



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 105 OF 2011**

**SAMROSS INVESTMENTS LTD. ::::::::::::::::::::::::::::::::::: PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD. ::::::::::::::::::::::::::::::::::: DEFENDANT**

**RULING**

1. The Notice to Preliminary Objection before the court is dated 24th March 2011. The Preliminary Objection relates to the Notice of Motion application dated 24th March 2011 and filed in court on the same day. The substantive orders sought in the said Notice of Motion is that the Defendant or his agents being Baseline Auctioneers be restrained by a temporary injunction from selling by way of public auction the Plaintiff's property known as ELDORET MUNICIPALITY BLOCK 14/331, ELDORET MUNICIPALITY BLOCK 10/85, ELDORET MUNICIPLAITY BLOCK 10/86 pending the determination of this suit. The application is based on the allegation that the above three suit properties have since been discharged by the Defendant's Bank, and any sale of the same would not be proper and would amount to travesty of justice, since the entire loan has been fully repaid.

2. The application is supported by affidavit of **John Kipkoriri Sambu** dated **24th March 2011** and is supported by the grounds stated therein

3. In opposing the application, the Respondent has relied on affidavit filed on 25th July 2011 sworn by Milly Jalega Odari. The Respondent also filed the current Preliminary Objection stating as follows:-

***1. The Applicant's entire suit and application is misconceived, unmaintainable and bad in law.***

***2. The Applicant's suit is res judicata and an abuse of the court process on account of this honourable court's decision in Eldoret HCCC No. 8 of 2007, Samross Investments & another – Vs – Kenya Commercial Bank & another.***

***3. The Applicant has deliberately failed to annex copies of the proceedings in Eldoret HCCC No. 8 of 2007 Samross Investments & another – Vs – Kenya Commercial Bank & another which is currently pending determination and Eldoret HCCC No. 2 of 2011 Samross Investments & another – Vs – Kenya Commercial Bank which was withdrawn (hereinafter "the former suits").***

4. ***The subject matter and issues in the former suits are similar to the subject matter and issues raised herein.***
5. ***The Applicant is guilty of non disclosure of material facts.***
6. ***The Applicant is guilty of forum shopping.***
7. ***The applicant's prayer for injunction does not lie.***

4. While the Defendant/Respondent filed submissions herein on 25th July 2012 the Applicant failed to do the same despite being given chance to do so and also to file a supplementary affidavit.

5. The Defendant/Respondent submitted that the Plaintiff's application dated 23rd March 2011 is *res judicata* for the reasons that the Plaintiff had previously filed a suit and a similar application for injunction in **Eldoret HCCC No. 8 of 2007 Samross Investments Limited and John Kipkorir Sambu – Vs – Kenya Commercial Bank Limited and Kenya Commercial Bank Finance Company ('the former suit')**.

6. The Defendants submitted that the subject matter of the former suit involved a loan and overdraft facilities advance to the Plaintiff in the sum of Kshs.8,920,750.00 in March 1999. The said loan is also the subject matter of this suit. In the former suit, the Plaintiff challenged the Defendant's right to exercise its statutory powers of sale in respect of properties known as Eldoret Municipality block 10/86 and Eldoret Municipality block 14/289 provided as security for the loan aforesaid (hereinafter collectively referred to as "the properties"). The Plaintiff has lodged a similar challenge before this Court. The former suit sought for declaratory orders that the 1st Plaintiff (Plaintiff herein) had fully serviced the loan account, which is the same ground upon which the Plaintiff now seeks relief from this Court.

7. It was further submitted by the Defendant that at the time of filing the former suit, the Plaintiff simultaneously filed an application for injunction dated 24th January 2007 seeking temporary orders of injunction restraining the Defendants from offering for sale the aforesaid properties. In this suit, the Plaintiff has filed a similar application for injunction seeking similar orders as sought in the Plaintiff's application dated 23rd March 2011. The application in the former suit was argued and in a Ruling delivered on 25th February 2009, the Honourable Justice Ibrahim found that there was an outstanding amount of Kshs.4,554,411.54 due to the Defendant as at 31st December 2005. The learned judge also found that the Plaintiffs were indebted to the 2nd Defendant for a sum of Kshs.14,840,889.89 as at 31st December 2005. On this basis, the Judge found that no *prima facie* case had been established and dismissed the Plaintiff's application with costs. The said Ruling was never appealed from nor set aside. The said application and Ruling in the former suit appears at page 46 - 73 and 75 – 89 of the Replying Affidavit of Milly Jalega Odari sworn on 25th March 2011 respectively. A perusal of paragraphs 2 and 3 of the further affidavit of John Kikoriri Sambu sworn on 1st April 2011 indicates that the said proceedings and ruling in the former suit are not in dispute.

8. The Defendant submitted that in view of the foregoing background, the Plaintiff's application for orders to restrain the Defendant through a temporary injunction from selling Eldoret Municipality Block Eldoret Municipality Block 14/331, Eldoret Municipality Block 10/85, Eldoret Municipality Block 10/86 on the basis that the loan has been repaid in full the issue is *res judicata* for the following reasons:-

- (a) ***The issue as to whether the Defendant has repaid the loan and whether the Defendant ought to be restrained from exercising its statutory power of sale, which was directly and substantially in issue in HCCC No. 8 of 2007 had been heard and finally decided after inter-partes hearing culminating in the Ruling of Justice Ibrahim of 25th February 2009.***

**(b) The present suit and the former suit are between the same parties litigating under the same title in respect of similar property and the same loan.**

**(c) The issues aforesaid in the former suit were determined by a court of competent jurisdiction and after hearing the parties on merit.**

**(d) There are no circumstances which have not emerged which been to and could not have been raised in the former suit to warrant filing of the suit.**

9. I have carefully considered the Respondent's submissions. Section 7 of the Civil Procedure Act defines *res judicata* in the following words:-

***"7. 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 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 pended by such court."***

10. The Plaintiff's application dated 23rd March 2012 falls squarely within the definition of *res judicata* as the issues raised in the Plaintiff's application were directly and substantially in issue in the former suit between the same parties litigating under the same title and that a decision has been rendered on the issues by a competent court on merits. In the court of Appeal case of **Mburu Gichua – Vs – Gachini Tuti (1976 – 80) 1 KLR 790** (appearing at page 7 of authority number 3 on the Defendant's List of authorities and the bundle of authorities attached), the court in considering the issue of *res judicata* expressed itself as follows:-

***"Moreover the liberty to present more than one application is always subject to the court's power to prevent abuse of its process, including mulcting the offending party in costs. It is also of course subject to the rule of res judicata including what is laid down in explanation (4) to Section 7, unless special circumstances is present in which event I would be content to follow the dictum of Wigram – Vs – C in Henerson – Vs – Henderson (1843) . . ., which the Privy Council described as the locus classicus of this aspect of Res Judicata in Yat Tung Investment Co. Ltd. – Vs – Da Heng Bank Ltd.***

***. . . where a given matter becomes the subject of litigation in an 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 subject of litigation in respect of 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 parties to form an opinion and pronounce a judgement, 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."***

11. In the upshot, the Preliminary Objection is sustained and the current application is dismissed. Since a similar suit is pending in Eldoret being Eldoret HCCC NO. 8 of 2007, the current suit may be stayed or dismissed as the parties may wish through an application.

12. Costs of the application shall be for the Defendant/Respondent.

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF OCTOBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**Present:**

Washika for the Plaintiff

Nyaburi holding brief for M/s Mate Defendant

Irene – Court Clerk