



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT AT MIGORI
ELC CASE NO. 117 OF 2017
(FORMERLY KISII ELC CASE NO. 487 OF 2015)

RUTH OCHOLAPLAINTIFF/RESPONDENT

VERSUS

NATIONAL BANK OF KENYA LTD1st DEFENDANT/APPLICANT

KEYSIAN AUCTIONEERS2nd DEFENDANT/APPLICANT

RULING

1. The instant application by way of Notice of Motion dated 13/10/2015 and filed on 9/12/2015, was brought under Certificate of urgency pursuant to Order 40 Rule 7, Order 2 Rule 15 and Order 51 Rule 12 of the Civil Procedure Rules and Sections 7, 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya and all other enabling provisions of the Law. The Applicants/Defendants namely National Bank of Kenya Ltd and Keysian Auctioneers are seeking against the Plaintiff / Respondent, the following orders;

“(a). Spent

(b). THAT the court be pleased to discharge and set aside the ex-parte orders issued on 9/09/2015.

(c). THAT the Plaintiff’s suit herein be dismissed for being Res Judicata.

(d). THAT the cost of this Application and the entire suit be borne by the Plaintiff.”

2. The Applicants / Defendants were initially represented by Ongweny & Moibi Advocates. Currently Meritad Law Africa(LLP) Advocates represent them. The Plaintiff /Respondent is represented by H. Obach & Partners Advocates.

3. Essentially, the application is based on grounds (a) to (K) on the face of it. These grounds include:-

(a).THAT on 8/09/2015, the 1st Defendant was served with the plaint filed in the High Court of Kenya at HomaBay together with an Application and Order to attend Court on 9/09/2015.

(b).THAT the Order did not state where the Application for injunction was to be heard.

(c).....

(d).....

(e).THAT the hearing proceeded in the absence of the Defendants' Advocates and ex-parte,interlocutory orders were issued restraining the Defendants from dealing with the Plaintiff's L. R. NO. KANYADA/KANYABALA /1430 charged in favour of the 1st Defendant pending the hearing and determination of the suit.

(f).THAT the Plaintiff has previously filed similar suits or has been involved in similar suits being KISUMU HCCC NO. 224 of 1997 instituted by the 1st Defendant and KISII CMCC NO. 139 of 2010 instituted by the Plaintiff.

(g)THAT the ex-parte orders issued by the Court on 9/09/2015 were obtained by the Plaintiff by not disclosing the existence of KISUMU HCCC NO. 224 of 1997 and KISS CMCC NO. 139 of 2010 to the Court whilst this is a material issue.

4. The application is supported by an affidavit sworn on 13/10/2016 by Paul K. Chelanga, the Acting Manager recovery Unit of the 1st Defendant together with annexed documents namely;

(a).Charge dated 11/7/19991 marked PKCI

(b.)Amended Plaint marked PKC 2

c).Proceedings in Ksm HCC No. 244 of 1997 marked PKC3

(d).Notice of Public Auction marked PKC4

(e).Order of Injunction granted in Kisii CMCC 139 /2010 marked PKC5

(f)Ruling in Kisii CMCC 139/2010 marked PKC6

(g).Instructions to 2nd Defendant by 1st Defendant marked PKC7

(h).Statutory Notice, Certificate of posting of registered articles, notification of sale, redemption notice, payment receipts and Daily Nation advert of Monday 7/8/15 marked PKC 8

5. In a replying affidavit of 17 paragraphs sworn on 18/1/2016, the Plaintiff / Respondent claims that she is the registered owner of the suit. She opposes the Notice of Motion. She further claims that she lawfully and procedurally obtained ex-parte orders restraining the Defendants / Applicants and that they will not be prejudice by the hearing and determination of the suit, among others.

6. I note that on 14/3/16, Mutungi J sitting at Kisii ELC directed that the Notice of Motion be argued by written submission; See **Order 51 Rule 16 Civil Procedure Rules, 2010 and Practice direction No. 33 (a) of ELC Practice Directions dated 25/7/14.** The parties filed submissions accordingly.

