REPUBLIF OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 515 OF 2013

PHILES NYOKABI KAMAU ……..…….. PLAINTIFF

VERSUS

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION ……. DEFENDANT

R U L I N G

1. The Plaintiff brought her Notice of Motion dated 19th November 2013 before this Court by way of Certificate of Urgency. Her Application was brought under the provisions of **Order 40 rule 1** of the *Civil Procedure Rules 2010* as well as **sections 1A and 3A** of the *Civil Procedure Act*. The Plaintiff was seeking a temporary injunction as against the Defendant either by itself, its servants and/or agents, auctioneers or whomsoever from advertising or offering or selling or in any other manner disposing or alienating of the Plaintiff's land being **Njoro/Ngata/Block 1/97** (hereinafter "the suit property") until the determination of this suit. The Application was grounded as follows:

> **"(a) The Defendant intends to sell the Plaintiff's land unless urgently restrained by an order of injunction.**
>
> **(b) The intended sale is irregular and is likely to occasion irreparable loss to the Plaintiff and her family.**
>
> **(c) The orders sought are necessary to preserve the security and for the ends of justice.**
>
> **(d) The orders sought are not in the least frivolous and are thus deserving."**

2. The Plaintiff's Application was supported by her own Affidavit sworn on 18th November 2013. She deponed that by a loan agreement dated 13th October 1989, the Defendant had agreed to advance a commercial loan to one **Newton Kamau t/a Ndovu Drycleaners** (hereinafter "the borrower") in the amount of Shs. 2 million at an interest rate of 16% per annum. The Plaintiff maintained that the Defendant had not released to the borrower the entire amount of the loan but that the borrower had dutifully service that amount of the loan released to him. The Plaintiff attached copies of assorted receipts and/or acknowledgements from the Defendant to this end. She continued by stating that the Defendant intended to wrongfully sell her land by public auction and had instructed Prime Valuers in Nakuru to undertake a valuation of the land for the purposes of sale. She believed that the Defendant's action in this regard was highly irregular, unilateral and oppressive. She maintained that the sale of the suit property would occasion irreparable loss to her

and her family. However, the Plaintiff maintained that she was prepared to give adequate and reasonable security by way of an undertaking for any damages that may be occasioned by the Defendant in relation to any injunctive orders that this Court may make.

3. On 3rd December 2013, this Court granted a temporary injunction pending the hearing and determination of the Plaintiff's said Application. Thereafter, the Plaintiff filed an Amended Defence dated 9th December 2013. On the 16th December 2013, the Defendant filed a Replying Affidavit sworn by its Debt Recovery Manager one **Peter Mugi Kuruga** on even date. The deponent noted that it was as a result of the failure by the Plaintiff to adhere to the loan repayment obligations that the Defendant was considering contractual and statutory means of recovering the outstanding loan balance. Mr. Kuruga confirmed that the loan Agreement dated 13th October 1989 made with the borrower was for the amount of Shs. 2 million which was advanced against the collateral security of the suit property. He maintained that the borrower failed to service the loan regularly as had been expected of him. As a result, the Defendant had resorted to taking positive steps to realise its security, within the parameters of the law. The suit property had not been proclaimed and advertised for sale by public auction as suggested by the Plaintiff in her Supporting Affidavit. The deponent maintained that the Application had been brought before this Court in bad faith and with the sole intention of frustrating the Defendant from exercising its statutory power of sale. He noted that by a letter dated 23rd August 2004, the Plaintiff had admitted the indebtedness to the Defendant and had requested the Defendant to reschedule the loan repayments. The Plaintiff had further requested to be allowed to subdivide the property which request had been declined by the Defendant.

