



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 139 OF 2014

DAPHINE BALINDA KETER.....PLAINTIFF

VERSUS

ECO BANK KENYA LIMITED.....DEFENDANT

RULING

The plaintiff brings this application for orders that the court does find that the consent dated 13.5.2014 did not allow the defendant to apply compound interest on the balance on the loan account and that the consent does not override the applicable statute on the rate of interest legally payable on the loan balance if any and whether the interest rate applied on the loan account since the enactment of the statute on interest rate is legal. The plaintiff further prays that this court determines whether or not the court order is enforceable against the plaintiff in Environment and Land Court Case No. 240 of 2013 to the extent that it was meant to bind parties and the borrower who were not party to this case and did not endorse it.

The application is supported by the affidavits of Daphine Balinda Keter and Tony John Kiplimo Keter and grounds whose gist is that the borrower has paid more than Kshs.24,000,000 after the consent was entered into and that the borrower and the charger were not parties to the consent dated 13.5.2014 and that the defendant has applied compound interest on the loan account contrary to the consent order. Further that the defendant has refused to adjust the interest rate in conformity with the current legal regime. The plaintiff contends that the auction is scheduled to take place on the 9th floor of a private office which is inaccessible to members of the public. The auctioneer has further restricted bids by introducing a requirement that bid forms be acquired at Kshs.1,000,000/= payable prior to the sale date. No current valuation of the property has been undertaken as envisaged by the law. The defendant is clogging the equity of redemption. The defendant has contrary to the law recovered more than 3 times the sum advanced.

Tony John Kiplimo Keter states that he is the owner of land reference 9939/32,9939/34 and 9939/36 and that he has learned from the plaintiff that the properties are scheduled for sale on 30.11.2016 as per advert appearing in the Daily Newspaper of 7.11.2016 but he has never been served with a redemption notice and that he has not been issued with any notification of sale. That he has not been notified by the defendant of any default of the loan repayment by the borrower.

According to Tony Keter the intended sale is illegal as no redemption notice has been issued and that no notice of default of loan repayment has been issued to him. Moreover, that a current valuation of the property has not been undertaken and yet the sale is scheduled to take place in a private office on the 9th floor of a building which is inaccessible to the public. That the defendant is clogging his equity of redemption by applying compound interest on the loan while at the same time applying a rate of interest higher than the statutory rate currently allowed. He has tried to find out why the property is due for sale only to learn that there was a consent entered between the plaintiff herein and the defendant without his

involvement. That the borrower Kwaliti Food Africa Limited did not endorse the consent order nor is it a party herein.

Daphine Balinda Keter states Tony John Kiplimo Keter is the registered owner of land reference 9399/32,9399/34 and 9399/36. That her matrimonial home is situated within the aforesaid parcels of land. Her husband charged the said parcels of land to secure a loan advanced to Kwaliti Foods Africa Limited. That the defendant has advertised the matrimonial properties for sale on the Daily Nation Newspaper of 7.11.2016. That the intended sale is illegal owing to the fact that no notification of sale has been issued to the charger and that no notice of default has been issued to the chargor. That the intended sale is illegal as no notice of redemption has been issued to the charger. Moreover that there was a consent entered into on 13th May 2014 between her and the defendant whereby it was agreed that the borrower Kwaliti Foods Africa Limited was to pay Kshs.23,000,000 to the defendant. That after the consent, the borrower has paid in excess of Kshs. 24,000,000 to the defendant. That it is her considered view that the consent is illegal and unenforceable against the chargor and the borrower as the consent was not executed between the borrower, the chargor and the defendant. That for the consent to be binding and enforceable against the chargor and the borrower and the chargor they ought to have endorsed it and/or been privy to it. That the borrower and the chargor did not endorse the consent order. The consent order fixed the rate of interest payable at Kshs.23% per centum per annum which is now above the statutorily allowed rate. That the rate of interest which was to be applied on the loan account as per the consent was a simple one but the defendant has been applying compound interest on the loan.

The defendant has refused to adjust the interest payable on the loan to the current legally permissible rate and therefore the rate of interest currently applied on the loan is illegal. That the consent dated 13.5.2014 ought to be amended to comply with the current laws in terms of the rate of interest legally payable in Kenya. That the consent order ought to be reviewed to comply with the law on interest rates. That the compound interest applied on the loan ought to be removed or deducted from the alleged loan balance.

The defendant has filed a preliminary objection that the plaintiff's application dated 28.11.2016 is *res-judicata* as the parties herein recorded a consent judgment on 13.5.2014 that determined the suit in finality and that the consent remains binding upon all the parties and the application remains an abuse of the process of court. The defendant submits that the application is res-judicata as the suit was compromised by the consent order and that the plaintiff seeks to vary the consent order through this application and the plaintiffs intend to relitigate using the Tony Keter, plaintiff in Environment and Land Court No. 240 of 2013 who was a party to the consent.

