for injunction earlier sought against the 1st Defendant in the lower court suit; which application was dismissed by the lower court.

[9] The 1st Defendant relied on the affidavit of **Samuel Kipchirchir** annexed to the 2nd application and asserted that upon the dismissal of the application for injunction by the lower court on **10 July 2018**, the Suit Property was advertised for sale and was duly auctioned and therefore that, instead of filing a fresh suit, the Plaintiff ought to have applied for amendment of the Plaint to include the prayers now sought before this Court and the additional parties.

[10] In her response to the 2nd application, the Plaintiff averred, in her Replying Affidavit sworn on **4 June 2019**, that the lower court suit was primarily aimed at stopping the sale; and that the matters complained of herein relate to the conduct of the sale itself, which in her view was fraudulent; and the subsequent destruction of her property; and therefore that her suit cannot be said to be *sub-judice* as the cause of action arose after the injunction application was dismissed. She filed another affidavit on **25 June 2019** to demonstrate that, unlike the previous suit, the current suit seeks declaratory orders as well as a permanent injunction. She further averred that she had filed a Notice of Withdrawal of the lower court suit on **25 June 2019**.

[11] Pursuant to the directions issued herein on **4 June 2019**, the two applications were heard simultaneously and were canvassed by way of written submissions. The basic contention by Counsel for the Plaintiff, whose written submissions were filed herein on **12 July 2019**, was that, whereas statutory notices were served on the Borrower, no such notice was served on the Plaintiff as the guarantor, although she was entitled, in law, to know what was happening. Citing **Section 90** of the **Land Act, 2012**, Counsel submitted that it is mandatory that the

Chargor, in this case the Plaintiff, be served with a three months' notice under that provision of the law; which was not done. He also relied, *inter alia*, on **Nairobi Civil Appeal No. 117 of 1998: Trust Bank Ltd vs. George Ongaya Okoth** that failure to serve notice was a fundamental breach, which should not be countenanced.

[12] The second facet of the Plaintiff's submissions is the argument that the sale was tainted with fraud, and therefore null and void. For instance, it was submitted that, although the Memorandum of Sale stated that the balance of the purchase price be paid within 90 days to the 1st Defendant, it was not until **19 March 2019**, about four and a half months later, that the 3rd Defendant completed payment. Thus, it was the submission of the Plaintiff that, in the circumstances, it is only fair and just that the orders sought in the 1st application be granted pending the hearing and determination of this suit.

[13] Counsel for the 1st Defendant filed separate written submissions in respect of the two applications. In respect of the 1st application, written submissions were filed herein on **26 June 2019** on behalf of the 1st and 4th Defendants by **M/s Mburu Maina & Co. Advocates**, contending, on the authority of **Giella vs. Cassman Brown & Co. Ltd [1973] EA 358** and **Mrao Ltd vs. First American Bank of Kenya Ltd & 2 Others [2003] KLR 125** that the Plaintiff's application and the entire suit does not meet the threshold laid down for the grant of temporary injunction. It was submitted that the Plaintiff has not only expressly admitted the loan taken by the 2nd Defendant against the security of the Suit Property, but also that the 2nd Defendant defaulted in servicing the facility and that, in consequence thereof, the Suit Property was sold to the 3rd Defendant.

[14] Counsel relied on **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR**; **Captain Patrick Kanyagia & Another vs. Damaris Wangechi & 2 Others [1995] eKLR** and **Civil Appeal No. 111 of 1986: Mbutia vs. Jimba Credit Finance Corporation & Another** to support the submission that the Court cannot re-write a contract for the parties; and that the Plaintiff's equity of redemption was extinguished the moment a valid contract was concluded in the exercise of the 1st Defendant's exercise of its statutory power of sale. Thus, it was contended that the Plaintiff has not shown that she has a *prima facie* case with a probability of success.

