

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NANYUKI**  
**CIVIL APPEAL NO E038 OF 2023**

**FAULU MICROFINANCE BANK LIMITED .....**  
**APPELLANT**

**VERSUS**

**1. EPHRAIM THUMBI MWAI**  
**2. TERESA WAKIURU THUMBI**  
**3. PHILLIPS** **INTERNATIONAL**  
**AUCTIONEERS.....RESPONDENTS**

**(Appeal from the ruling dated 26/10/2023 in Nanyuki CM**  
**Civil Case No. E054 of 2023- V Masivo**  
**(SRM)**

**J U D G M E N T**

1. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents (herein referred as the Respondents) filed a notice of motion application dated 14/09/2023 seeking for temporary injunction against the Appellant and the 3<sup>rd</sup> Respondent restraining them from trespassing onto, selling, transferring or disposing off or in any other way interfering with parcel of land known as Title No. Gakawa/Kahurura Block 1(Ichuga) 1459 (the suit property) pending hearing and determination of the

application interpartes and pending hearing and determination of the main suit. Other incidental orders were sought including that pending hearing and determination of the main suit, the Appellant do issue the Respondents with all bank statements with regards to the loan facility and costs of the suit.

2. In opposing the application, the Appellant filed a notice of preliminary objection dated 18/09/2023 on the grounds that;

- i. The Plaintiffs' application and suit is incompetent, fatally and incurably defective and is an abuse of the honourable court for reason that the application and the suit fall short of the doctrine of *res judicata* under **Section 7** of the **Civil Procedure Act** as the prayer for injunction was heard and determined in *Nanyuki Civil Case 110 of 2019 Ephraim Thumbi Mwai & Teresa Wakiuru Thumbi vs Faulu Microfinance Bank Limited & another.*

ii. That the Plaintiffs' application and entire suit is based on an incurable illegality and ought to be struck out forthwith with costs to the 1<sup>st</sup> Defendant.

**3.** The trial magistrate in his ruling dated 26/10/2023 dismissed both the Respondents' notice of motion application and the preliminary objection filed by the Appellant herein. Upon dismissal of the preliminary objection, the Appellant preferred this appeal and filed a memorandum of appeal dated 23/11/2023 raising the following grounds of appeal;

- i. The learned magistrate erred in law and fact in finding that the preliminary objection lacked merit.
- ii. Such further and other grounds as may be raised at the hearing of the appeal.

**4.** The Appellant's prayers are that the ruling with respect to preliminary objection be set aside and the preliminary objection dated 18/09/2023 be allowed.

**5.** The appeal was canvassed by way of written submissions. The Appellant's counsel submitted that the Appellant raised a preliminary objection on account that there

was a previous suit between the parties herein being *Nanyuki Civil Suit no 110 of 2019-Ephraim Thumbi Mwai & another vs Faulu Microfinance Bank Limited & another* which was dismissed in its favour hence allowing it to exercise its power of sale. The preliminary objection was however dismissed on account that the issues in dispute in *Nanyuki Civil case No. E54 of 2023 Ephraim Thumbi Mwai & another vs Faulu Microfinance Bank Limited & another* arose subsequent to the delivery of judgment in the previous suit and therefore, they could not have been subject to the judgment and that the cause of action was not available at the time the earlier judgment was rendered. He submitted that the court only focused on the application rather than considering both the application and the plaint. By failing to assess the connection between the judgment and the plaint, the court misdirected itself as the judgment clearly addressed the issues that were central to the suit.

**6.** He submitted that in the previous suit, the Respondents' claim was based on non-service of statutory notices and illegality of the advertisement and mandatory

injunction to restrain the sale. In the current suit, the Respondents are seeking similar reliefs as they are challenging service of statutory notices and legality of the advertisement. That in the judgment of the previous suit, the court had addressed the issue of notices where it found that they were duly served hence there was no need for the Appellant to reissue the notices.

7. He further submitted that the trial court argued that the arrears claimed in the notices differed from the amount reflected in the bank statement hence constituting a new matter not covered under the doctrine of *res judicata*. Noteworthy, the Respondents had not contested the amount claimed as their contention was solely on the issue of notices hence the trial court relied on an unpleaded issue to justify hearing the matter. He maintained that no new issues have arisen subsequent to the judgment. He placed reliance on the case of ***Kennedy Mokuu Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende (2022) eKLR*** where the court observed that the mere discovery of fresh evidence on matters which have been open for controversy in

the earlier proceedings is no answer to a defence of *res judicata* and that it is not permissible for parties to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion. He submitted that a party must demonstrate the new facts and evidence arose after the judgment and could not have been discovered with reasonable diligence during the previous suit and the new evidence must be substantial to alter the outcome of the suit.

