



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC CASE NO. 40 OF 2018**

**SUSAN KIRIGO KINYUA.....PLAINTIFF/APPLICANT**

**VERSUS**

**I & M BANK LTD.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**LEAKEY AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. By a plaint dated **13<sup>th</sup> August, 2018** and filed on the same day, Susan Kirigo Kinyua, hereinafter referred to as the applicant, filed the suit herein

to *inter alia* permanently restrain the respondents by themselves, their agents, servants or anybody acting under their instructions from advertising for sale, alienating, disposing titles No. **Thegence /Karia/1387** and **Nyeri/Municipality Block III/ 70** (the suit properties).

2. The plaintiff who is a spouse of the registered proprietor of the suit properties, gave consent for the properties to be charged in favour of the 1<sup>st</sup> respondent to secure some financial accommodation extended to a company, D.K Jolly Stores Ltd, which is owned by her husband.

3. Explaining that the suit properties are comprised of commercial rental stores (Nyeri/Municipality Block III/70) and commercial shops and residential flats (Thegence/Karia/1387 with tenants), the plaintiff blames the respondents for having advertised the suit property for sale by public auction without issuing her or the tenants with a notice as required under the Land Act, 2012.

4. Simultaneously with the plaint, the applicant brought the notice of motion of even date seeking a temporary injunction to restrain the respondents by themselves, their employees, servants and/or agents, assigns and/or any other person whatsoever acting on their behalf and/or mandate and/or instructions from proceeding with the sale by public auction of the suit properties on 15<sup>th</sup> August, 2018 or any other day at all pending the hearing and determination of the application and the suit.

5. In alternative to the prayer for a temporary injunction pending the hearing and determination of the suit, the applicant prays for suspension and/or postponement of sale of the suit properties for a period of 3 months or for such other period as the court may determine.

6. The application is premised on the grounds on its face which can be summarized as follows: -

(i) That the respondents did not comply with the requisite provisions of the law before trying to realize the securities. In particular, the respondents are said to have failed to comply with the provisions of **Sections 96** and **97** of the Land Act, 2012.

(ii) The realization process initiated by the respondents was a nullity in law;

(iii) That unless the orders sought are granted the applicant will suffer irreparable loss; and

(iv) That it is in the wide interest of justice that the application be allowed.

7. The application is supported by the affidavits of the applicant, Susan Kirigo Kinyua, sworn on **13th August, 2018** in which the averments on the face of the application are reiterated.

8. The application is opposed through the replying affidavit of Ernest Wanjohi, a Debt Recovery Officer sworn on **28<sup>th</sup> September 2018**, working with the 1<sup>st</sup> respondent on the grounds that it is defective, incompetent, bad in law and an abuse of the court process. In that regard, it is pointed out that the issues raised in the suit and application were raised and determined in Nyeri ELC No.192 of 2017-D.K. Jolly stores vs. I &M Bank Ltd & Another; that the applicant was served with the requisite statutory notices; that the issue of service of notices on the applicant and the tenants was canvassed in the previous application; that some of the orders sought have been overtaken by events; auction sale was conducted before the orders issued in this application were served on the respondents.

9. The applicant is faulted for having failed to disclose to the court about the previous proceedings over the suit properties.

10. Arguing that the applicant has not made up a case for being granted the orders sought, the respondents urge the court to dismiss the application with costs to them.

11. In a rejoinder, the applicant filed a further affidavit through which she acknowledges that there were previous proceedings concerning the suit property and the company run by her husband, D.K Jolly Stores Ltd, but denies having been guilty of non-disclosure of material facts concerning the previous proceedings.

12. Arguing that the issues raised in the instant application are distinct from those raised in the previous application, she stated that the parties in the two suits are distinct entities. The applicant reiterated her contention that neither the other tenants nor she was served with the requisite statutory notices. She also maintained that the suit properties were not sold on 15<sup>th</sup> August, 2018.

13. In further support of the application, the applicant deposed that she is aware that her husband, Duncan Kinyua Macharia, has made arrangements to settle all outstanding liabilities with the 1<sup>st</sup> respondent. She accused the 1<sup>st</sup> respondent of failing to advise her husband on the extent of his indebtedness to facilitate a loan buy off by another financial institution.

14. When the application came up for hearing, advocates for the parties reiterated the averments contained in the affidavits sworn in support and opposition to the application.

15. From the pleadings filed in this suit I find the issues for determination to be:-

- (i) Whether the application herein is res judicata the application filed in Nyeri ELC 192 of 2017;
- (ii) Subject to the outcome of (i) above, whether the applicant has made up a case for being granted the orders sought;
- (iii) What orders should the court make.

16. With regard to the first issue, it is acknowledged that a similar application was filed and prosecuted vide Nyeri ELC No. 192 of 2017 between the company owned by the applicant's husband and the respondents in the instant application but contended that the instant application is not res judicata the one filed in the previous suit because the applicant in the instant suit and the former suit are distinct entities.

17. Maintaining that the instant application is res judicata the one filed in the former suit, counsel for the respondent pointed out that the issues raised in the current application were raised in the former.

18. Having read and considered the ruling in the former application, particularly Paragraph 35 thereof, I agree with counsel for the respondent that the issue as to whether the applicant herein was served with the notices issuable under the Land Act before the respondent attempted to sale the suit properties was raised and a determination made in respect thereof in the former proceedings. In that regard, see paragraph 35 of the ruling delivered in the former proceedings which is as follows: -

**“35. On whether the 40 day notice was served on the deponent’s spouse and the tenants in possession of the suit property, there being no averment in the pleading to the effect that the deponent’s spouse and the tenants in the suit property were not served, I find that contention to be a departure from the applicant’s pleadings and as such incapable of being the basis of issuance of any orders against the 1<sup>st</sup> respondent as it was not accorded an opportunity to respond to that issue through its pleadings.”**

19. Although no conclusive determination was made in the former proceedings on the issue of whether the applicant was served with the notices, clearly service to the applicant and the other tenants in the suit premises was one of the matters that was taken up in the former proceedings.

20. As pointed out above, the issue as to whether the applicant was served with the requisite notices was one of the issue framed for consideration, although no conclusive finding concerning whether or not the applicant and the other tenants were served, the court was nevertheless satisfied that the respondents had made a case for being granted the orders sought. Can the applicant, who in these proceedings is represented by the same advocate who represented her husband in the former proceedings, be heard to say that she was not aware of the former proceedings? My take is that she cannot as if she bothered to know she would have known.

21. In my view, this a proper case for application of the principle espoused in the case of **Omondi v National Bank of Kenya Limited and Others [2001] EA 177** thus:-

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

22. The upshot of the foregoing is that the issues raised in this suit are res judicata those raised in the previous proceedings.

23. Having determined that the application is res judicata the former, I need not consider the other issues framed for the court’s consideration.

24. The upshot of the foregoing is that the application has no merit and is hereby dismissed with costs to the respondents.

**Orders accordingly.**

**Dated, Signed and Delivered in open court at Nyeri this 20th day of December, 2018.**

**L N WAITHAKA**

**JUDGE**

Coram:

Ms Macharia h/b for plaintiff/applicant

Mr. Kimani for defendants

Court assistant - Esther