



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

**Civil Suit 92 of 2010**

**ROSEMARY KARIUKI.....PLAINTIFF**

~VRS~

**THE CO-OPERATIVE BANK OF KENYA LTD.....1<sup>ST</sup> DEFENDANT**

**ALBERT WANYONYI.....2<sup>ND</sup> DEFENDANT**

**GEORGE KARIUKI KAMAU.....3<sup>RD</sup> DEFENDANT**

**STEPHEN MUNGAI KAMAU t/a GARAM INVESTMENT..... 4<sup>TH</sup> DEFENDANT**

**PETER WANYONYI WANJALA..... 5<sup>TH</sup> DEFENDANT**

**RULING**

The facts of this case are clear. The Plaintiff was the registered proprietor of land parcel no.E.Bukusu/S.Kanduyi/2323. She guaranteed the 3<sup>rd</sup> Defendant a loan of Ksh.2,000,000/= from the 1<sup>st</sup> Defendant. On 26/9/ 2007 a charge in favour of the 1<sup>st</sup> Defendant was registered against the title. The 3<sup>rd</sup> Defendant had problems in servicing the loan. Following correspondences and negotiations which did not yield the repayment of the loan, the 1<sup>st</sup> Defendant decided to exercise its statutory power of sale to recover Ksh.2,341,953.89 that was outstanding. The Plaintiff was fully placed in the picture and the notice served on her. The 4<sup>th</sup> Defendant, an auctioneer, was instructed to sell the property by public auction. Notice of 45 days was sent to her to redeem the property by paying Ksh.2,512,333.54 failing which the property would be sold by public auction. When there was no payment the property was, following advertisement, sold to the 5<sup>th</sup> Defendant who was the highest bidder at Ksh.1,310,000/=. He paid the amount and the property was transferred to him. He is now the registered proprietor.

This suit was filed on 16/9/2010 seeking a declaration that the auction which was conducted on 6/9/2010 was null and void and not enforceable. Also sought was an injunction to restrain the Defendants, and all those acting under them, from evicting the Plaintiff, or alienating the property, or interfering with the Plaintiff's possession of the same. Lastly, the Plaintiff sought the account of the loan between the 1<sup>st</sup> Defendant and the 3<sup>rd</sup> Defendant. The Plaintiff's complaint was that the property which was worth Kh.13 million had been sold for Ksh.1.3 million; that the property had been sold without the Defendant following the proper procedures; and that the 4<sup>th</sup> Defendant did not have jurisdiction to sell a property in Western Province.

The 1<sup>st</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants filed defences denying the claim. The 3<sup>rd</sup> Defendant kept quiet.

On 24/5/2010 the 1<sup>st</sup> and 4<sup>th</sup> Defendants filed the present motion under Order 2 rule 15 (a), (b), (c) and (d) of the Civil Procedure Rules seeking to have the suit struck out with costs because it did not disclose a reasonable cause of action against them; it was frivolous, vexatious and scandalous; it was an abuse of the process of the court; and it was *res-judicata*. The two Defendants were represented by Ocharo Kebira & Co. Advocates, the 5<sup>th</sup> Defendant by Masinde & Co. Advocates and the Plaintiff by Omundi Bw'Onchiri & Co. Advocates. Counsel agreed to file written submissions on the motion. I have considered the pleadings, the affidavits and annexures and the submissions.

It is not in dispute that when this suit was filed the Plaintiff had sued the 1<sup>st</sup> Defendant in CM CC no.508 of 2009 at Bungoma seeking a permanent injunction to stop the intended sale of the property. The property had been advertised for sale by the 4<sup>th</sup> Defendant on instructions by the 1<sup>st</sup> Defendant over the loan. The 1<sup>st</sup> Defendant filed a defence to say the intended sale was in exercise of its statutory power of sale under the charge after the loan was not serviced. The suit was heard and on 27/7/2010 it was dismissed with costs by the Chief Magistrate. It was found that intended sale was in exercise of the 1<sup>st</sup> Defendant's statutory power of sale after the borrower failed to repay the loan and after due notices had been issued to both the borrower and the Plaintiff who was the guarantor. The Plaintiff was aggrieved by the decision and filed an appeal to this court in HCCA No.104 of 2010 at Bungoma. She sought stay of the intended sale. When she did not obtain interim orders she filed the present suit. The property had in the meantime been sold.