**8.** He argued that if the Respondents were dissatisfied with the outcome of CMCC No. 110 of 2019, they should have pursued an appeal rather than filing a new suit hence the current suit invites the trial court to sit on its own decision where no appeal or review has been preferred. He maintained that the issues raised in the current suit have already been addressed and determined in the previous suit. The introduction of new facts or evidence as asserted by the trial court does not alter the fundamental nature of the dispute nor does it demonstrate a change in circumstances

that could not have been discovered with reasonable diligence during the previous suit.

9. In rejoinder, the Respondents' counsel submitted that any issue that was not directly and substantially in issue in the former suit cannot form part of *res judicata*. That the instant suit is pegged on facts and circumstances that arose subsequent to the issuance of courts judgement in *Civil Case No. 110 of 2019* since the 3<sup>rd</sup> Respondent proceeded to attempt to auction the suit property by placing an advertisement dated 28/08/2023. That their pleadings are based on these recent actions which is an issue that had not risen at the time of filing the previous suit hence could not have been canvassed in that suit. That another issue that arose was whether fresh notices ought to have been issued following the dismissal of their suit which was not addressed in the previous suit hence these are new facts which are not subject to the principle of *res judicata*. Further, the current amount claimed in loan arrears and subject of which the Respondents' property was to be auctioned remains unknown since the bank statement in the current suit indicated that the

loan overdue was Kshs.2,765,349.44/- whereas in the previous suit, it was stated that the loan overdue was Kshs.2,356,590/-. Therefore, it is certain that the Appellant is not certain of the amount owing.

**10.** He submitted that the Appellant did not issue any statutory notice that reflected the sum claimed by Appellant's manager or those indicated in the bank statement hence it failed to adhere to the provisions of **section 90** of the **Land Act**. That the notices issued should have reflected the current amount owed. He submitted that the notices relied on by the Appellant had been issued in 2019 and the Appellant ought to have considered the payments made in the past four years and implication brought about by the passage of time. Reliance was placed on the case of ***Kanorero River farm Ltd & 3 others v National bank of Kenya Limited [2002] 2 KLR 207*** as quoted in ***Republic v Attorney General & 2 others ex parte Tom Odoyo Oloo (2016) eKLR*** to support their claim that even though the Appellant had been given a leeway to proceed to realise its security in the previous suit,

this did not negate the Respondents' right to challenge the manner in which the statutory power of sale is exercised.

**11.** He submitted that delivery of the judgment in the previous suit and subsequent advertisement of sale created a new factual situation which could not have been dealt with in the previous suit. That the Appellant's right to exercise its statutory power of sale as was affirmed in the previous suit did not preclude them from following due procedure in executing the same. That the statutory notices issued in 2019 are void and cannot be used to initiate the realisation of security in the suit premises. Similarly, the subsequent redemption notification was invalid and a nullity and reliance was placed on the case of ***Village Auto Bazaar Limited v Kenya Commercial Bank Limited (2020) eKLR*** where the court held that since matters complained arose after the consent, the Plaintiff was not precluded from challenging the banks actions based on the new facts which were not available at the time the consent was recorded and that the Plaintiff was entitled to challenge the manner in which the statutory power of sale was being exercised and that issue,

being subsequent to the consent, and one that raises new facts is not *res judicata*.

**12.** He submitted that the issues in this suit relate to actions and omissions by the Appellant after the judgment was delivered which could not have been decided in the previous suit. That among the issues to be canvassed is the issue of valuation as they are not aware of any updated forced valuation that have been conducted save for which that had been conducted in the year 2019. That it is unlikely that the value has remained constant from 2019 to 2023. That the Appellant has failed to show where in the previous proceedings the issue of advertisement or the need for fresh notices had been canvassed in the previous proceedings hence the present case present issues that were not directly and substantially in issue in the previous case.

**13.** I have considered the Appeal, the grounds set forth and the affidavit evidence on record. I have had due regard to the learned submissions filed. For determination is whether the Appeal has merit, and based on the findings thereon, what orders should issue.

**14.** The brief history of the matter is that the Appellant extended a bank facility to the 2<sup>nd</sup> Respondent which was secured by an existing charge. Following a default on facility, the Appellant sought to exercise its statutory power of sale to recover the outstanding amount which was challenged by the 1<sup>st</sup> and 2<sup>nd</sup> Respondent by filing *Nanyuki Civil Suit No. 110 of 2019-Ephraim Thumbi Mwai & another vs Faulu Microfinance Bank Limited & another* which suit was dismissed allowing the Appellant to resume efforts to recover the outstanding liabilities. The Respondents however instituted fresh proceedings under *Nanyuki Civil Suit no E54 of 2023-Ephraim Thumbi Mwai & another vs Faulu Microfinance Bank Limited & another*. Consequently, the Appellant raised a preliminary objection on the ground of *res judicata* which was dismissed on account that the issues in dispute arose subsequent to the delivery of judgment in the previous suit and therefore could not have been subject to the judgment and that the cause of action was not available at the time the earlier judgment was rendered.

