



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL SUIT NO.59 OF 2016**

**MARY N. NJEHIA.....PLAINTIFF**

**-VERSUS-**

**THE NATIONAL BANK OF KENYA LTD.....1ST DEFENDANT**

**DENIS KIRUI T/A**

**SADDABRI AUCTIONEERS.....2ND DEFENDANT**

**DAVIS NYANJUI NJEHIA.....3RD DEFENDANT**

**RULING**

1. The application before me dated 13<sup>th</sup> June 2016 seeks orders to strike out the plaintiff's plaint with costs to the defendants. It is brought under **Order II Rule 3 (2) (O (1))** of the **Civil Procedure Rules** and on the grounds that the court had on 31<sup>st</sup> May 2016 ruled that the suit was *res judicata* and that it does not serve any interest to have the suit on record.

2. The supporting affidavit sworn by One Ann W. Maina, who is the 1<sup>st</sup> defendant's Nakuru Branch Operations Manager depones that the plaintiff had previously filed Nakuru HCC No.22 of 2015 and Nakuru HCC No.2 of 2016 seeking similar orders. That the court pronounced itself on 31<sup>st</sup> May 2016 and held that the matter was *res judicata* on account of the above mentioned matters previously filed and that the present suit does not serve any purpose and should be struck out with costs. No response was made to the application. However at the hearing on 8/3/2016, Mr. Kiburi for the applicant informed the court that service was duly effected. Mr. Ikuu for the plaintiff/respondent confirmed that his firm was served. The court therefore allowed the application to be heard.

3. In brief oral submissions, Mr. Kiburi for the applicant reiterated the averments in the supporting affidavit. He submitted that the plaintiff had filed Case No.2/2016 and that suit was struck out. That earlier on there was a similar Case No.22/2015 in which the plaintiff was denied an injunction. Similarly, an injunction had been denied in suit No.2/2016 and the suit found *res judicata*. Counsel further submitted that the present suit No.59/2016 was similar to other previous suits and should be struck out with costs.

4. In oral submissions, Mr. Ikuu for the respondent urged that the application was premature as no defence had been filed by the defendant/applicant. He submitted that the application should be a statement of defence and that the suit will show whether the issues were *res judicata*. Counsel further submitted that the plaintiff's case will be set out once the defence is filed. In further submissions in reply, Mr. Kiburi for the applicant referred the court to an earlier ruling showing that the suit was *res judicata*.

He opposed the respondent's submissions stating that counsel ought to have filed a replying affidavit or grounds of opposition. The issue before me as I see it is whether the present suit, being suit No.59/2016 should be struck out for being *res judicata*.

5. The issue before me as I see it is whether the present suit, being suit No.59/2016 should be struck out for being *res judicata*.

Section 7 of the Civil Procedure Act states:

***“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 their 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”.***

There are clear principles to be considered before striking out a suit or pleadings. Striking out at **DT Dobie & Co (Kenya) Ltd Vs Joseph Mbaria Muchina & Another (1982) KLR**, the Court stated that a court of justice should aim at sustaining a suit rather than terminating it.

In **Uhuru Highway Development Limited V Central Bank of Kenya & 2 Others (1996) eKLR** Civil Appeal No.36 of 1996 C.A. Nairobi, the court explained the doctrine of *res judicata* in the following terms:-

***“In order to rely on the defence of res judicata there must be:-***

- i. a previous suit in which the matter was in issue.***
- ii. the parties were litigating under the same title***
- iii. a competent court heard the matter in issue***
- iv. the issue has been raised once again in a fresh suit”.***

6. In the present application, the applicant argues that the court (**Mulwa J**) had vide a ruling dated **31<sup>st</sup> May 2016** ruled that the suit was *res judicata*. The applicant also submitted that the respondent had filed suit No.22/2015 in which she was denied an injunction. Other than referring the court to the ruling in HCC No.22 of 2015 and HCC No.2/2016, the applicant did not provide any additional material that would show the court the outcome or status of the 2 suits. The submissions of the respondent in this application were not helpful either.

7. From the face of the two rulings on record however, it is evident that in the application filed in Case **No.22/2015**, the court declined to grant the applicants an injunction but issued temporary orders pending compliance with the mandatory statutory notice of sale. The plaintiff in that case was **Davis Njehia T/A Davis Academy & Another**, while the defendant was the **National Bank Ltd**. For the application in **Case No.2/2016**, the court declined to delve into the substantive application ruling that the application was *res judicata*. The plaintiff in that case was **Margaret Nyambura Kinyanjui Njehia** while the defendant was the **National Bank of Kenya Ltd**.

The two rulings, on the material before court, have not been appealed. Further, no material has been placed before me to show the progress or outcome of the two suits. In particular, no material has been placed before me to show that any of the suits has been struck off as submitted by the applicant. What is clear from the ruling in HCC No.22/2016 dated 20/1/2016 however is that the application in that suit was declared *res judicata*. In **Uhuru Highway Development Ltd Vs Central Bank of Kenya & 2 others (1996) eKLR**, the Court of Appeal affirmed the principle that *res judicata* applies to suits as well as interlocutory applications within the suits.

8. In my considered opinion therefore, there was nothing to stop the applicant in that application, who is also the plaintiff in the present suit, from proceeding with the suit so that the issues in the suit could be determined with finality. Having seen from the plaint as filed, and from the two rulings of Mulwa J that the parties are similar in the suits and that the issue primarily centres around a charge executed over the same properties in favour of the 1<sup>st</sup> defendant, I must agree with the applicant that it would be an abuse of the process of court for multiple suits to be filed by the same parties over the same subject matter. I am persuaded that the present suit is an attempt to dress an old suit in new clothing.

The same must be struck out at this early stage and the plaintiff directed to pursue the suits already filed to their logical conclusion. In the premises, the application dated 13/6/2016 is allowed with costs to the respondent.

Orders accordingly.

***Ruling delivered, dated and signed in open court this 12<sup>th</sup> day of June 2017***

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**R. LAGAT KORIR**

**JUDGE**

*In the presence of:*

*C/A .....Emojong.....*

*N/A.....for applicant*

*N/A.....for respondents*