



**THE REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAJIADO**  
**CIVIL CASE NO. 39 OF 2018**

**JUSTUS ONYAMBU OANDA.....1<sup>ST</sup> PETITIONER**

**MARISELLAH MORAA OKIOMA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**UNAITAS SACCO SOCIETY LTD.....1<sup>ST</sup> DEFEDANT**

**TIMELESS DOLPHIN AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**RULING**

By an application dated 16<sup>th</sup> October, 2018 filed under certificate of urgency brought under Section 1A, 1B, 3A 59 and 63(e) of the Civil Procedure Act, and Order 40 Rule 1(a) and 2 (1) of the Civil Procedure Rules, 2010 Section 90(2 & 3), 96, 97, 98, 103 and 104 of the Land Act, 2012 and all other enabling provisions of the law, the supporting affidavit and the annexures thereto, and the notice of preliminary objection and further upon hearing both counsels for and against the application for orders:

1. That this application be certified urgent and be and heard on priority basis and service on the basis and service on the defendants be dispensed with in the in the first instance and the application be heard exparte.
2. That this Honourable Court be pleased to grant a temporary order of injunction restricting the defendant/respondents whether by themselves, their employees, servants, agents from advertising for sale, selling whether by public auction or private treaty disposing off or otherwise howsoever completing by conveyance or transfer of any sale completed by public auction or private treaty taking possession, appointing receivers and exerting powers conferred under section 90(3) of the Land Act Leasing, letting charging or otherwise interfering with the plaintiff's ownership of and title to all land title no. NGONG/NDONG/38046 pending the hearing and determination of this application.
3. That this Honourable court be pleased to grant a temporary order of injunction restraining the defendant/respondents whether by themselves, their employees, servants, agents from advertising for sale, selling whether by public auction or private treaty disposing off or otherwise howsoever completing by conveyance or transfer of any sale completed by public auction or private treaty taking possession, appointing receivers and exerting powers conferred under section 90(3) of the Land Act Leasing, letting charging or otherwise interfering with the plaintiff's ownership of and title to all land title no. NGONG/NDONG/38046 pending the hearing and determination of this application.
4. That this Honourable Court be pleased to grant an order compelling the 1<sup>st</sup> defendant to render proper calculations and account on the plaintiff's loan account.
5. That any other order as this Honourable court may deem fit.
6. That the costs of this application be provided.

This application is premised on the grounds couched in the notice of motion and a supporting affidavit dated 16<sup>th</sup> October 2018. The said grounds are that on or about the 2<sup>nd</sup> October 2015 the 1<sup>st</sup> Defendant advanced a loan facility to Jusmo Investment Limited of Kshs.8, 000,000.00 which was secured by a collateral security title no. NGONG/NGONG/38046 furnished by the 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs/Applicants in favour of the 1<sup>st</sup> Defendant/Respondent; that the 1<sup>st</sup> Defendant through its agent, the 2<sup>nd</sup> defendant herein has placed an advert on the daily nation newspaper of 1<sup>st</sup> October 2018 advertising the suit property for sale by public auction to be held on 19<sup>th</sup> October 2018; that the 2<sup>nd</sup> Defendant has never issued a notice to the plaintiffs as required under Rule 15 (d) of the Auctioneers Rules the import of it being that the plaintiffs who are the owners were never given a chance to redeem the loan as required by the law; that the applicant have issues with the matter in which the loan account had been handled by the 1<sup>st</sup> Defendant who despite several requests has refused to provide proper figures of the loan arrears as it has also failed to fully account to some of the repayment done; that the Plaintiffs are committed to clearing the loan arrears and have therefore entered into negotiations with a prospective buyer and they are optimistic that the sale will go through.

Further grounds that the 1<sup>st</sup> Defendant/Respondent has never issued a Notice to sell the charged property to the Applicants, notifying them of its intention to exercise its statutory power of sale over property title no: NGONG/NGONG/38046 as per Section 96 of the Land Act 2012; that the notices were not issued and the intended statutory sale of the charged property by the Defendants/Respondents violates the laid down procedure for exercising a statutory power of sale as the plaintiff was never served with the mandatory statutory notice as provided for under Section 90(1) of the Land Act 2012 and the Auctioneers Act; that the Defendants have failed to issue a valuation report over the suit property; that the Applicant is reasonably and justifiably apprehensive that the Respondents may proceed to sell the suit property in violation of the law and to the detriment of the applicant; that the Applicant faces imminent risk of losing their proprietorship over the suit property once the 1<sup>st</sup> Defendant/Respondent exercises its statutory power of sale over the suit property as the same is their matrimonial home; that unless the application herein is heard immediately, and the orders sought therein granted there is a real and present danger that the Defendants/Respondents will proceed to blatantly violate the law and procedurally advertise and/or sell the charged property thereby rendering this application and suit filed herewith nugatory; that the 1<sup>st</sup> Defendant/Respondent will not suffer any prejudice if orders sought are granted since the suit property is charged in its favour and is still holding the title document and in the event it does, the same can adequately be compensated by an award of damages and that in the interest of justice the orders sought be granted.

