



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT NAKURU**  
**CASE No. 24 OF 2017**

**DORCAS MUMO MUTUA.....PLAINTIFF**

**VERSUS**

**EQUITY BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**NATHAN MUTUA KOLILE.....2<sup>ND</sup> DEFENDANT**

**STEPHEN NZULA MULI.....3<sup>RD</sup> DEFENDANT**

**VALLEY AUCTIONEERS.....4<sup>TH</sup> DEFENDANT**

**RULING**

***(Application for injunction to restrain the defendants from selling the suit property; applicant arguing that no spousal consent was obtained prior to charge being registered; charge was registered on 11<sup>th</sup> October 2006; respondents arguing that the suit and application were res judicata and sub judice in view of three other cases previously filed; held that the application was res judicata and that there was no requirement for spousal consent prior to 2<sup>nd</sup> May 2012; application struck out; suit stayed)***

1. This ruling is in respect of plaintiff's Notice of Motion dated 31<sup>st</sup> January 2017. The application is brought under Sections 82(3) and 97 of Land Act and Order 40 Rules 2 and 3 of the Civil Procedure Rules among other provisions. The applicant seeks the following orders:

***1. Spent.***

***2. Spent.***

***3. THAT pending the hearing and determination of this suit, the honourable court be pleased to issue a temporary injunction restraining the Defendant/Respondents by themselves, their agents, employees and/or servants from attaching, causing to be advertised, selling and/or disposing off the Applicant's parcel of land NAKURU MUNICIPALITY BLOCK 21/66.***

***4. THAT costs of this application be provided for.***

2. The application is supported by an affidavit sworn by the plaintiff on 31<sup>st</sup> January 2017. In it, the plaintiff deposes that she is married to the 2<sup>nd</sup> defendant and that during their marriage they acquired land

parcel L.R. No. Nakuru Municipality Block 21/66, the suit property in which they reside as a matrimonial property. That the 2<sup>nd</sup> defendant charged the suit property in favour of the 1<sup>st</sup> defendant to secure a facility granted by the 1<sup>st</sup> defendant to the 3<sup>rd</sup> defendant. That the 3<sup>rd</sup> defendant defaulted in the repayment of the loan and the 1<sup>st</sup> defendant therefore instructed the 4<sup>th</sup> defendant to sell the property by public auction. Indeed, the plaintiff received proclamation notices dated 28<sup>th</sup> October 2016 and 20<sup>th</sup> December 2016, from the 4<sup>th</sup> Defendant. Ultimately, the 4<sup>th</sup> defendant advertised the property for sale on 13<sup>th</sup> February 2017. The plaintiff contends that the notices are unlawful since the 2<sup>nd</sup> defendant did not consult her prior to agreeing to act as a guarantor. The plaintiff also deposes that she instituted **Nakuru CMCC No. 1025 of 2011** and obtained orders which the defendants have disregarded.

3. The 1<sup>st</sup> and 4<sup>th</sup> defendants responded to the application through the replying affidavit of Peter Waititu sworn on 28<sup>th</sup> February 2017. Mr. Waititu is the Credit Manager of the 1<sup>st</sup> defendant based at its Nakuru Kenyatta Avenue Branch. He confirmed that indeed, the 3<sup>rd</sup> defendant obtained a loan facility of KShs. 4,000,000 from the 1<sup>st</sup> defendant and that the loan was secured by a charge over the suit property and a guarantee by the 2<sup>nd</sup> defendant. He further stated that as at the time the charge and guarantee were entered into, the law did not require any spousal consent. That the 1<sup>st</sup> defendant had complied with all its legal obligations in seeking to exercise statutory power of sale and as such, the sale should be allowed to proceed.

4. Mr. Waititu also deposed that besides **Nakuru CMCC No. 1025 of 2011 Dorcas Mumo Mutua –vs- Equity Bank & Nathan Mutua Kolile**, the plaintiff had also filed **Nakuru CMCC No.533 of 2012** which is still pending. There is also **Nakuru HCCC No. 172 of 2009** which was filed by the 2<sup>nd</sup> defendant and in which an application for injunction was dismissed. Consequently, the issues raised by the application are both sub-judice and re-judicata.

