



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE No. 615 OF 2013

NATHAN MUTUA KOLILE..... PLAINTIFF

VERSUS

EQUITY BANK LIMITED.....1ST DEFENDANT

STEPHEN NZULA MULI T/A

GENERATION HIGHWAY ENTERPRISES.....2ND DEFENDANT

RULING

1. By Notice of Motion dated 20th February 2018, the plaintiff seeks the following orders:

1. Spent.

2. Spent.

3. That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a prohibition order to prohibit the 1st defendant/respondent either by itself, its servants and or agents from disposing off, transferring, alienating, developing or in whatsoever manner interfering with all that parcel of land known as LR No. Nakuru Municipality Block 21/66.

4. That this honourable court be pleased to grant any other relief it deems fit in the circumstances.

5. That costs of this application be provided for.

2. The application is supported by an affidavit sworn by the plaintiff on 20th February 2018. He deposed that as the registered proprietor of land known as **Nakuru Municipality Block 21/66** (the suit property) he charged it in favour of the 1st defendant to secure a loan facility of KShs 1,200,000 which the 1st defendant advanced to the 2nd defendant. He also executed a letter of guarantee and indemnity in favour of the 1st respondent for the same purpose. According to him, the 2nd defendant repaid the loan to the tune of KShs 3,297,138 thereby extinguishing his obligation as a guarantor. Despite this, the 1st defendant has issued a Notification of Sale in respect of the suit property. The sale is scheduled for 16th March 2018.

3. The 1st defendant responded to the application by filing Notice of Preliminary Objection dated 7th March 2018 in which it urged the court to strike out the application. The grounds of the preliminary objection are:

I. That the entire application is res judicata in view of the ruling delivered by the honourable court on 10th December 2010.

II. That the application is inept and untenable in law.

III. That the orders sought are incapable of being granted.

4. On his part, the 2nd defendant opposed the application through his replying affidavit sworn on 9th March 2018. He deposed that the application is res judicata and urged the court to strike it out. He also stated that in another case being **Nakuru ELC No. 24 of 2017, Dorcas Mumo Mutua –vs- Equity Bank, Nathan Mutua Kolile, Stephen Mula Nzuki & Valley Auctioneers**, a Notice of Motion dated 31st

January 2017 was filed by the plaintiff in the said case seeking similar orders as those sought in the present case. The court delivered a ruling in respect of the application on 9th November 2017. He annexed a copy of the plaint, the application, the ruling and other pleadings filed in the case. He further stated that the plaintiff in **ELC No. 24 of 2017** is the wife of the plaintiff in this case.

5. Both the application and the preliminary objection were heard together on 14th March 2018. Counsel for the plaintiff/applicant in submissions reiterated the applicant's case as pleaded in the application and supporting affidavit and urged the court to allow the application. Regarding the preliminary objection, counsel submitted that the ruling delivered herein on 10th December 2010 was premised on an incorrect set of facts as pleaded in the plaint at that time and that the current application is based on a plaint which has since been amended to introduce new facts. Regarding ELC No. 24 of 2017, counsel submitted that the plaintiff therein is totally different from the plaintiff herein. Accordingly, *res judicata* does not apply.

6. On their part, counsels for the defendants submitted that *res judicata* is applicable.

7. I will consider the preliminary objection first since if it is upheld, there will be no need to consider the merits of the application.

8. At the core of the issues presently before the court is whether or not *res judicata* is applicable. *Res judicata* is provided for under **section 7 of the Civil Procedure Act**. The said section 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, 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.

9. 'Suit' includes an application since its defined at **section 2** the Act to mean "**all civil proceedings commenced in any manner prescribed**".

10. For *res judicata* to apply, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit.

11. I do not need to go into any lengthy explanation on the nuts and bolts of *res judicata*. The Court of Appeal explained its essence in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** as follows:

Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -

"...where a given matter becomes the subject of litigation in and 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 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 cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, 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 ..."

.... Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

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 unravelling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature.

12. With the foregoing explanation in mind, it is important to revisit the record in this matter. Such a perusal shows that on 16th June 2009, alongside the plaint, the plaintiff filed Chamber Summons dated 7th May 2009 in which he sought the following orders:

1. This application be heard ex parte in the first instance on the ground that the defendants/respondents and/or their servants, agents or otherwise, intend unless restrained by this honourable court, to sell the property known as Nakuru Municipality Block 21/66 or otherwise as threatened or at any other time thereafter to dispose of, alienate, transfer and/or otherwise interfere with the plaintiff/applicant interest in the said property, pending the hearing and determination of this suit.

2. Pending the hearing and determination of this suit, the defendants/respondents by themselves, their officers, servants, agents or otherwise howsoever be restrained from selling the property known as Nakuru Municipality Block 21/66 or otherwise

howsoever as threatened or at any other time thereafter and from disposing of, alienating, transferring and/or otherwise howsoever interfering with the plaintiff/applicant interest in the said property.