7. By written submissions dated 23/5/2016, the Defendants'/Applicants' counsel argued on the facts of the case, issues for determination and urged this court to allow the orders sought in the application. He relied on **Article 50 of the Constitution of Kenya, 2010** that provides for right to fair hearing and **Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya (CPA)** in respect of the doctrine of res-judicata. Furthermore, the counsel relied on case law hereunder;

a) **TransAfrica Assurance Co. Ltd-Vs-Lincoln Mujuni HC of Uganda Misc No. 789 of 2014 at Kampala (Uganda)** regarding the right of audience before court by a party in the interest of justice and in order not to leave room for multiple disputes.

b) **Patel;-vs-E.A Cargo Handling Service Ltd (1974) EA 75, 76 BC** as quoted in the case of

Maina-Vs-Mugira (1983) eKLR where it was held that the main concern of the court is to do justice to the parties with unfettered discretion given to it by the rules.

c) **Uhuru Highway Development Limited-Vs-Central Bank of Kenya and 2 others (1996) eKLR at page 6** on four pre requisites for a matter to be deemed res judicata. These prerequisites are;

- i. A previous suit in which the same matter was in issue.
- ii. The parties are the same or are litigating under the same title.
- iii. A competent court heard the matter in issue and determined it and
- iv. The issue has been raised once again in a fresh suit.

d) **Edwin Thuo -Vs-Attorney General and Another (2010)eKLR** where it was held that courts must always be vigilant to guard against litigants evading the doctrine of res judicata.

e) **Mwangi Njangu-Vs-Meshack Mbogo Wambugu and Esther Mumbi HCCC No. 2340 of 1991 (Unreported)** on the re litigating and the use of res judicata doctrine

8. The Plaintiff / Respondent's counsel in submissions, gave a summary of facts of the case, issues for determination, analysis of the issues and asked the court to find judgment in favour of the plaintiff/applicant. He cited **Article 22 of the Constitution of Kenya, 2010** on the enforcement of the Bill of Rights, **Order 12 Civil Procedure Rules, 2010** that provides for the procedure in hearing and consequence of non-attendance and sections 1A and 7 of the Civil Procedure Act Cap 21. He relied on legal authorities namely;

a) Maina-Vs-Mugira case (supra)

b) **Shah-vs-Mbogo (1967) EA 116 at 123B** on exercise of discretion by the court.

c) **Gideon Sitelu Konchella-vs-Daima Bank Ltd (2013) eKLR** that justice would be better served if we dispose of matters expeditiously.

d) **Allen-Vs-Sir Alfred Mcalpine (1968) 1 All ER 543** where it was noted that the delay of justice is a denial of justice.

e) **Solomon Kitundu and 2 others-VS-Park Towers Ltd and 2 others and Warehousing-vs-National Bank of Kenya (2006) eKLR** that a case heard and determined means that the court heard arguments, considered the case and came to a conclusion.

f) **Enock Kirao Muhanji-vs-Hamid Abdalla Mbarak (2013) eKLR** where A O Angote J held interalia.....

“It is trite law that a court without jurisdiction cannot hear a matter. It therefore follows that the court in RMCC No. 711 of 2009 could not hear the issue raised in the said suit and even if it had proceeded to hear and determine the issues. The determination would have been null and void.”

9. I have carefully studied the entire application, replying affidavit and submissions made by both counsel. It is trite law that issues for determination emerge from the record. In **Blay -vs-Pollard and Morris (1930) 1 KB**, Scrutton L J, gave his opinion that:

“Cases must be decided on the issues on the record: and if it is desired to raise other issues, they must be placed on record by amendment.” (emphasis provided)

10. The Court of Appeal for East Africa in the case of **Gandy-vs-Caspair Limited (1956) 23 EACA at 140** gave useful guidance. It observed that a case should be found in the pleadings or involved in or consisted with the case thereby made.

11. In the present case, the submissions of both counsel reveal common ground that the issues for determination are three-fold;

a) Have ex-parte orders granted on 09/09/2015 prejudiced the rights of the Defendants and be dismissed?

b) Is the Plaintiff's suit Res Judicata and it be dismissed?

c) Who is to bear the costs of the present application and the entire suit?

12. The grounds of the application particularly ground (f) points to the fact that the Plaintiff/Respondent has previously filed or has been involved in similar suits being Kisumu HCCC No. 224 of 1997 instituted by the 1st Defendant and Kisii CMCC No. 139 of 2010 instituted by the Plaintiff. In ground (g) of the application, the Defendants/Applicants state that the Plaintiff/Respondent did not disclose the existence of the similar suits hence causing the issuance of ex parte orders on 9th September, 2015.

13. In paragraph 10 of the replying affidavit, the Plaintiff/Respondent urged this court to take judicial notice that the existence of Kisumu HCCC No. 224 of 1997 is a matter of public record. The Plaintiff/Respondent termed the allegation of concealment of the existence of the Kisumu suit as scandalous meant to divert the attention of this honourable court from the matter in issue. She further stated that the 1st and 2nd Defendants/Applicants will in no way be prejudiced by the hearing and determination of this suit.