5. The 2<sup>nd</sup> defendant responded to the application through his replying affidavit sworn on 18<sup>th</sup> April 2017 wherein he confirmed that the plaintiff is his wife and that he charged the suit property in favour of the 1<sup>st</sup> defendant as a guarantor for the 3<sup>rd</sup> defendant. He further deposed that he never informed the plaintiff prior to charging the suit property and that the 1<sup>st</sup> defendant never informed him that he ought to have consulted the plaintiff before charging the property since it was matrimonial property. He accused the 3<sup>rd</sup> defendant of deliberately failing or refusing to repay the loan. The 2<sup>nd</sup> defendant made several other statements in the affidavit all of which I have considered.

6. The 3<sup>rd</sup> defendant responded to the application through grounds of opposition in which he stated that spousal consent was not necessary in the year 2011 and that there is no evidence that the suit property is matrimonial property.

7. The application was disposed of by way of written submissions. In that regard, application's submissions were filed on 30<sup>th</sup> May 2017, the 2<sup>nd</sup> defendant's submissions were filed on 7<sup>th</sup> September 2017, the 3<sup>rd</sup> defendant's submissions were filed on 18<sup>th</sup> September 2017 while the 1<sup>st</sup> and 4<sup>th</sup> defendants' submissions were filed on 2<sup>nd</sup> May 2017.

8. I have considered the application, affidavits filed, the grounds of opposition, submissions and authorities cited by the parties. The issues that emerge for determination are whether the application is *sub-judice*; whether the application is *res-judicata*; whether spousal consent was necessary; and whether the application should be allowed. I will deal first with the issues of *sub-judice* and *res-judicata* since the merits of the application for injunction may need no consideration if the defendants' contentions on those issues are upheld.

9. The 1<sup>st</sup> and 4<sup>th</sup> defendants have argued that the application is *sub-judice* since the issue of whether or not the plaintiff is entitled to an injunction is pending before the subordinate court in cases previously instituted being **Nakuru CMCC No. 1025 of 2011 Dorcas Mumo Mutua vs Equity Bank & Nathan**

**Mutua Kolile; Nakuru CMCC No. 533 of 2012 Elizabeth Wanjir Evans vs Equity Bank and Nakuru HCC No. 172 of 2009 Nathan Mutua Kolile vs Equity Bank & Stephen Nzula Muli.**

10. Section 6 of the Civil Procedure Act provides as follows:

**No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**

11. The applicant has conceded that she filed **Nakuru CMCC No. 1025 of 2011**. She has exhibited a copy of an injunctive order that she obtained therein. The order shows that the 1<sup>st</sup> and 2<sup>nd</sup> defendant herein are 1<sup>st</sup> and 2<sup>nd</sup> defendant in the said suit. The subject matter is land parcel number NAKURU MUNICIPALITY BLOCK 21/66 which the suit property herein.

12. The 1<sup>st</sup> and 4<sup>th</sup> defendants have also argued that there also exists **Nakuru HCC No. 172 of 2009 Nathan Mutua Kolile vs Equity Bank & Stephen Nzula Muli** wherein the subject matter is the suit property herein. I have perused the ruling dated 10<sup>th</sup> December 2010 and I note that the plaintiff in the said case is the 2<sup>nd</sup> defendant herein; the 1<sup>st</sup> defendant therein is the 1<sup>st</sup> defendant herein while the subject matter is whether or not an injunction should issue to restrain the defendants from selling the suit property herein. Needless to state, the plaintiff in **Nakuru HCC No. 172 of 2009** is the husband of the plaintiff herein I thus find that the plaintiff herein was litigating under the plaintiff in **Nakuru HCC No. 172 of 2009**. Regarding **Nakuru CMCC No. 533 of 2012 Elizabeth Wanjir Evans vs Equity Bank**, no material has been placed before me to enable me determine the subject matter thereof.

13. I have also perused the plaint herein and I note that besides costs, the plaintiff only seeks judgment for a permanent injunction to restrain the defendants from advertising or selling the suit property. From the above discourse, I find and hold 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.

