



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CORAM: F. MUGAMBI, J
CIVIL SUIT NO. 040 OF 2021

BETWEEN

CATHERINE NJOKI NJIRAINI
PLAINTIFF/APPLICANT

VERSUS

CO-OPERATIVE BANK OF KENYA LTD
DEFENDANT/RESPONDENT

RULING

Introduction and Background

1. Before me for determination is the Notice of Motion dated 2nd May 2025, filed by the plaintiff. The application seeks injunctive relief against the defendant Bank, restraining it from alienating, selling, disposing, leasing, or otherwise interfering with the following parcels of land: KAJIADO/KAPUTIEI-NORTH/12380, Land Title Number KAJIADO/KAPUTIEI-NORTH/7212, Land Title Number KAJIADO/KITENGELA/20308 and Land Title Number

KAJIADO/KITENGELA/21712 pending the hearing and determination of this suit.

2. The applicant's case is that a statutory notice under **section 90 of the Land Act, 2012** was issued by the Bank on 25th March 2025 but was only received by her on 17th April 2025. She contends that the notice was issued during the pendency of the suit, contrary to the doctrine of *lis pendens*, which bars parties from alienating property during the subsistence of litigation. It is her argument that unless injunctive relief is granted, the intended sale will defeat her proprietary interest and render the pending suit nugatory, as the properties may pass to third parties.
3. The Bank, through a replying affidavit sworn on 15th May 2025 by its Legal Manager, Duncan Matisero, raised a preliminary objection. It argues that the application is res judicata by dint of **section 7 of the Civil Procedure Act**, having been previously canvassed and determined in this Court's rulings delivered on 30th June 2023 and 26th July 2024 (on review). The Bank asserts that the Court is now *functus officio* on the issue of injunctive relief.

Analysis and Determination

4. The first issue is whether this Court has jurisdiction to entertain the present application, given the history of earlier applications and decisions already rendered.

Section 7 of the Civil Procedure Act provides:

“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 ... and has been heard and finally decided by such court.”

5. The doctrine of *res judicata* was exhaustively considered by the Supreme Court in **John Florence Maritime Services Ltd V Cabinet Secretary, Transport & Infrastructure & 3 Others, [2015] eKLR**, where the Court observed:

“The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court’s limited resources and timely termination of

cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of Judgments by reducing the possibility of inconsistency in Judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.”

6. I have revisited the earlier Rulings as pointed out by the Bank in this matter. In the Ruling of 30th June 2023, this Court found as follows at paragraphs 18-19:

“It is therefore my finding that the applicant has not established a prima facie case with a probability of success. As was held in Nguruman Limited v Jane Bonde Nielsen & 2 Others [2014] eKLR, once a prima facie case

is not established, the court need not consider irreparable harm or balance of convenience.”

7. Again, in the Ruling of 26th July 2024, while dismissing a review application, the Court observed at paragraphs 12-13:

“Promissory estoppel cannot be relied on to avoid a legal obligation. As an equitable remedy, promissory estoppel will not be enforced if it would result in unfairness or injustice.

This brings me back to the finding that the applicant does not deny the facilities were advanced by the bank and that there was a default. The restructuring of the facilities was entirely at the bank's discretion, considering the applicant's conduct. No evidence has been presented to show that the promise to dispose of the applicant's properties amounted to releasing the applicant from legal liability.”

8. The Court of Appeal in **Telkom Kenya Ltd V John Ochanda, [2014] eKLR** explained the doctrine of *functus officio* in these terms:

“Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon... once a court has pronounced itself on a matter, it lacks jurisdiction to revisit it, save where provided for under the law.”

9. Guided by the foregoing authorities and the Court’s own previous pronouncements, it is beyond peradventure that this Court has already rendered final and conclusive determinations on the issue of injunctive relief as between these very parties and in respect of the same subject matter. The present motion, though now styled under the cloak of *lis pendens*, is in substance no more than an attempt to re-litigate issues that have been fully canvassed and adjudicated upon.

10. I consider it appropriate to comment, albeit briefly, on the doctrine of *lis pendens*. The doctrine, rooted in

section 52 of the Indian Transfer of Property Act, 1882 and received into our law through common law principles, operates to restrain parties from transferring or otherwise dealing with property during the pendency of litigation where rights to that property are directly and specifically in issue. Its underlying rationale, as explained in **Mawji V US International University & Another, [1976] KLR 185**, is to preserve the subject matter of a suit and to prevent the ends of justice from being defeated by allowing a party to dispose of property in dispute before the Court has rendered its judgment.

11. Madan J.A. (as he then was) stated thus:

“It would be a poor and insufficient system of justice, unethical to contemplate, if a successful plaintiff is forced to litigate again and again to restore the status quo either by further proceedings in the same suit or by a fresh suit if the property in dispute is transferred to a third party. The Court therefore must protect the status quo ... the law does not allow litigant parties to give to others, pending the

litigation, rights to the property in dispute, so as to prejudice the opposite party.”

12. That said, a careful reading of ***Mawji (supra)*** makes it clear that the doctrine of *lis pendens* does not, in and of itself, operate as an automatic injunction to restrain a chargee from exercising its statutory power of sale. Its effect is to subject any transaction to the outcome of the litigation, but it does not extinguish or suspend lawful rights unless an applicant satisfies the established threshold for the grant of an interlocutory injunction under ***Order 40 of the Civil Procedure Rules***, as distilled in ***Giella V Cassman Brown & Co Ltd, [1973] EA 358.***

13. In ***Mawji***, the Court emphasized that while the doctrine preserves the subject matter of litigation, the equitable remedy of an injunction remains discretionary and must be grounded on proof of a *prima facie* case with a probability of success, irreparable harm not compensable by damages, and, where necessary, the balance of convenience. Having already pronounced myself in previous rulings that the applicant failed to establish a *prima facie* case, it

follows that reliance on *lis pendens* cannot, without more, revive a claim to injunctive relief.

- 14.** To finally dispose of the issue concerning the statutory notice issued under **section 90 of the Land Act, 2012**, the applicant's only complaint is that she received the notice belatedly. However, no credible evidence has been adduced to support this contention—neither proof of the alleged date of receipt nor any contemporaneous protest letter to the Bank. The allegation therefore remains bare and unsubstantiated.
- 15.** Moreover, the argument that the suit will be rendered nugatory if injunctive relief is denied cannot be sustained. The law expressly anticipates such situations: **section 99(4) of the Land Act** provides that any person aggrieved by an irregular or unlawful sale has a remedy in damages. As the Court held in **Andrew Muriuki Wanjohi V Equity Building Society Ltd & Another, [2006] eKLR**, once default is admitted, the equity of redemption is extinguished upon sale, and the chargor's recourse lies not in restraining the statutory sale indefinitely but in seeking damages where irregularity is demonstrated.

16. This principle reinforces the position that damages are an adequate remedy and that an injunction is not available in the absence of a *prima facie* case. It also follows that even if the doctrine of *lis pendens* were to apply, the applicant has not established a *prima facie* case or irreparable harm beyond damages. The doctrine cannot therefore be invoked to revive an application that is already foreclosed by prior rulings.

Disposition

17. In light of the foregoing analysis, I find that the application dated 2nd May 2025 is incompetent and an abuse of the Court process. The application is accordingly struck out with costs to the respondent Bank.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI
THIS 27TH DAY OF OCTOBER 2025.**

**F. MUGAMBI
JUDGE**