Mr. Momanyi on his part argues that the applicant seeks the interpretation of the consent executed on 13.5.2015 between the applicant and the defendant. The applicant is neither the borrower nor the guarantor of the loan given by the defendant and that she is not the registered owner of the property. Mr. Momanyi argues further that the defendant has not demonstrated that the issues raised in this matter have arisen and been dealt with previously. The issue of compound interest is raised and also the issue of the defendant breaching the loan in the process of exercising its statutory power of sale.

I have heard both parties and do find that on 14.5.2014, a consent order was filed in court and adopted in the following terms:

a. Kwaliti Foods Africa Limited (the borrower) shall pay to Eco Bank Kenya limited (the defendant) a sum of Kenya Shillings Twenty Three Million in full and settlement of the debt. (Agreed sum).

b. The borrower shall pay the defendant's advocates legal charges and the Auctioneer's charges.

c. The agreed sum of Kenya Shillings Twenty Three Million (Kshs.23,000,000/=) payable under clause (a) above will be paid by the borrower to the defendant as follows:

i. Kshs.700,000/= per month for the next 6 months with effect from 5th June, 2014 to November, 2014 and which installments shall be payable on or before the 5th day of each succeeding month.

ii. Kshs.1 Million per month with effect from 5th December, 2014 until full payment and which installments shall be payable on or before 5th day of each succeeding month.

iii. The said agreed sum of Kshs. 23,000,000/= shall continue accrue interest at the rate of 23% per annum with effect from the date of recording of this consent order until full payment and which interest shall be paid by the borrower to the defendant alongside the payments delineated in clause (c) above.

iv. In default of payments of any one (1) installment the terms of the consent order herein shall automatically lapse and the entire outstanding sum as at the date of recording of the consent order together with accrued and accruing interest less any payments made shall become due and payable and the defendant bank shall be at liberty to exercise its statutory power of sale and sell the charged properties. The defendant shall not proceed with the exercise of the statutory power of sale over parcels number 9399/32, 9399/34 and 9399/36 so long as the plaintiff honours the terms of the consent herein.

v. The consent order herein shall apply and be adopted in Hccc ELC No. 240 of 2013.

In a nutshell, the suit herein is related to Eldoret ELC No. 240 of 2013 between Tony Keter and Eco Bank Ltd formerly High Court Civil Case NO 221 OF 2011. This suit was commenced and compromised by Daphine Keter the wife of who Tony Keter, the plaintiff in suit no 240 of 2013. Kwality Food Ltd, the borrower of the loan is not a party to the suits.

Mr. Tony John Kiplimo Keter states that he is not party to the consent entered into between his wife and the bank which bound him and the borrower, however, this court finds that he has made no attempt to set aside the consent and he is not sure whether the consent binds him as per paragraph 8 of the affidavit sworn on 19.12.2016.

Mr. Momanyi signed the consent on his behalf and appears to be acting on his behalf considering the supporting affidavit filed and dated 28/11/2016 and also the affidavit in reply to the notice of the preliminary objection, hence he cannot be heard to argue that he was not party to the consent. Even if he was not a party, he has acquiesced in the said consent and has benefited from the same as his properties were rescued from the auctioneers hammer due to the consent and therefore he is bound unless he applies to set it aside. Suffice is to say that the consent order has been partially honored and it is not indicated why the parties in the two suits have made an about-turn on the consent.

The doctrine of *res judicata* in Kenyan law is embodied or anchored on Section 7 of the Civil Procedure Act. It is in these terms:-

“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.” 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.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any 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.

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.

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.

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.

From the above, 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

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.

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.....”

In **Kamunye & others v Pioneer General Assurance Society Ltd [1971] E.A. 263**. 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 unraveling uncontrollably. In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence.

I do find that the defendant’s preliminary objection is well founded as the parties in the suit and application are the same and that the plaintiffs in the two suits being husband and wife are litigating over the same interest as the dispute is in respect of their matrimonial properties according to their pleadings and therefore it appears that they are litigating or claiming for the same interest which interest **fits the explanation no 6 of section 7 of the Civil Procedure Act Cap 21 Laws of Kenya of res judicata**, and having filed separate suits and having compromised both suits in Eldoret Environment and Land Court case no 139 OF 2014 the issues raised in the application herein are res judicata as they are the same and

have determined by consent to finality which consent has not been set aside. I therefore, uphold the preliminary objection and dismiss the application with costs.

DATED AND DELIVERED AT ELDORET ON 10TH DAY OF MARCH, 2017.

ANTONY OMBWAYO

JUDGE