**15.** The trial magistrate in his ruling dated 26/10/2023 dismissed the preliminary objection and the Respondents' notice of motion application. In dismissing the preliminary objection, the learned magistrate observed that the issue in dispute in the current suit is whether the Appellant should have issued fresh notices and whether the bank was using forced sale valuation of 2019. That whether the bank properly exercised its statutory power of sale is a new and different matter not covered by the doctrine of *res judicata*. That since the matters complained of arose after the judgment, he held that the Respondents were not restrained from challenging the bank actions based on the new facts which were not available at the time of the judgment. That a contrary holding would have conferred on the bank legal immunity from actions taken after the judgment and he placed reliance on the case of **Village Auto Bazaar limited vs Kenya Commercial Bank(supra)** and **Kanorero River farm Ltd & 3 others v National bank of Kenya Limited (supra)** and held that the Respondents were entitled to challenge the manner in which the statutory power of sale is being

exercised and that issue being subsequent to the judgment and one that raises new facts is not *res judicata*.

**16.** The Appellant's contention in this appeal is that the issues raised in the suit before the trial court being *Nanyuki Civil Suit no E54 of 2023-Ephraim Thumbi Mwai & another vs Faulu Microfinance Bank Limited & another* are substantially similar with the issues that were raised in the previous suit that was dismissed in their favour in *Nanyuki Civil Suit No. 110 of 2019-Ephraim Thumbi Mwai & another vs Faulu Microfinance Bank Limited & another*, hence the pending suit before the trial court (E54/2023) is *res judicata*.

**17.** The Respondents' contention is that the issues raised in the current suit (E54/2023) arose after the dismissal of the previous suit (110/2019) and they relate to the Appellant's action of attempting to sell the suit property without issuing fresh notices, without conducting a forced valuation and issues that arose after the property was advertised for sale after the dismissal of the previous suit. Therefore, these issues bring in new facts and circumstances which were not in issue in the previous suit.

**18. Section 7** of the **Civil Procedure Act** provides as follows:

*“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.”*

**19.** The Supreme Court in the case of **John Florence Maritime Services Ltd & Another v Cabinet Secretary Transport and Infrastructure & 3 Others, Petition 17 of 2015 (2021) KESC 39 KLR (Civ)** held as follows:

*“For res judicata to be invoked in a civil matter the following elements must be demonstrated:*

- a) There is a former judgment or order which was final;*
- b) The judgment or order was on merit;*
- c) The judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and*
- d) There must be between the first and the second action identical parties, subject matter and cause of action.”*

**20.** What I am required to do is to determine whether the issues raised in Civil case E54 of 2023 are similar to the ones that were raised in civil Case 110 of 2019. While doing this, the court is required to determine which issues were determined in the previous suit.

21. As observed by the trial court, a party can institute fresh proceedings if new circumstances arise as was held in the cases relied on by the trial court viz. **Village Auto Bazaar Limited v Kenya Commercial Bank (supra)** and **Kanorero River Farm Ltd vs National Bank (supra)**

22. The court in **Nyali Construction & Ele v Barclays Bank Limited [2015] eKLR** also observed that an application particularly in the case of injunction applications seeking to restrain a party from auctioning property may be filed more than once. The court went ahead and held that;

*“This is because although an injunction application may be dismissed the subsequent auctions may violate the law and such violation can be basis of a subsequent applications. Such subsequent applications would not offend the doctrine of res judicata because they would be on an issue not determined previously. It follows therefore that dismissal of application does not always necessarily “shut the door” to the seat of justice for an application.”*

23. In the case of **Omondi v National Bank of Kenya Limited and Others [2001] EA 177** the court held that:

*“Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.”*

**24.** And in the case of *Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported)* it was stated;

*“If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata ....”*

**25.** In the instant appeal, the Respondents were in the previous case (Civil Suit 110 of 2019) seeking for orders that;

- i. A declaration that the notice of sale, the advertisement for sale and the sale of the suit premise is illegal, null and void.
- ii. A mandatory injunction restraining the Defendants from selling and/or in any other manner alienating and or interfering with the Plaintiff’s property known as Gakawa Kahurura/Block 1/Ichuga/1459.
- iii. Costs of the suit.

**26.** They are seeking the similar prayers as they had sought in the previous suit.

**27.** They averred in the plaint that the advertisement dated 28/08/2023 was illegal as they were not issued with statutory notices and notification of sale as required by law and that the advertisement did not indicate whether the auction was by reserved price. They further averred that they were making regular periodical repayment of the loan.