4. At paragraph 10 of his Replying Affidavit, Mr. Kuruga detailed that there was already an existing suit before the Court being **HCCC No. 2851 of 1997** as between the Defendant herein as Plaintiff and the borrower plus the Plaintiff as the Defendants. He attached copies of the pleadings and documents in relation to that suit as exhibit "PMK 2" to his Affidavit. The deponent went on to say that he had been advised by his advocates on record herein that this matter was therefore *sub judice*. He had also been advised that the Plaintiff had not made out a *prima facie* case as against the Defendant justifying the issuance of an injunction in this matter. He noted that, despite the statement that the Plaintiff had made to the effect that she was prepared to furnish an undertaking in damages, such was not warranted as the borrower was truly indebted to the Defendant as he had acknowledged in writing back in 2004. Mr. Kuruga noted that the Defendant was a statutory state Corporation with extensive resources, quite capable to compensate the Plaintiff in damages if such were found due as the value of the suit property is known and quantifiable.

5. The borrower, **Newton Kamau Ngethe** swore a Supplementary Affidavit on behalf of the Plaintiff dated 2nd December 2013. He deponed to the fact that the Plaintiff was his mother. He confirmed that the Plaintiff had deposited her title deed with the Defendant as security for the loan advanced by the Defendant to him. The intended purpose of depositing the said title deed was for the purposes of registering a Charge against the title. However, the Defendant had agreed to the borrower's request to accept alternative security for his loan. He attached a copy of a letter dated 3rd August 1992 from the Defendant addressed to Ndovu Drycleaners in that regard. The borrower had also carried out a search of the suit property and attached to his said Affidavit, a photocopy of the Certificate of Official Search as exhibit "NKN 2". Further, he had been informed by the Plaintiff's advocate on record that the Defendant was not entitled to purport to exercise a chargee's power of sale unless a Charge had been registered against the title. The Certificate of Official Search revealed that no such Charge had been so registered.

6. Counsel for the parties appeared before this Court on the 3rd March 2014 and made verbal submissions. Mr. Mulwa for the Plaintiff detailed that her *prima facie* case was demonstrated by the Affidavit in support of the Application as well as the Supplementary Affidavit sworn by **Newton Kamau Ngethe** on 2nd December 2013. The Plaintiff was the registered proprietor of the suit property. There was no dispute that her title deed was in the custody of the Defendant and that steps were being taken by the Defendant to sell the suit property. Counsel noted that the

Defendant had alleged that it held collateral security in the form of the said title deed but offered no evidence as to how that security was created. On her part, the Plaintiff had exhibited a Certificate of Official Search relating to the suit property which did not disclose any encumbrance there over. There was never executed any Charge as against the suit property. As a result, there was no justification for the Defendant to continue to hold the Plaintiff's title deed. Counsel maintained that the fact that the Defendant had stated in its Replying Affidavit that it was taking steps to sell the suit property was justification enough for the application for injunction. The Defendant would have this Court believe that the Plaintiff had admitted the debt and that was not the case. The letter exhibited to the Replying Affidavit was from Ndovu Drycleaners, not from the Plaintiff. Mr. Mulwa submitted that had the Plaintiff been a guarantor, then the Defendant did not appear to be able to distinguish as between the liability of a debtor and that of a guarantor. If the Plaintiff had been the latter, then a formal demand notice should have been served upon her, which it had not.

7. On the part of the Defendant, counsel relied entirely upon the Replying Affidavit sworn on 16th December 2013. More specifically, counsel referred to the fact that there was a pending case in this Court being **HCCC No. 2851 of 1997**. The Plaintiff in that suit was the Defendant in this one. It had filed suit as against the said **Newton Kamau Ngethe t/a Ndovu Drycleaners** as well as the Plaintiff herein as guarantor. The issues in that case were exactly the same as the current case before Court. On that basis, counsel submitted that the Plaintiff was not entitled to the injunctive Orders sought because they are equitable in nature and whosoever comes to equity must come with clean hands. The Plaintiff had failed to disclose the pending suit before Court when she appeared and obtained *ex parte* Orders. Mr. Mulwa, in a short rejoinder, stated that the old case had made no mention of the title to the suit property as the Plaint was for the recovery of money and interest. In his opinion, that Plaint could not bar the Plaintiff's current application for injunction.

