



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 313 OF 2018

SHARON EVA ALIKO.....PLAINTIFF

VERSUS

NICHOLAS KIHUMBA MAINA.....1ST DEFENDANT

CONSOLIDATED BANK LTD.....2ND DEFENDANT

CRATER VIEW AUCTIONEERS.....3RD DEFENDANT

RULING

1. This ruling is in respect of Notice of Motion dated 27th November 2018. The following orders are sought in the application:

1. Spent.

2. Spent.

3. That pending the hearing and determination of the suit herein the honourable court be pleased to issue a temporary order of injunction restraining the defendants/respondents from advertising for sale by public auction, selling by public auction, disposing off, transferring, and/or dealing in any manner adverse to the plaintiff/applicant with all that parcel of land known as Nakuru Municipality Block 16/229.

4. That the honourable court be pleased to issue any direction to preserve the property known as Nakuru Municipality Block 16/229.

5. Costs of the application be provided for.

2. The application is supported by an affidavit sworn by the plaintiff. The plaintiff deposed that she is the 1st defendant's wife having been married to him on 1st December 2001 at Nyahururu Catholic Church. She added that although the 1st defendant is the registered owner of the parcel of land known as Nakuru Municipality Block 6/229 (the suit property) the said property was acquired jointly with the 1st defendant and is thus matrimonial property. In the year 2014, the 1st defendant charged the suit property in favour of the 2nd defendant to secure a financial accommodation of KShs 25,000,000. The charge was registered without any spousal consent being obtained from the plaintiff. The 2nd defendant has advertised the property for sale by public auction on 4th December 2018 at 12 noon in exercise of statutory power of sale. She urged the court to find that she is the 1st defendant's wife and that the purported exercise of power of sale is illegal. She also deposed that the 1st defendant filed **ELC No. 263 of 2015 (Nakuru) Nicholas Maina Kihumba v Consolidated Bank of Kenya Limited & Margaret Anindo t/a Igaare Auctioneers** against the 2nd defendant seeking to restrain the 2nd defendant from exercising statutory power of sale and that a consent dated 3rd August 2017 was recorded in the matter thus settling the suit.

3. The 2nd and 3rd defendants opposed the application through a replying affidavit sworn by Richard G. Mwaura, the 2nd defendant's Branch Manager at its Nakuru Branch. He deposed that the 1st defendant defaulted in his loan repayment obligations and was in arrears of KShs.42, 446, 552.24 as at 30th November 2018. As such, the 2nd defendant's right to exercise statutory power of sale had accrued. He added that in view of ELC 263 of 2015 and the orders made therein, this suit is res judicata.

4. The 1st defendant had not filed any response by the time the application was heard. Nevertheless, the court ordered that hearing proceeds in view of the impending auction sale.

5. Counsel for the applicant submitted that the suit property was acquired by the joint efforts of the plaintiff and 1st defendant and that spousal consent was needed prior to the suit property being charged. That the plaintiff therefore had an overriding interest. Regarding ELC 263 of 2015, counsel submitted that the said suit does not make this suit res judicata since parties in this suit are not the same as the ones in the said suit. The prayers in the said suit are not the same as those in this suit. The prayers in the earlier suit concerned breach of contract while those in the present suit concern declarations concerning plaintiff's rights as a spouse. Counsel therefore urged the court to allow the application.

6. Counsel for the 2nd and 3rd respondents submitted that spousal consent and affidavit of marriage were obtained prior to the property being charged and that legally, there was no need for certificate of marriage at the date the suit property was charged. Counsel further argued that the matter is res judicata since the plaintiff in ELC 263 of 2015 is now 1st defendant herein while the 2nd defendant herein was 1st defendant in ELC 263 of 2015. The other party in ELC 263 of 2015 was an auctioneer. Counsel added that in this suit, it is the 1st defendant litigating in disguise. He therefore urged the court to dismiss the application.

7. I will consider the plea of res judicata first. Res judicata has a statutory foundation deeply rooted in **Section 7 of the Civil Procedure Act** which 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.

8. Consequently, 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 determined by a competent court and the issue is raised once again in the new suit.

9. The Court of Appeal had the following to say as regards the provisions of **Section 7 of the Civil Procedure Act in John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**:

.... the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally...

10. There is no dispute that there was another suit being **ELC No. 263 of 2015 (Nakuru) Nicholas Maina Kihumba v Consolidated Bank of Kenya Limited & Margaret Anindo t/a Igaare Auctioneers** and that the suit was concluded through consent dated 3rd August 2017. The plaintiff herself exhibited the consent.

11. I note that the parties to ELC 263 of 2015 and parties to this case are same save for the change in auctioneers and also save for the fact that the plaintiff herein was not a party to ELC 263 of 2015. The change in auctioneers is understandable since the auctioneer is involved in the matter as an agent of the bank. The bank is at liberty to instruct a different auctioneer in respect to any particular incidence of exercise of chargee's statutory power of sale.

12. What about the presence of the plaintiff herein in the matter? Does that make the proceedings herein to be between different parties from those in ELC 263 of 2015? **Explanation 6 of Section 7 of the Civil Procedure Act** states:

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.

13. The plaintiff maintains that she is the spouse of the 1st defendant. If that be the case, she falls squarely under the explanation No. 6 above. To the extent that she seeks to stop exercise of statutory power of sale, she was definitely interested in the litigation in ELC 263 of 2015. Whatever the first defendant herein claimed in ELC 263 of 2015 was claimed for himself and all persons interested in such right, including the plaintiff herein. I therefore find that parties to this case and those to ELC 263 of 2015 are the same.

14. What about reliefs sought? The consent dated 3rd August 2017 and filed in ELC 263 of 2015 shows that the said matter concerned whether the defendant bank could exercise chargee's remedies including power of sale. Those are the core issues raised herein. Even though the aspect of spousal consent has been introduced in this suit, I find that that is an issue that ought to have been included in the litigation in ELC 263 of 2015. In that regard, I need not say more than reproduce explanation 4 of **Section 7 of the Civil Procedure Act** which 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.

15. In view of the foregoing, I find that this suit is res judicata. It is hereby struck out with costs to the 2nd and 3rd defendants.

Dated, signed and delivered in open court at Nakuru this 4th day of December 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Chege for the Plaintiff/Applicant

1st Defendant/respondent present in person

Mr Ojo for 2nd and 3rd Defendants/respondents

Court Assistants: Gichaba & Lotkomoi