



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT KISUMU**  
**ELC CASE NO.240 OF 2015**

**JAMES NYANCHIRI NYAOSI.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA..... DEFENDANT**

**RULING**

1. James Nyanchiri Nyaosi, the Plaintiff commenced this proceedings through the plaint dated 8<sup>th</sup> September 2016, filed contemporaneously with a notice of motion of even date.
2. The National Bank of Kenya, the Defendant, issued a notice to raise preliminary objection dated 27<sup>th</sup> September 2016 on the following three points;
  - “1. This suit is res judicata as the issue herein had been adjudicated and a determination made in Nairobi H.C.C.C. No.1229 of 2002.
  2. This matter is an abuse of the court process and ought to be struck off.
  3. This court has no jurisdiction as the same had been determined by another court of competent jurisdiction.”
3. The court gave directions on the notice of motion on the 26<sup>th</sup> October 2016 and directed that the matter be mentioned on the 29<sup>th</sup> November 2016. That when counsel for both parties appeared before the court on the 29<sup>th</sup> November 2016, they agreed to have the preliminary objection field by the Defendant heard and determined first. The court then issued directions on filing of written submission on the preliminary objection. The Defendant’s counsel filed their written submissions dated 14<sup>th</sup> March 2017 on the 15<sup>th</sup> March 2017.
4. That when the matter came up for mention on the 14<sup>th</sup> June 2017, the counsel for the Plaintiff indicated that they had filed their written submissions on the same day but were yet to serve it. The court then fixed that matter for ruling today. The court has perused through the record and there is no written submissions or any other document filed on the 14<sup>th</sup> June 2017 or thereafter.
5. The following are the issues for the court’s determination;
  - a) Whether the issue raised in this suit have previously been determined between the same parties by a court of competent jurisdiction.

b) Whether the suit is an abuse of the courts process.

c) What orders to issue.

6. The court has carefully considered the three grounds on the preliminary objection, written submissions by counsel for the Defendant, the pleadings filed and come to the following determinations;

a) That the Plaintiff suit arises from the Defendant's steps to auction land parcels **Kisumu/Kasule/1758 and Kisumu/Manyatta B/896** that were among the securities he had charged to secure some financial facilities with the Defendant. The Plaintiff accuses the Defendant for failing to give information on his fixed deposit of Ksh.500,000/= and the interest thereof all totaling to Kshs.800,000/=.

b) That the Plaintiff prayers in the plaint dated 8<sup>th</sup> September 2016 is for a declaration that the Defendant's refusal to give him information necessary to redeem his property is unlawful, permanent injunction restraining the Defendant from auctioning the said properties, general damages and costs.

c) That the prayers sought in the notice of motion dated 8<sup>th</sup> September 2016 are for temporary injunction restraining the Defendant from auctioning the two properties, order requiring the Defendant to show how the fixed deposit funds were accounted for and the amount that was outstanding before the auction and costs.

d) That from the suit documents in respect of Nairobi Milimani Commercial Court Civil Case No.1229 of 2002 that are annexed to the replying affidavits of Paul Chalanga and Samuel Mundia, both sworn on 4<sup>th</sup> October 2016 in response to the Plaintiff's notice of motion dated 8<sup>th</sup> September 2016, the following is discernable.

- The suit had been filed by National Bank of Kenya Ltd who is the Defendant in this suit.
- The suit was against, James Nyaosi Nyanchiri, who the courts takes to be the Plaintiff in the instant suit, and three others.
- That the suit was for recovery of various financial facilities accorded to the Defendants and secured on charges over land parcels Kisumu/Manyatta B/896, Kisumu/Kasule/1758 among others.
- That Nairobi Milimani commercial Courts & Tax Division Civil Suit No. 1229 of 2002 was decided in favour of National Bank of Kenya Ltd (Defendant in the instant suit) as confirmed by the annexed amended decree issued on the 21<sup>st</sup> April 2011 which contains the following orders among others;

“1. That judgment be and is hereby entered against the 1<sup>st</sup> Defendant in the sum of kshs.3,978,440.40/= with interest at 29% p.a. as from 1<sup>st</sup> September 2001 until payment in full.”

- That the annexed suit papers shows the 1<sup>st</sup> Defendant to be James Nyaosi Nyanchiri (Plaintiff herein) and Matha Bosibori t/a Jadama Enterprises.

e) That any issue concerning the status of the fixed deposit or any other security or guarantee relating to the financial facilities subject matter of Nairobi Milimani Commercial Court case No.1229 of 2002 is a matter covered under explanation 4 of **Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya** as “*any matter which might and ought to have been made a ground of defence or attack in such former suit “and which” shall be deemed to have been a matter directly and substantially in issue in such suit..*” That as submitted by counsel for the Defendant, the issues between the parties herein on the financial facilities secured on the two properties among others, have been determined by a court of competent jurisdiction. That those issues cannot be

raised before the court as the Plaintiff has attempted to do by filing this suit and notice of motion, whose main purpose is to challenge the execution proceedings issued under that former suit. This is an abuse of the court's process as the Plaintiff option was to go back to the court that dealt with the previous case or move the appellate court as appropriate.

f) That this suit is therefore an abuse of the court's process and res judicata as it concerns issues already decided between the parties in the previous suit by a competent court.

7. That flowing from the foregoing the court upholds the Defendant's preliminary objection and issues the following orders;

a) That the Plaintiff's suit commenced vide the plaint dated 8<sup>th</sup> September 2016 be and is hereby struck out with costs.

b) That the Plaintiff notice of motion dated 8<sup>th</sup> September 2016 is hereby struck out with costs.

c) Order accordingly.

d)

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

DATED AND DELIVERED THIS 8<sup>TH</sup> DAY OF NOVEMBER 2017

In presence of;

Plaintiff                      Absent

Defendant                     Absent

Counsel                        Mr. Awino for the Plaintiff

Mr. Yogo for the Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**8/11/2017**

8/11/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr. Yogo for the Defendant

Mr. Awino for the Plaintiff

Court: Ruling dated and delivered in open court in presence of Mr. Awino and Yogo for the Plaintiff and

Defendant respectively.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**8/11/2017**