[15] It was further submitted, on behalf of the 1st and 4th Defendants, that the Plaintiff has failed to show that she stands to suffer irreparable harm which cannot be compensated by an award of damages in the event that the injunction sought is not granted. Counsel urged the Court to note, from page 5 of the Plaintiff's own Valuation Report annexed to her Further Affidavit as Annexure JJS-3, that the property was occupied by her caretaker. He accordingly submitted that it is an afterthought for the Plaintiff to thereafter contend that she was forcefully evicted from the Suit Property, yet she voluntarily vacated the property. Counsel relied on Paul **Muhoro Kihara vs. Barclays Bank (K) Ltd [2001] 2 EA 420** and **Davis Nyanjui t/a Davis Academy & Another vs. National Bank of Kenya Ltd [2015] eKLR** for the proposition that once land has been given as security for a loan, it becomes a commodity for sale by that very fact; and that sentimental attachment to the property cannot be a serious consideration to deny the charge its statutory power of sale.

[16] Thus, it was the submission of Counsel for the 1st and 4th Defendants that, in the event that a finding is ultimately made that the Defendants ought not to have sold the Suit Property, then any loss that may have been suffered by the Plaintiff could be compensated in damages. In conclusion, Counsel submitted that even the balance of convenience is in favour of the Defendants, noting that the 3rd Defendant has since mortgaged the property for a loan on the basis of the same property. He accordingly urged for the dismissal of the 1st application with costs.

[17] In respect of the 2nd application, the 1st Defendant relied on its written submissions filed on **26 June 2019**. The 1st Defendant contends that the entire suit is incompetent from the standpoint of **Section 6** of the **Civil Procedure Act**. Counsel relied on **Tahir Sheikh Said Investment Ltd vs. Administrator-TSS Grain Millers Ltd & 2 Others [2018] eKLR** to support his argument that the 1st Defendant need only prove one facet of the options set out in **Section 6** aforementioned, namely:

[a] that the matter in the subsequent suit is also directly and substantially in issue in the previous suit;

[b] that the proceedings are between the same parties, or between parties under whom they or any of them claim, litigating under the same title;

[c] that the suit or proceeding is pending in the same or any other court having jurisdiction to grant the relief claimed.

[18] It was thus the submission by Counsel for the 1st Defendant that, from a look at the two plaints, it is manifest that the subject matter revolves around the property number **ELDORET MUNICIPALITY/ BLOCK 14/1015** and the exercise of its statutory power of sale in disposing of that property to the 3rd Defendant; and therefore, that the question of whether or not the 1st Defendant had met all the statutory requirements pertaining to the exercise of its statutory power of sale runs in both suits. Counsel posited that any cause of action arising after the sale can therefore be introduced in the former suit by way of amendment of Plaintiff, instead of filing a parallel suit as has been done herein. He relied on **Barclays Bank of Kenya Ltd vs. Elizabeth Agidza & 2 Others [2012] eKLR** and **Republic vs. Registrar of Societies – Kenya & 2 Others Ex Parte Moses Kirima & 2 Others [2017] eKLR** for the proposition that it is in the interest of the parties and the system of administration of justice that multiplicity of suits between the same parties over the same subject matter be avoided as they do nothing but to clog the wheels of justice, hold up resources that would be available for fresh matters and add to the backlog of cases that the courts have to deal with.

[19] As for the assertion that the Plaintiff has since filed a Notice of Withdrawal in the lower court suit, Counsel for the 1st Defendant urged the court to find that the same was done in bad faith for the sole purpose of frustrating the prosecution and benefit of the 2nd application. Moreover, it was pointed out that, from a look as the said Notice, it had neither been filed in lower court file, nor served on the Defendants therein. Counsel further faulted the said notice for the reason that it had been filed by the Plaintiff in person, yet she has an Advocate on record in the lower court suit, namely: **M/s Douglas Ombati & Co. Advocates**.

[20] More importantly, Counsel for the 1st Defendant pointed out that the Notice of Withdrawal of Suit annexed to the Plaintiff's Replying Affidavit of 25 June 2019 is not properly sealed or stamped for purposes of Rule 9 of the Oaths and Statutory Declarations Rules and urged the Court to have the same expunged from the record. He relied on Jeremiah Nyangwara Matoke vs. Independent Electoral and Boundaries Commission & 2 Others [2017] eKLR and Solomon Omwega Omache & Another vs. Zachary O Ayieko & 2 Others [2016] eKLR to underscore the submission that the requirement for the sealing and marking of annexures with serial letters is mandatory; and that failure to comply is fatal for the annexures concerned.