8. At paragraph 11 of the Plaint in this suit, the Plaintiff makes mention of **HCCC No. 2851 of 1997**. She details that she was a defendant therein but that the same was never prosecuted since its inception. In contrast, the annexures to the Replying Affidavit clearly detail the Pleadings in that suit. Counsel for the Plaintiff is quite right in that it is a suit filed by the Defendant herein for the recovery of money and interest. The Defendants in that suit are the said **Newton Kamau Ngethe** as the debtor and the Plaintiff herein as the guarantor. What counsel for the Plaintiff conveniently overlooks, when he says that there is no mention in that suit of the suit property, is that the Plaintiff herein brought a Chamber Summons therein dated 14th February 2006 seeking a temporary injunction until the final determination of that suit as against the Defendant herein (as regards the suit property) in exactly the same terms as the Application before this Court in this suit. To my mind, a more obvious case of *res judicata* I have yet to come across.

9. The law as regards *res judicata* cases is now well settled as per **Pop-in (Kenya) Ltd & 3 others vs Habib Bank AG Zürich (1990) KLR 609** which is the milestone decision. In that case the Court held *inter-alia*:

> **"…. The plea of *res judicata* applies not only to points which the court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time."**

Further with regard to the matter being *res judicata*, **section 7** of the **Civil Procedure Act** provides that:

> **"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 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."**

Explanation (4) of that section further provides that:

> **"Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."**

From the above, it is clear that the court will not deliberate on a matter that has been directly and substantially in issue in a previous suit. Further, a matter that the party to the suit ought by reasonable diligence, to have raised in the former suit, will be deemed as determined by the court in that suit.

10. I have also gleaned some assistance from 3 English cases as follows. Firstly the case of **Director of Public Prosecutions v Humphrys (1976) 2 All ER 497** in which the court referred to the decision of **Lord Diplock** in **Mills vs Cooper (1967) 2 All ER 100 at P. 103** who had this to say:

> **"…. a party to civil proceedings is not entitled to make, as against the other party, an assertion, whether of fact or the legal consequence of fact, the correctness of which is an essential element in his cause of action or defence, if the same assertion was an essential element in his previous cause of action or defence in previous civil proceedings between the same parties or their predecessors in title and was found by a court of competent jurisdiction to be incorrect, unless further material which is relevant to the correctness or incorrectness of the assertion and could not by reasonable diligence have been adduced by that party in the previous proceedings, has since become available to him."**

In **Mills vs Cooper**, the issue for determination by the court was whether the matter in a case had been concluded in a previous suit brought on similar facts. It was held that the issue had been heard and determined in a previous suit and the prosecution was barred from re-opening the question and hearing the case anew. **Lord Diplock**, in rendering his decision, referred to the case of **Haystead vs Taxation Commissioner (1925) All ER 56**, wherein he observed:

> **"…. the issue estoppel results in there being no issue in the subsequent civil proceedings to which such evidence would be relevant. Issue estoppel is a particular application of the general rule of public policy that there should be finality in litigation."**

Further, in **Mcllkenny vs Chief Constable (1980) 2 All ER 229, Lord Loreburn** struck out the action by saying:

> **"The issue had already been finally determined against them by a court of competent jurisdiction in the criminal proceedings to which they were parties, and in those proceedings they had a full and fair opportunity of presenting their case, and in all the circumstances it would not be just to allow them to re-open the issue… In any event it would be an abuse of process to all the Plaintiffs to litigate again the identical issue to that which had already been decided against them in the criminal proceedings, and they would not be permitted to call the further evidence on which they sought to rely…"**

11. I have no doubt that the matters raised by the Plaintiff not only in her suit but also the Application before this Court have been raised in previous proceedings being **HCCC No. 2851 of 1997**. As a result, these matters are clearly *res judicata* and cannot and should not be raised here. Litigation must necessarily come to an end and our courts, busy enough as they are, do not need to be burdened with repeated applications of the same nature. As a consequence, I dismiss the Plaintiff's Notice of Motion dated 19th November 2013 with costs to the Defendant.

DATED and delivered at Nairobi this 1st day of April, 2014.

J. B. HAVELOCK

JUDGE