14. In the plaint dated 7th September, 2015 at paragraph 14, the Plaintiff/Respondent clearly concealed the existence of the two previous similar suits thus the rights of the Defendants/Applicants stand prejudiced thereby. He stated that;

“There is no other suit pending and there have been no previous proceedings in any court between the plaintiff and the defendants over the same subject matter”

15. The procedure and powers of this court include the procedure laid down by the Civil Procedure Act under **Section 19 of the ELC Act 2015 (2012). Section 5 of the Civil Procedure Act provides;**

Any court subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred. (emphasis added)

16. The doctrine of res Judicata is provided under **Section 7 of the Civil Procedure Act** which reads;

“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.”

17. In **Black's Law Dictionary 9th Edition**, the term *res judicata* is defined as an issue that has been definitively settled by judicial decision. The three essential ingredients of the term are outlined therein as;

a) An earlier decision on the issue, a

b) A final judgment on the merits and

c) The involvement of the same parties or parties in privity with the original parties.

18. I find abundant help in the case of **PIL Kenya Limited-vs-Oppong (2009) KLR 442 at 494**, it was held, inter alia;

*“..The court’s view is that all the issues which the superior court was being asked to adjudicate upon in HCC No. 446 of 2001 were directly in issue in HCCC 260 of 2000. **It is also clear that the issues were between the same parties or parties litigating under the same title. Consequently HCCC No. 446 of 2001 was clearly res judicata. Alternatively HCCC No. 446 of 2001 was in my view caught by judicial estoppel** even if the issues raised were not the same, all the issues in the subsequent suit namely HCCC No. 446 of 2001 could have been raised in the earlier suit HCC No. 260 of 2000, and if not raised they were deemed to have been raised under the doctrine of judicial estoppel or issue estoppel, because the earlier case is deemed to have dealt with all the critical issues. The suit, the subject matter of this appeal was therefore not sustainable in law and ought to have been dismissed on this ground as well...” (emphasis provided)*

19. I note that on 14th July, 2005, in Kisumu HCCC No. 224 of 1997, M Warsame J (as he then was) heard and determined this dispute. He observed thus ;

“The circumstances in this case dictate that I exercise my discretion in favour of the defendants, but what appears from the proceedings is that they have come to court with unclear hands. It is clear from the facts of this case that Judgment must have been obtained way back in the year 2002, while it is clear the case was filed in 1997. The defendant is somewhat suspect in view of the clear evidence or material against them”

In the premises I allow the defendant’s application.....three days.” (emphasis supplied)

20. It is definite that the Defendants failed to comply with the orders of court issued on 14th July, 2005 in Kisumu HCCC No. 224 of 1997. It rendered the earlier judgment against them valid hence determined the matter.

21. Furthermore, on 21st September, 2012, in Kisii CMCC No. 139 of 2010, the late L Kaitany (RM as she then was) cited the case of **The Motor Vessel Lilian “S” (1989) KLR1at 14** and held that the court had no jurisdiction to entertain the dispute. She then dismissed the suit and discharged interim orders granted on 1st November, 2010. The Defendants/Applicants referred to Kisii CMCC No.139 of 2010 which the Plaintiff/Respondent did not mention in her replying affidavit. Nonetheless I find instructive the case of **Enock Kirao Muhanji case** (supra) instructive

22. It follows that there has been a previous suit namely Kisumu HCCC No. 224 of 1997, The suit involved the same parties, the same subject matter and it was heard and determined by a competent court as judicially recognized in **Uhuru Highway Development Ltd case** (supra). The Plaintiff/Respondent has concealed that fact in this fresh suit which I find not sustainable in law.

23. I am conscious of the right to fair hearing under **Article 50 (1) Constitution of Kenya, 2010** and the decision in **Sebei District Administration-vs-Gasyali and others (1968) EA 300 at 304** that denying a party a hearing should be the last resort. I find that the same matter involving the same parties has already been heard and case determined. Be that as it may, the circumstances and interest of justice dictate that I find the case Res Judicata.

24. Consequently and for the reasons stated above, I allow the Defendant’s/Applicant’s application dated 13th October, 2015 in the following terms;

a) Ex parte orders issued on 9th September, 2015 be and are hereby discharged and set aside.

b) This suit be and is hereby dismissed for being res judicata.

On costs, I bear in mind the proviso to section 27 of the CPA and the decision in Rai-vs-Rai (2014) eKLR. The Plaintiff/Respondent shall bear the costs of the entire suit including the instant application.

Delivered, Signed and Dated in open court at Migori this **19th** Day of **July, 2017**.

G.M.A. Ongondo

Judge

In presence of :-

Ms Nyarige counsel holding brief for Obach for the Plaintiff/Respondent

Tom Maurice-court assistant