In opposition to the Applicant's case, the counsel for the Respondent Mutuwa Waweru and Co. Advocates filed a quick notice of preliminary objection. In that notice, counsel requested, on a point of law that the entire suit herein and/or the application dated 16/10/2018 be struck out with costs on the grounds that:

- a) The entire proceedings herein are a gross violation of the process of the Honourable Court as the matter raised are substantially in issue in a previously filed suit between the parties that is still pending determination being

**Milimani Chief Magistrate's Court Case No.6640 of 2017, Jusmo Investments Limited, Justus Onyambu Oanda & Marisellah Moraa Okioma –vs- Unaitas Sacco Society Limited & Another;** and

- b) The application dated 16/10/2018 is *res judicata* in so far as it raises for determination matters that have already been decided and/or which could have been raise for determination by the Honourable Court in **Milimani Chief**

**Magistrate's Court Case No.6640 of 2017, Jusmo Investments Limited, Justus Onyambu Oanda & Marisellah Moraa Okioma –vs- Unaitas Sacco Society Limited & Another** in a ruling delivered therein on 17/07/2018.

#### **ANALYSIS AND DETERMINATION**

The doctrine of *res judicata* is set out in the **Civil Procedure Act** at **Section 7** 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 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.”***

The **Civil Procedure Act** also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:

***“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.”***

In essence therefore, the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The Court in the English case of **HENDERSON VS HENDERSON (1843-60) ALL E.R.378**, observed thus:

***“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court***

***requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.***

It therefore follows that a Court will as well invoke the doctrine in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties. Applying the above principles to the instant case, I have noted that the Defendant furnished the court with documentary evidence in form of pleadings to demonstrate that indeed the issues raised in this application were substantially in issue in a previous suit between parties herein. I have seen and perused a copy of a plaint; notice of motion application dated 13/09/2017 and the supporting affidavit thereto; a replying affidavit by Nancy Nduta Muiruri sworn on 22/11/2017 and ruling stated 17/07/2017 delivered by **Honourable Orengo K.I. in Milimani Chief Magistrate's Court Case No. 6640 of 2017, Jusmo Investments Limited, Justus Onyambu Oanda & Marisellah Moraa Okiama-vs- Unaitas Sacco Society Limited & Another**. I have noted that the remedies which were sought and the grounds which were brought by the applicant in support of the abovementioned suit which are identical to the ones brought in the instant application.

The applicants claim against the respondent was in respect of the mortgage contract. The charge debt and interest secured by the first respondent had immediately become payable and the statutory power of sale exercisable under section 90 of the Land Act. Reference has been made by learned counsel Mr. Mutua for the respondent regarding adjudication of the same issue of injunction before Milimani law courts. For the reasons given by the court the applicant claim was dismissed and an injunction denied. While it would normally be left to the litigant to take the next course of action, the decision rendered by a competent court clothed with jurisdiction is binding to the parties unless overturned on appeal or review. It is but correct to state that in the defence of resjudicata there must be; A Previous suit in which the matter was in issue. The parties were the same or litigating under the same title. Competent court heard the matter in issue. The issue has been raised once again in a fresh suit.

The thrust of this principle is to put an end to litigation and to injunct vexatious litigants from filing multiple suits after the original one is dismissed. There can be no distinction between interlocutory applications and suits when it comes to the application of the principle on rejudicata. I also find no doubt to the legal proposition that any party seeking declarations and reliefs in a court of law on any matter must come clean, candid and with full disclosure of all the facts in issue on the matter. As to what constitutes a previous suit for purposes of invoking rejudicata section 89 of the civil procedure Act caters for the word suit as defined in section 2 of the Act as.; means all civil proceedings commenced in any manner prescribed.

The pleadings and ruling of the court attached to the replying affidavit by Mr. Mutua tend to show that what the applicant is complaining about exercise of statutory power of sale has been litigated and a decision reached by the learned magistrate at Milimani commercial court. Counsel in that application instead of preferring an appeal filed a fresh notice of motion seeking temporary injunction to stop the sale.

The court of appeal in **Lali Swaleh Lali and others v Stephen Mathenge Wachira civil application number 257 of 1994** held as follows:

***“Parties must bring before court exercising reasonable diligence all points that they could take and that points taken then cannot again be taken as the same would amount to an abuse of the process of the court.***

In my conceded view learned counsel for the applicant did no inspire confidence that he did not know of existence of a previous application on the same set of facts like the ones before me. When I directed counsel to approach the issue from the perspective of the defendant material that the suit is resjudicata but he insisted on proceeding and arguing the application. I expected a diligent counsel properly advised and retained by his client to be upstanding for the prudent administration of justice and not to engage in litigation for the sake of it.

In the foregoing, it's clear from both the previous and the instant applications that the applicant was/is seeking for an injunction to restrain the Defendant from exercising its statutory power of sale pursuant to section 90 of the Land Act, No.6 Laws of Kenya. The said issue has been directly and substantially in issue in both suits between the parties herein. In the previous application the Honourable court heard and determined the same and in its ruling, it pronounced itself as follows:

***“From the foregoing I find that the Plaintiff has not met the requirement as prima facie case and has failed the damages test. His application must therefore fail. The application dated 13<sup>th</sup> September 2017 is dismissed with costs to the defendant/Respondent.”***

In the circumstances, I'm of the view that the proceedings herein fall within the scope of the doctrine of res judicata which is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives. This court therefore finds as follows:

The upshot of this:

1. This court lacks jurisdiction to entertain the motion as the application is res-judicata.
2. That the notice of motion be and is hereby dismissed for being fatally defective and incompetent with costs to the defendants.

**Dated, Delivered and Signed in open court at Kajiado this 18<sup>th</sup> day of October, 2018.**

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**R. NYAKUNDI JUDGE**

**Representation**

Mr. Mutua for the Defendant/Respondent – present

Mr. Senteu for the Plaintiff/Applicant - present