



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC.NO. 203 OF 2019

TAHIR SHEIKH SAID INVESTMENT LIMITED..... PLAINTIFF

VERSUS

1. BANK OF AFRICA LIMITED

2. ABDULMAJID MOHAMED ADAM.....RESPONDENTS

RULING

1. This ruling is in respect to the Notice of Motion application dated 18th November, 2019 by the plaintiff seeking for an order of injunction restraining the defendant by itself, its servants and/or agents or otherwise howsoever from alienating, selling, disposing off or in any other manner dealing with plaintiff's property known as MOMBASA/BLOCK XXI/147,165, 526, 527, 586, and MOMBASA/BLOCK XXVI/81 (the "suit properties") pending the hearing and determination of the suit; the Notice of Motion application dated 9th December, 2019 seeking for order to set aside the ex-parte order of injunction given on 18th November, 2019, that this suit be dismissed with costs and for Nurein Tahir Sheikh Said to be summoned and cross-examined under oath on his verifying affidavit dated 18th November 2019.

2. The plaintiff's application is supported by the affidavit of Nurein Tahir Sheikh Said sworn on 18th November 2019 and is based on the grounds that the plaintiff has never executed a charge of the suit premises in favour of the defendant and defendant therefore has no statutory power of sale over the suit properties and that the alleged charge over the suit properties is based on forged deed of Guarantee and Indemnity.

3. In opposing the plaintiff's application, the defendant filed a replying affidavit sworn by Morgan Kinyanjui on 9th December, 2019. The defendant contends that the ex-parte order dated 18th November, 2019 cannot last for more than 14 days as this would contravene Order 40 Rule 4 of the Civil Procedure Rules; that this court has no jurisdiction to entertain this suit and that the case is res judicata as the plaintiff herein has filed several suits and applications in the High Court and Court of Appeal wherein it sought similar orders of injunction over the same suit properties. The defendant further contends that the plaintiff is guilty of material non-disclosure as it deliberately refused, failed and/or neglected to disclose the several suits previously filed and other material facts listed in the replying affidavit.

4. The defendant's application dated 9th December, 2019 is supported by the affidavit of Morgan Kinyanjui sworn on 9th December 2019 raising same grounds as those in the replying affidavit in response to the plaintiff's application dated 18th November, 2019. The said application is not opposed.

5. The applications were canvassed by way of written submissions which the parties duly filed and which I have read. I have considered the applications and the submissions made. The issues for determination are:

i. Whether or not this court has jurisdiction.

ii. Whether the suit is res judicata.

iii. Whether the plaintiff is entitled to the orders sought.

iv. Whether the defendant is entitled to the orders sought.

6. It is the defendant's submission that this court has no jurisdiction to entertain this suit as the same exclusively lies with the High Court. The defendant submitted that the jurisdiction of this court is limited to areas specific under Article 162 of the Constitution, Section 13 of the Environment and Land Court Act and Section 150 of the Land Act, and that the dispute herein does not fall within any of the areas envisioned by the said provisions. The defendant's advocates relied on the case of **Albert Chaurembo Mumba & 7 Others –v- Maurice**

Munyao & 148 Others (2019)eKLR; Republic –v- Karisa Chengo & 3 Others (2017) eKLR; Cooperative Bank of Kenya Ltd –v- Patrick Kangethe Njuguna & 5 Others (2017)eKLR and submitted that in the circumstances, the ex-parte orders given on 18th November 2019 and extended on 17th December, 2019 is a nullity.

7. Counsel for the plaintiff cited the same provisions and submitted that the plaintiff has approached this court to stop the defendant from transferring the plaintiff's title to its land by sale purportedly by statutory power of sale based on forged security, and that if the defendant is not stopped the plaintiff's title to land will be extinguished. It is the plaintiff's submission that this court has jurisdiction to determine questions of title to land.

8. Article 162 of the constitution provides for the creation of the Environment and Land Court. Article 162 (2)(b) provides that parliament shall establish courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. Pursuant to the said provision of the constitution, parliament enacted the Environment and Land Court Act. The jurisdiction of the court ELC is provided under Section 13. Pursuant to Section 13 (1), the court has both original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (2) (b) of the constitution. Section 13 (2) in very broad terms states that the court has jurisdiction to hear any other dispute relating to environment and land. It will be seen from Section 13 (2) (d) and (e) that the court has jurisdiction to hear a matter relating to public, private and community land, contracts, choses in action or other instruments granting any environment and land. It will therefore be appreciated that the jurisdiction of the court in so far as disputes involving environment or land is very wide and almost limitless. Furthermore, the remedies that the court can grant includes injunctions.