14. The 1<sup>st</sup> and 4<sup>th</sup> defendants also argued that the issue of whether or not an injunction should issue to restrain the defendants from selling the suit property herein is *res judicata*. The principle of *res judicata* is found at 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.**

15. 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. The Supreme Court of India explained the essence of the principle of *res judicata* in **M. Nagabhushana v. State of Karnataka & Ors. [2011] INSC 88** as follows:

***“14. The principles of Res Judicata are of universal application as it is based on two age old principles, namely, ‘interest reipublicae ut sit finis litium’ which means that it is in the interest of the State that there should be an end to litigation and the other principle is ‘nemo debet his ve ari, si constet curiae quod sit pro un aet eademn cause’ meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause.***

***This doctrine of Res Judicata is common to all civilized system of jurisprudence to the extent***

*that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should forever set the controversy at rest.*

**15. That principle of finality of litigation is based on high principle of public policy.**

*In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of Res Judicata has been evolved to prevent such an anarchy.*

*That is why it is perceived that the plea of Res Judicata is not a technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties.*

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 10<sup>th</sup> December 2010 the High Court in **Nakuru HCC No. 172 of 2009** considered whether or not an injunction should issue to restrain the 1<sup>st</sup> 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 19<sup>th</sup> September 2006 while the charge document was executed on 4<sup>th</sup> 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. Indeed, explanation (4) of section 7 of the Civil Procedure Act 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.**

Explanation (6) thereof 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.**

18. For the foregoing reasons, I find and hold that Notice of Motion dated 31<sup>st</sup> January 2017 is *res judicata*. Even if I had not found that the application is *res judicata*, the applicant would still need to satisfy the test in **Giella –vs- Cassman Brown & Co. Ltd [1973] E.A 358**. She must establish a *prima facie* case with a probability of success. Even if a *prima facie* case is established, an injunction would not issue if damages can adequately compensate her. Finally, if the court is in doubt as to the answers of the above two tests then the court would determine the matter on a balance of convenience. As was recently held by the Court of Appeal in **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**, all the three **Giella** conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially and that if *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration.

19. The only reason why the plaintiff faults the proposed exercise of statutory power of sale is the alleged absence of spousal consent. I have read the Letter of Guarantee. It was executed on 19<sup>th</sup> September 2006. The charge is dated 4<sup>th</sup> October 2006 and was registered on 11<sup>th</sup> October 2006.

20. The requirement of spousal consent was introduced by section **79(3) of the Land Act 2012**. The Act came into force on 2<sup>nd</sup> May 2012. Prior to that date there was no requirement for spousal consent and the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not therefore need to obtain spousal consent prior to registration of the charge instrument herein. The Court of Appeal confirmed this position when it stated in **Fredrick Chege Ndogo v Bernard Njoroge Mbugua & another [2016] eKLR** as follows:

**We conclude this limb of the appeal by stating that the requirement for spousal consent is a recent development in Kenya attributable to the enactment of the Land Registration Act of 2012 and the Land Act of 2012 by parliament. It had no application whatsoever to the sale of the suit land which predated the statute.**

21. Consequently, to the extent that the applicant's case rests on the alleged absence of spousal consent, no prima facie case is established. In the circumstances, irreparable injury and balance of convenience need no consideration. The application would also fail on the merits.

22. In view of my finding that Notice of Motion dated 31<sup>st</sup> January 2017 is res judicata, I hereby strike out the application with costs to the 1<sup>st</sup> and 4<sup>th</sup> defendants. I do not award the 3<sup>rd</sup> defendant costs since his default triggered the process of enforcement of statutory power of sale. I also do not award the 2<sup>nd</sup> defendant costs since he supported the application.

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**.

**Dated, signed and delivered in open court at Nakuru this 9<sup>th</sup> day of November 2017.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Mr. Imbwanga holding brief for Mr. Simiyu for the plaintiff

Mr. Ojo for the 1<sup>st</sup> and 4<sup>th</sup> defendants

No appearance for the 2<sup>nd</sup> defendant

Mr. Karanja for the 3<sup>rd</sup> defendant

Court Assistants: Gichaba and Lotkomoi