It is quite clear that both in the plaint and accompanying verifying affidavit in this suit the Plaintiff did not disclose the fact that she had unsuccessfully sued the 1<sup>st</sup> Defendant in the subordinate court in the same matter. In paragraph 13 of the plaint and in the verifying affidavit it was stated that there was no suit seeking similar orders pending between the parties. That was an outright lie. There was an appeal pending between them challenging the findings by the subordinate court over the sale of the property. The present suit challenged the sale that had ensued. It is clear that the Plaintiff was guilty of not disclosing that there existed another case between the parties over the same subject matter. I agree with the counsel for the 1<sup>st</sup> and 4<sup>th</sup> Defendants that it is an abuse of the process of the court, and also vexatious, for a party to mount several proceedings in various courts of law, or in the same court, over the same subject matter. In the case of **Leonard Onyancha v. Post Bank Credit Ltd, HCCC no.396 of 2000 at Kisumu** it was observed that where the Plaintiff files a suit knowing that there is a similar suit pending in a court of competent jurisdiction and swears a verifying affidavit to the effect that there is no suit pending that amounts to an abuse of the process of the court and the suit should be struck out. I agree with that observation.

The other crucial issue raised in the application was that this suit was *res-judicata* in view of the subordinate court case. The submission by counsel for the Plaintiff was that looking at cause of action and relief sought in the two cases the suit was not *res-judicata*.

Under section 7 of the Civil Procedure Act,

*"7. No court shall try any 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."*

In the case of **Abok James Odera v. John Patrick Machira, Civil Application no. Nai 49 of 2001** it was held that 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 the same or litigating under the same title;
- (iii) a competent court heard and determined the matter in issue; and

(iv) the issue had been raised once again in a fresh suit.

It should also be pointed out that the plea of *res-judicata* applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, 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 (**Pop-In (Kenya) Ltd & 3 Others v. Habib Bank AG Zurich [1990] KLR 609**).

Both in this suit and the one in the subordinate court the Plaintiff was suing the 1<sup>st</sup> Defendant over the loan of Ksh.2 million that she had guaranteed. In the subordinate court the Plaintiff was complaining that she had not been notified that the borrower had defaulted and that she had not been put in the picture regarding the loan defaults and she had been surprised to see her property advertised. She agreed that her property had been used as security. The property had been advertised for sale. In the present suit the property had already been sold. Like in the subordinate court, she was claiming the auction was null and void. She was claiming that the property had been sold

*“without following the proper procedures like notice and advertisement among others.”*

In the affidavit that she swore to support her application for a temporary injunction in the instant suit she acknowledged that the 4<sup>th</sup> Defendant had been instructed to auction the property to recover Ksh.2,512,333.54 that was outstanding on the loan. She claimed that she had not been served with statutory notice. The common issues in the two cases are whether the Plaintiff guaranteed a loan of Ksh.2 million to the 3<sup>rd</sup> Defendant by the 1<sup>st</sup> Defendant; whether the loan was repaid; if it was not repaid, if the Plaintiff was informed of the default; whether the Plaintiff was issued with a statutory notice of sale; whether the auctioneer issued the notice to the Plaintiff to redeem the property failing which it would be auctioned; and whether the auction was advertised. The subordinate court received evidence on these issues and found that the Plaintiff had guaranteed the loan which was not serviced; she was issued with a statutory notice of sale; she was required to redeem the property which she had not; and that the property had been properly advertised for sale. These are the same issues the Plaintiff is, in the present suit, asking the court to determine. The principle of *res-judicata* would not allow that as a competent court has heard these issues and pronounced itself on them.

The Plaintiff may argue that the issue whether the 4<sup>th</sup> Defendant had authority to sell a property in Western Province and the issue whether the property worth Ksh.13 million should have been sold for Ksh.1.3 million were not issues before the subordinate court and are therefore not *res-judicata*. The 4<sup>th</sup> Defendant had advertised the property for sale at the time the subordinate case was filed. His authority to advertise the property ought to have been questioned in the suit. Secondly, the amount required by the 1<sup>st</sup> Defendant was known, and it was known that the sale intended to recover that amount. The Plaintiff did not raise the value of the property in the suit.

Lastly, the Plaintiff may argue that the parties before the subordinate court are not the same parties in the instant suit. It is clear that the Plaintiff was litigating for herself and for the 3<sup>rd</sup> Defendant who had failed to repay the loan that she had guaranteed. The 4<sup>th</sup> Defendant was instructed by the 1<sup>st</sup> Defendant to sell the property to realize the security and the bank (1<sup>st</sup> Defendant) transferred the property to the 5<sup>th</sup> Defendant who was the highest bidder at the auction. The 4<sup>th</sup> Defendant could have been sued in the subordinate court. The 5<sup>th</sup> Defendant is being sued under the title of the 1<sup>st</sup> Defendant.

In conclusion, the present suit is, in view of the suit in the subordinate court, *res-judicata* and cannot therefore be re-litigated.

These are the reasons why the application by the 1<sup>st</sup> and 4<sup>th</sup> Defendants is allowed with costs. The entire suit is struck out.

Dated, signed and delivered at Bungoma this 10<sup>th</sup> day of October, 2012.

**A. O. MUCHELULE**  
**JUDGE**