



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**

**CIVIL CASE NO. 8 OF 2016**

**LAMECK MBAKA MOTEGI.....PLAINTIFF**

**-VERSUS-**

**BANK OF BARODA (K) LTD.....1<sup>ST</sup> DEFENDANT**

**LEGACY AUCTIONEERING.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me is an application dated 5<sup>th</sup> September 2017 brought by the plaintiff under provisions of Order 51 rule 1 and 40 rule 1 of the Civil Procedure Rules. In the main, the applicant seeks:

*1. That this court do restrain the Defendants by way of an injunction by itself, its agents and/or servants from selling, transferring, alienating charging or in any way interfering with the plaintiffs quiet possession and use of **Land Parcel No. Njoro/Ngata Block 1/702 (Original 4) Kiamunyi Estate** pending hearing of this application interparties, and the suit thereafter.*

2. Grounds for the application are stated on the face of the application. The plaintiff has sworn the affidavit in support of the application.

3. In opposing the application, the respondents in their grounds of opposition dated 14<sup>th</sup> September 2017 state that the application is without merit, totally incompetent, abuse of court process, and that no denial of arrears has been demonstrated including that no irreparable loss has been demonstrated if orders sought are not granted.

4. The applicant got some relief on the 18<sup>th</sup> September 2017 when an interim order of injunction was granted pending interpartes hearing of the application.

I have considered the court proceedings in this matter from its inception as well as the parties written submissions.

5. From the onset, I have noted that the applicant has failed to mention that a very similar application, word by word, under the same legal provisions, seeking similar orders over the same property, between the same parties was filed on the 26<sup>th</sup> February 2016, and a decision rendered on the 16<sup>th</sup> February 2017.

6. The only submission that is new by the applicant in this application is in my view is that he claims to have made a payment of Kshs.7,000,000/=out of the demanded sum of Kshs.18,000/= (as at date of this application). The respondent's firm stand is that this application is *Res Judicata* and citing **Bernard Mugo Ndegwa -vs- James Githae and 2 Others (2010) e KLR** submitted that

- the parties are the same in both applications.
- Parties are the same
- There is concurrence of jurisdiction of the court
- Subject matter is the same and
- There is a final determination as far as the previous decision is concerned.

7. My ruling on the 16<sup>th</sup> February 2017 which is annexed to the respondents submissions was on the issues raised in this present application.

I agree with the respondent that all issues raised were fully determined therein. I have not been told that there is an appeal against the said ruling and if so, the outcome.

8. If circumstances have changed and a party wishes the court to consider the said changed circumstances, there is a procedure under which that can be done but not through a similar application; that in itself vexes the opposite party as double jeopardy – which is against public policy, by harassing an individual or body with numerous litigation over the same dispute – **Ukay Estate Ltd & Another -vs- Shah Hirji Manek Ltd & 2 Others (2006) e KLR.**

9. A matter is heard and finally decided and thus *Res Judicata* when, according to **HCCC No. 311 of 2000 Mombasa** (Maraga J, as he then was) in **Anaj Warehousing Ltd -vs- National Bank of Kenya Ltd and Another, when the court which heard it has exercised its judicial mind on the matter in controversy after it had heard arguments, considered it and come to a decision.** Without further elucidation, I find the present application to be *Res Judicata*.

10. The issue of whether or not the applicant will suffer irreparable damage by a denial of the orders sought, was canvassed in the earlier application. There is no gainsaying that the Respondent loaned to the applicant money that he has failed to repay. By that act, the bank has suffered financial loss and has over the period accorded the applicant humble opportunity to repay.

11. It is not the duty of the court to render decisions which would assist defaulting borrowers to continue in default to the detriment of the public whose money the bank holds and lends to deserving persons on understanding that those persons would repay.

12. The balance of convenience in such circumstances would at all times tilt in favour of the lender who is allowed to recover the money, in the manner agreed in the instrument, the basis of the relationship, this time being the charge document. - **National Bank of Kenya Ltd -vs- Isaac A. Ogetta (1999) e KLR.**

13. For those reasons, I find no merit at all in the application dated 5<sup>th</sup> September 2017.

The temporary orders of injunction granted to the applicant on the 18<sup>th</sup> September 2017 are hereby discharged.

14. Costs of the application are awarded to the Respondent.

**Dated, Signed and delivered this 4<sup>th</sup> Day of October 2018**

**J.N. MULWA**

**JUDGE**