3. *This injunction application be heard inter partes on such date and at such time as this honourable court may direct.*

4. *The costs of this application be awarded to the plaintiff/applicant.*

13. The application was heard on 28th June 2010 before Ouko J. (as he then was) who dismissed it in a ruling dated 10th December 2010. Among others, the judge stated as follows:

The only ground advanced by the applicant in seeking to restrain the 1st respondent from selling the suit property is that he is unaware of any loan secured by the title to the suit property.

From the uncontroverted averments by both respondents, that the applicant executed charge documents as well as letter of guarantee on 19th September 2006 in respect of a loan advanced to the 2nd respondent, it can only be concluded that the applicant is seeking equity with unclean hands. He cannot claim that he gave the 2nd respondent the title to the suit land for safe custody and only suspected that the latter may have used it to obtain a loan when he had himself signed to guarantee that loan. The applicant is guilty of material non-disclosure that disentitles him to any equitable relief.

In view of this, I see no prima facie case here and dismiss the application with costs to the respondents.

14. At the time this suit was filed and the application heard, the matter was in the High Court and had the number **HCCC No. 172 of 2009**. Subsequently, the suit was transferred to this court and given the new number **ELC Case No. 615 of 2013**.

15. It is clear to me that the question of whether or not an interlocutory injunction could issue against the defendants was heard and determined conclusively on 10th December 2010. It matters not that the plaintiff has since done an overhaul to his case by extensively amending the plaint. Explanation (4) of **section 7** of the **Civil Procedure Act** addresses that kind of a situation. It states:

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.

16. Whatever new matters that are pleaded in the amended plaint are matters that the plaintiff might and ought to have pleaded from the onset. If litigants were to be allowed to mutate their cases by amendment then reintroduce issues that have been determined, the very mischief that *res judicata* aims at stopping would reign.

17. There is even more reason why *res judicata* must be brought in to restore sanity in this litigation. As correctly pointed out by the 2nd defendant, this court delivered a ruling on 9th November 2017 in **Nakuru ELC Case No. 24 of 2017** reported as **Dorcas Mumo Mutua v Equity Bank Limited & 3 others [2017] eKLR**. Suffice it to quote part of the ruling:

16. I have already discussed the nature of the proceedings in Nakuru HCC No. 172 of 2009 and Nakuru CMCC No. 1025 of 2011, the parties and the injunctive relief sought therein. I have similarly noted that in the ruling dated 10th December 2010 the High Court in Nakuru HCC No. 172 of 2009 considered whether or not an injunction should issue to restrain the 1st defendant from selling the suit property herein. The court dismissed the application. I have also found that the plaintiff herein was litigating under the plaintiff in Nakuru HCC No. 172 of 2009.

17. A perusal of the Letter of Guarantee shows that it was executed on 19th September 2006 while the charge document was executed on 4th October 2006, both dates occurring before the filing of Nakuru HCC No. 172 of 2009. Thus the issue of spousal consent could and ought therefore to have been raised in the said matter...

For the foregoing reasons, I find and hold that Notice of Motion dated 31st January 2017 is res judicata. ...

23. Further, in view of my finding that that the issue of whether or not an injunction should issue to restrain the defendants from selling the suit property herein is sub judice in Nakuru HCC No. 172 of 2009 and Nakuru CMCC No. 1025 of 2011, both of which were filed before this suit, I hereby stay this suit pending hearing and determination of Nakuru HCC No. 172 of 2009 and Nakuru CMCC No. 1025 of 2011.

18. Clearly, the plaintiff herein and his wife have been engaging the defendants and courts in a plethora of litigation over the same issue. That must stop. As can be seen above, this court had to stay **Nakuru ELC Case No. 24 of 2017** on 9th November 2017 pending hearing and determination of this particular case and **Nakuru CMCC No. 1025 of 2011**. On that occasion, the court also declined to grant an injunction to stop an auction sale of the suit property. Barely three months later, the plaintiff filed the present application. I do not think that was a coincidence.

19. Having filed this suit on 16th June 2009 and subsequently amending the plaint on 2nd December 2013, the plaintiff must face his demons and set the matter down for hearing. Upon delivery of this ruling, I will give directions to ensure progress of the main suit.

20. In view of the foregoing discourse, I have no doubt in my mind that Notice of Motion dated 20th February 2018 is not only *res judicata*,

it is also an abuse of the court's process. I hereby strike it out with costs to the defendants.

21. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 16th day of March 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Njuguna for the plaintiff/applicant

Mr. Ikua for the 1st defendant/respondent

Mr. Karanja for the 2nd defendant/respondent

Court Assistants: Gichaba & Lotkomoi