9. The dispute before this court relates to the charge over the suit properties. The plaintiff seeks a declaration that the charges created over the suit properties are forgeries and are otherwise illegal, null and void; cancellation of the charges registered against the suit properties as well as an injunction to restrain the defendant from selling or disposing of the suit properties by public auction. It cannot be argued that the dispute is not over land. It is over land and interest in land. A charge is a disposition relating to land. The current law on charges is in part C of the Land Registration Act and part VII of the Land Act and Section 101 of the Land Registration Act, and Section 150 of the Land Act gives this court jurisdiction to hear and determine disputes, actions and proceedings concerning land under the two Acts. From the foregoing, I find no merit in the argument that this court has no jurisdiction to hear and determine this suit.

10. On the issue of res judicata, the defendant submitted that several suits and applications have been filed in the High Court and Court of Appeal seeking similar orders of injunction over the same properties. That the said suits and applications have all been dismissed. The said suits are shown as:

i. Mombasa Civil Appeal No. 99 of 2016 Bank of Africa –v– Juja Coffee Exporters Ltd & 4 Others. On 25th January, 2018 the Court of Appeal dismissed the chargor's appeal for an injunction and allowed the Bank's appeal paving the way for the sale of the charged properties.

ii. Sabir Tahir Sheikh Said & 6 Others –v- Bank of Africa Ltd (2018)eKLR. In this case, the beneficiaries' suit seeking injunctive orders over the suit properties was dismissed with costs by Hon. Lady Justice Njoki Mwangi on 21st September 2018.

iii. Juja Coffee Exporters Ltd & 2 Others –v- Bank of Africa & 2 Others (2019)eKLR. In this case, the Court of Appeal dismissed a second injunction over the suit properties on 7th March 2019.

iv. HCCC No. 80 of 2018: Osman Tahir Sheikh Said & 2 Others –v-Bank of Africa Limited where the entire suit was dismissed and the orders of injunction given on 10th April 2019 set aside.

v. HCCC No. 86 of 2019: Osman Tahir Sheikh Said & 2 Others –v- Bank of Africa Limited where an application for injunction dated 29th October 2019 was dismissed on 15th November 2019 on grounds of res judicata because the court had dismissed a similar application in HCCC No. 80 of 2018.

11. The law pertaining to the doctrine of res judicata is captured under the provision of Section 7 of the Civil Procedure Act which states:

“No court shall try any suit or issue in which the matter is 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 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.”

12. Section 28 of the Environment and Land Court Act also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction.

13. The doctrine of res judicata as stated has been explained in a plethora of decided cases. In the case of **Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 Others (2017)eKLR**, the Court of Appeal stated as follows:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and recourses in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and force, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be nuisance and brought to disrepute and calumny. The foundation of res judicata thus rest in the public interest for swift, sure

and certain justice.”

14. In the case of **John Florence Maritime Services Limited & Another –v- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR**, the Court of Appeal stated as follows:

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court’s limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon.”

The Court of Appeal went on and stated:

“The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata.

Res judicata based on a cause of action arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in a subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to open that issue.”

It has also been stated that the principle applies to applications with the same force whether the application be final or interlocutory.

16. I have considered all the cases outlined by the defendant in their affidavit in response to the plaintiff’s application and the affidavit in support of the defendant’s application. In Mombasa Civil Appeal No. 99 of 2016, and Sabir Tahir Sheikh & 6 Others –v- Bank of Africa Ltd (2018) eKLR (Mombasa HCCC No. 29 of 2018), the plaintiff and the defendant herein were parties and the dispute was the exercise of the bank’s statutory power of sale over the suit properties herein. The matter was instituted in the High Court which granted a temporary injunction on terms against the exercise of the bank’s statutory power of sale. The bank appealed to the court of appeal challenging the injunction as a whole and the court of appeal set aside the order issued by the High Court. Among the subject matters were PLOT NO. 147 SECTION XXI MOMBASA ISLAND, PLOT NO. 165 SECTION XXI MOMBASA ISLAND, PLOT NOS. 526 AND 527 SECTION XXI MOMBASA ISLAND, PLOT NO. 586 SECTION XXI MOMBASA ISLAND, AND TITLE NO. MOMBASA/BLOCK XXVII/381, all of which are the subject matters of the present suit.

16. I am convinced that the previous suits are much related to the suit herein and involved the same parties or parties under whom they or some of them claim. The subject matters therein are the same suit properties as the present as in the present suit. The issues in the present suit and in the previous suits were also the same. The former suits sought injunctive orders as in the present case. Applying the stated law to the facts before me, it is clear that the plaintiff seeks to open issues that were determined in the former suits or issues that could have been raised in the previous proceedings. Moreover parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. In my view, by filing this suit, the plaintiff is trying to litigate a concluded matter by bringing an issue or cause of action which rightly could have been raised in the former suit.

17. In the result, I make the following orders:

- a. The application dated 9th December 2019 by the defendant succeeds and the same is allowed with costs to the defendant.**
- b. The orders issued by this court on 18th November, 2019 be and are hereby vacated and/or set aside.**
- c. The plaintiff’s suit and the Notice of Motion dated 18th November 2019 be and are hereby struck out with costs to the defendant.**

18. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 20th day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE