Chebos & another v Purple Royal Auctioneers & 3 others (Commercial Case E745 of 2024) [2025] KEHC 15696 (KLR) (Commercial and Tax) (30 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15696 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E745 OF 2024

JWW MONG'ARE, J

OCTOBER 30, 2025

BETWEEN

SAMUEL KIPKURGAT CHEBOS ..... 1ST PLAINTIFF

BEATRICE CHEPLORIR KIPKURGAT ..... 2ND PLAINTIFF

AND

PURPLE ROYAL AUCTIONEERS ..... 1ST DEFENDANT

KCB BANK KENYA LIMITED ..... 2ND DEFENDANT

ROBERT MUGENDI NJAGI ..... 3RD DEFENDANT

HORIZON CARGO LIMITED ..... 4TH DEFENDANT

RULING

1. The Plaintiffs/Applicants have by an application filed before this Honourable Court on 2nd December 2024 brought under a Certificate of Urgency and filed pursuant to Sections 1A, 1B and 63 of the *Civil Procedure Act*, Order 40 Rule1,2,3, Order 51 Rule 1 of the Civil Procedure Rules and Section 68 of the *Land Registration Act* and they seek to restrain the Respondents from interfering in any way whatsoever with the property known as LR NO. 337/3236, located in Machakos County, hereinafter referred to as "the suit property" pending the hearing and determination of the suit herein.

2. The Plaintiffs allege that they were guarantors to a loan facility advanced to the 3rd and 4th Defendants, the principal borrower, through a legal charge registered in favour of the 2nd Defendant Bank for the sum of USD 150,000 and the said facility was secured through a legal charge over the suit property, registered in 2015.

3. In addition, the Plaintiff argue that the suit property is their matrimonial home and being in retirement is their sole abode and if the 2nd Defendant is allowed to proceed with exercising its statutory power of sale as it has commenced to do, the Plaintiffs will suffer irreparable loss incapable of being remedied by an award of damages.

4. The Application is opposed and the 2nd Defendant has filed a replying affidavit sworn on 5th February 2025 by Elijah Waweru. In its reply, the 2nd Defendant argues that the present application is bad in law and cannot be entertained by the court as a similar suit seeking primarily the same prayers and based on the same subject matter and between the same parties was heard and determined by a court of competent jurisdiction. The 2nd Defendant argues that the present suit and the application offends the doctrine of res judicata and should not be entertained as the same amounts to an abuse of the court. In addition, and in reply to the substance of the application, the Defendant has argued that the Plaintiffs have not met the tenets for which an order of injunction can be granted by this Honourable court.

Analysis And Determination

5. Having carefully considered the pleadings filed by the parties and the rival submissions to this application, I find that the 2nd Defendant has raised a preliminary issue that this court must determine as it has the potential to determine the matter altogether in the first instance since it touches on the jurisdiction of this court. It is therefore paramount that this court must answer the question as to whether the suit and the present application offend the doctrine of res judicata.

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

> "
>
> "7. Res judicata- 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.
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> Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.
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> Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any
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> provision as to right of appeal from the decision of that court.
>
> Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.
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> Explanation. — (4) Any matter which might and ought to have been made 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.
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> Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.
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> Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

7. The Court of Appeal in Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR espoused the principles of res judicata as follows ... "The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

   (a) The suit or issue was directly and substantially in issue in the former suit.

   (b) That former suit was between the same parties or parties under whom they or any of them claim.

   (c) Those parties were litigating under the same title.

   (d) The issue was heard and finally determined in the former suit.

   (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

8. Similarly, the Court of Appeal expounded the doctrine of res judicata in the Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR, where it 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 resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

9. Flowing from the above decisions of the Court of Appeal and the dictates of section 7 of the *Civil Procedure Act*, the court must satisfy itself that the case before it is not res judicata. From the pleadings I note that the Defendants argue that the 3rd and 4th Defendants moved the Magistrates Court in CMCCOMM NO. E727 OF 2021 and that the Plaintiffs were enjoined to the suit as Defendants and were indeed represented by counsel in the said proceedings.

10. I note from the pleadings that both parties agree that the suit in the Magistrate's court was dismissed for want of prosecution. I agree with the position taken by the Plaintiffs that a dismissal for want of prosecution is not a determination of the suit on merit. This position was upheld by the court in Munira v Attorney General (Constitutional Petition No. E007 of 2020)[202]KEHC 271 where the court stated "for the basic ingredients of the doctrine of res judicata to apply, three basic conditions must be satisfied. The party relying on it must show; -

    (a) That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated;

    (b) the matter in issue in the latter suit must have been directly and substantially in issue in the former suit;

    (c) that a court competent to try it had heard and finally decided the controversy between the parties."

11. I find therefore that the suit before this court is not res judicata as the previous suit before Magistrates Court was dismissed for want of prosecution and not determined on merit.

12. Having satisfied myself that the suit before this court is not res judicata I then turn to the substantive motion which is the Plaintiff's application for injunction. I do not think it is in dispute that for an order of injunction to issue, the Plaintiff is required to satisfy the conditions set out in the case of Giella v Cassman Brown & Co., Ltd. [1973] E.A. 358, firstly, the Applicant must start by demonstrating it has a prima facie case with a probability of success; that it will suffer irreparable injury which would not adequately be compensated by an award of damages and that; if the Court is in doubt, it should decide the application on the balance of convenience. These conditions are to be applied as separate, distinct and logical hurdles which the Plaintiff is expected to surmount sequentially which means that if it does not establish a prima facie case then irreparable injury and balance of convenience do not require consideration (see Nguruman Limited v Jan Bonde Nielsen& 2 others [2013] KECA 347 (KLR).

13. The parties also agree that what constitutes "a prima facie case" was set out by the Court of Appeal in Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] KECA 175 (KLR) as follows:-

> A prima facie case in a civil application includes but is not confined to a "genuine and arguable case." It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.

14. On prima facie case, I note that the Plaintiffs admit to offering their security to be charged to secure the borrowings to the 3rd and 4th Defendants herein. Both the Plaintiffs and the 3rd and 4th Defendants admit that the loan facility so advanced has not been paid that indeed the same is still due and outstanding. What the Plaintiffs object to is the attempt by the 2nd Defendant to proceed to exercise its statutory power of sale as against the suit premises while they claim to only have acted as guarantors and not the true beneficiaries of the loan that was advanced to the 3rd and 4th Defendants herein by the 2nd Defendant.

15. I have carefully considered the said arguments and I am in agreement that once a security is offered to be charged to secure a borrowing it becomes a commodity for sale. It is not enough for a party to claim that the property cannot be sold because it is either matrimonial property or it is of sentimental value to the party.

16. I have also considered the arguments that the Bank, the 2nd Defendant herein is proceeding to exercise its rights under the charge without having effected proper service to the Plaintiffs. I have noted the arguments by the 2nd Defendant and the material presented to demonstrate indeed the Plaintiffs have all along been made aware by the 2nd Defendant of the steps being taken towards recovering the funds advanced to the 3rd and 4th Defendants including service through registered mail to the Plaintiffs last know postal address. As the Plaintiffs have not disputed that the addresses therein belong to them, I find that the Plaintiffs received those Notices or it is presumed that the same were received (see Nyangilo Ochieng & another v Fanuel B. Ochieng & 2 others [1996] KECA 205 (KLR)]. I further note that indeed the Plaintiffs participated as parties in the two suits that were filed by the 3rd and 4th Defendants in respect of the suit premises and had legal representation. This to me is a demonstration that the Plaintiffs have all along been aware of the default status of the loan by the 2nd Defendant to the 3rd and 4th Defendants.

17. I find therefore that the Plaintiffs have not established a prima facie case as set out in Mrao Ltd (Supra) to warrant this court grant the temporary orders of injunction. Subsequently, the Plaintiffs having

failed to make out a prima facie case for an injunction and in line with the dicta in Nguruman(supra) their quest ends at this point.

18. The upshot is that the Plaintiffs' application dated 2nd December 2024 has no merit and the same is dismissed with costs to the 2nd Defendant to be borne by the Plaintiffs. The interim orders in place are hereby discharged forthwith. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 30TH DAY OF OCTOBER 2025

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J.W.W. MONGARE

JUDGE

In The Presence Of:-

Ms. Bosire for the Plaintiffs/Applicants.

N/A for the 1st Defendant.

Ms. Cheruiyot for 2nd Defendants/Respondents.

N/A for the 3rd and 4th Defendant.

Amos - Court Assistant