**28.** The issue of whether the Appellant was supposed to conduct a forced valuation before advertising the property again is not raised in the plaint. The Respondents have not also claimed that fresh notices were supposed to be issued in the plaint but only averred that they were not issued with the statutory notices for sale.

**29.** The relationship between a lender and a borrower is a contractual one governed by specific terms. The borrower is obligated to pay the monies advanced within the terms of the lending contract. When there is default the lender has the right to realize security within the terms of the contract and within the parameters set in law in respect of issuance of the prerequisite statutory notice, Valuation for purposes of

guiding a reserve price, notification of sale and advertisement.

**30.** The parties herein were in court in MCCC NO. where the claim by the Respondent was for orders;

- a. A declaration that the notice of sale, the advertisement for sale and the sale of the suit premise is illegal, null and void.
- b. A mandatory injunction restraining the Defendants from selling and/or in any other manner alienating and or interfering with the Plaintiff's property known as Gakawa Kahurura/ Block 1/ Ichuga/1459.
- c. Costs of the suit.

**31.** This suit was determined and the outcome was a dismissal of the said claim. My understanding of that outcome is that the Appellant was found to have complied with the law in its attempt to realize security.

**32.** The Respondent is back to court in the current suit Civil suit No. E054 OF 2023 where the orders sought are;

- a. A declaration that the notice of sale, the advertisement for sale and the sale of the suit premise is illegal, null and void.
- b. A mandatory injunction restraining the Defendants from selling and/or in any other manner alienating and or interfering with the Plaintiff's property known as Gakawa Kahurura/ Block 1/ Ichuga/1459.
- c. Costs of the suit.

**33.** These prayers are word for word with the prayers in the previous suit. An argument has been proffered that the issues raised in the current suit arose after the dismissal of the previous suit and they relate to the Appellant's attempt to sell the suit property without issuing fresh notices and without conducting a fresh valuation. It is argued by the Respondent that the notices relied on by the Appellant were issued in 2019 and the Appellant ought to have considered the payments made in the past 4 years.

**34.** In the court's decision in the previous suit, the process by the Appellant in its quest to realize security was validated. There was no order for issuance of fresh notices or

valuation. The issue of alleged subsequent payments (and I have not seen clear evidence of such payments) post the dismissal of the previous suit is in my view an issue of taking accounts.

**35.** On the material before court, whereas circumstances can change in a matter of this nature where a party who had approached the court earlier may need protection over future infractions by a lender and which may be similar to issues raised in a previous suit in which case such a party would not offend the doctrine of res judicata (**See Nyali Construction & Ele v Barclays Bank Limited [2015] eKLR**), the court must remain hawk eyed to stem abuse of the court process and to do substantive justice to both the lender and the borrower. Any subsequent suit must be subjected to a microscopic eye to test its bonafides and propriety in determining whether it offends the doctrine of res judicata.

**36.** As aptly put by Majanja J in ***E.T v Attorney General & another (2012) eKLR*** ;

***“...The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by***

*introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.”*

37. Useful guidance is also found in the decision in ***Omondi v National Bank of Kenya Limited and Others*** [2001] EA 177 the court held that:

*“Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.”*

38. To my mind, the window to regurgitate issues already determined by a court in factual scenarios as is now before court must of necessity be a very narrow one and one that arises from clearly demonstrated infractions by the lender. A cosmetic face lift of an earlier suit will not suffice. In this regard I share the court’s view in the case of ***Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported)*** where it was stated;

*“If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata ....”*

**39.** It would be a travesty of justice of monumental proportions to allow an acknowledged debtor to hang onto any straw available to evade the realization of a security after failing in his contractual obligations under the lending contract. Both the lender and the borrower have equal protection before the law.

**40.** On the material before court, am satisfied that the issues raised in Civil Suit 110 of 2019 and determined are the same issues between the same parties in Civil Suit No. E054 OF 2023 and the subsequent suit is thus res judicata. Am fortified in this finding by the fact that no new cause of action has arisen, the court made a determination on the validity of the statutory notice, valuation, notification of sale and advertisement.

**41.** I am fortified in this finding by the holding in **Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR** where in addressing the parameters to consider, the court stated:

***“Is this case res judicata? Unless it is abundantly clear, when res judicata is raised, a court of law should always***

*look at the decision claimed to have settled the issues in question and the entire pleadings-of the previous case and the instant case-to ascertain; 1) what issues were really determined in the previous case; and 2) whether they are the same in the subsequent case and were covered by the decision of the earlier case.”*

**42.** In the premises, the appeal herein has merit and is allowed. The ruling and orders of the trial court are hereby set aside and substituted thereof with an order allowing the preliminary objection dated 18/09/2023.

**43.** With the result Nanyuki Civil suit No E054 is struck out with costs to the Respondent.

**Dated signed and delivered virtually this 16<sup>th</sup> day of October 2025.**

**A.K. NDUNG’U**

**JUDGE**