[21] The Court has given careful consideration to the two applications, the various responses filed herein, as well as the parties' written submissions and the authorities relied on therein. I note that the two applications are intertwined; and that the 2nd application is in effect a response to the 1st application in so far as it raises the pleas of *res judicata* and *sub-judice*. Moreover, the outcome of the 1st application will undoubtedly impact on the 2nd application. I will therefore consider both simultaneously.

[22] One of the enabling provisions cited in support of the 1st application is Order 40 Rule 1(a) of the Civil Procedure Rules. It provides that:

"Where in any suit it is proved by affidavit or otherwise that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongly sold in execution of a decree ... the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders."

[23] There is no dispute that the Plaintiff acted as a guarantor for the 2nd Defendant in respect of a loan facility provided by the 1st Defendant to the 2nd Defendant, in respect of which the Suit Property was charged as security. A copy of the Charge was annexed to the 1st Defendant's Replying Affidavit filed on 23 May 2019. The Plaintiff thereby covenanted to pay to the 1st Defendant all monies due on account of the loan; and to discharge all obligations and liabilities of the 2nd Defendant to the Bank when due. The parties are also in agreement that, in exercise of its statutory power of sale, the 1st Defendant instructed **Tango Auctioneers & General Merchants** to sell the Suit Property; and that the said Auctioneers proceeded accordingly and sold the property to the 3rd Defendant in a public auction held on 9 October 2018. There is therefore no dispute that the property has since been transferred to the 3rd Defendant who promptly caused it to be charged to Commercial Bank of Africa.

[24] It is manifest therefore that the Plaintiff knowingly filed 1st application belatedly and that no useful purpose would be served by issuing a temporary injunction in the manner sought in prayer 3 of the Plaintiff's Notice of Motion dated 13 May 2019. This point was made in HCCC No. 124 of 2005: Jane Kemunto Mayaka vs. Municipal Council of Nakuru & Others thus:

"Injunctions are issued to prevent the occurrence of an event that has not occurred or that is threatened to occur that would likely injure the Applicant and are not issued where such an even has taken place..."

[25] Secondly, and more importantly, the Defendants have demonstrated that before filing this suit, the Plaintiff filed Eldoret E & L Suit No. 18 of 2018 wherein she applied for similar orders pending the hearing and determination of that suit. The pleadings and other documents filed in that suit were annexed to the 1st Defendant's affidavit in support of the 2nd application. Also annexed to the said affidavit was the ruling delivered by the lower court dated 10 July 2018, clearly showing that the Plaintiff's application was found to be without merit and was accordingly dismissed. Accordingly, the Plaintiff was precluded, by dint of Section 7 of the Civil Procedure Act, from filing a similar application. Her options in the circumstances were either an appeal or an application for review based on the developments following the ruling of 10 July 2018.

[26] Section 7 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya, does provide that:

"No Court shall try any suit or issue in which the matter 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...and has been heard and finally decided by such Court."

[27] A perusal of the Plaintiff's application in the lower court suit shows that manifest that the subject matter revolves around the property number **ELDORET MUNICIPALITY/ BLOCK 14/1015** and the exercise of its statutory power of sale prior to and after the sale. The question of whether or not the 1st Defendant had met all the statutory requirements pertaining to the exercise of its statutory power of sale is plainly an issue in both suits. There is no question that the proceedings are between the same parties, or between parties under whom they or any of them claim, litigating under the same title; or that the suit the lower court had the jurisdiction to handle the suit and grant the relief claimed.

[28] It is therefore clear to me that the 1st application is indeed *res judicata* and that the Plaintiff's suit is *sub-judice*. As the question of whether or not the lower court suit has been, in fact, withdrawn, cannot be determined on the basis of the impugned Notice of Withdrawal annexed to the Plaintiff's Replying Affidavit of 25 June 2019, the Orders that commend themselves to me, in respect of the two applications, are as follows:

[a] That the Plaintiff's application dated 13 May 2019 is *res judicata*; and therefore the same is hereby struck out with costs;

[b] That the Plaintiff's suit herein is *sub-judice* and is hereby stayed pending confirmation of withdrawal of Eldoret Chief Magistrate's E & L Suit No. 18 of 2018 pending before the lower court.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 5TH DAY OF DECEMBER, 2019

OLGA SEWE

JUDGE