



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 440 OF 2017

NAKURU MACHINERY SERVICES LTD1ST PLAINTIFF

ZACHARIA MBURU CHEGE2ND PLAINTIFF

MARY CHEGE3RD PLAINTIFF

VERSUS

ECO BANK (K) LTD.....DEFENDANT

RULING

(Application for injunction to restrain the defendant from exercising statutory power of sale; the defendant argued that the suit is res judicata and an abuse of court's process in view of the fact that the plaintiffs had filed another suit in the subordinate court wherein an application for injunction to restrain the defendant from exercising statutory power of sale had been dismissed; held that the application is res judicata and that the suit is an abuse of court's process; suit struck out)

1. By Notice of Motion dated 21st November 2017, the plaintiffs sought the following orders:

1. Spent.

2. Spent.

3. The defendant by itself, servants, or agents be restrained from selling, disposing off or in any way eliminating L.R Dundori/Lanet Block 10/127 and Nakuru Municipality Block 23/48 pending hearing and determination of this suit.

4. Costs of the application be provided for.

2. The application is supported by an affidavit sworn by the 2nd plaintiff on 21st November 2017 wherein he deposes among others that the defendant advertised plots number Dundori/Lanet Block/10/127 and Nakuru Municipality Block 23/48 the suit properties, for sale by public auction on 22nd November 2017. The sale is said to be a pre-mature exercise of the defendant's chargee's power of sale.

3. In the plaint filed together with the application, the plaintiffs aver that the suit properties are charged in favour of the defendant to secure facilities held by the 1st plaintiff. It is further averred that the defendant has advertised the suit properties for sale by public auction in breach of an agreement to the effect that payments would be made to the defendant by National Irrigation Board (NIB) from funds owed to the 1st

plaintiff by NIB. It is also averred in the plaint that there is no case pending in court between the plaintiffs and the defendant.

4. The defendant responded to the suit through statement of defence filed on 1st December 2017. It is averred at paragraph 12 of the defence that this suit is an abuse of process and that it is sub-judice in view of another case being Milimani CMCC No. 801 of 2017. The defendant also responded to the application through replying affidavit sworn by Elizabeth Hinga on 1st December 2017. She deposed that the arrangement allowing payments to be made from NIB was only to ease repayment but was not to bar exercise of defendant's statutory power of sale. That the 1st plaintiff having defaulted, the defendant's statutory power of sale had crystalized. She further deposed that the plaintiffs had filed another suit being Milimani CMCC No. 801 of 2017 and had sought an injunction similar to the one now being sought and that the application was heard and dismissed in a considered ruling. She annexed copies of pleadings in the said suit as well a copy of a ruling dated 30th June 2017.

5. The defendant also responded to the suit by filing notice of intention to raise a preliminary objection on the grounds that both the application and the suit are res judicata and abuse of court's process in view of the existence of Milimani CMCC No. 801 of 2017 and the orders made therein. The defendant further argued that this court lacks jurisdiction to entertain this suit in the circumstances.

6. At the hearing of the application Ms. Kimure, learned counsel for the plaintiffs submitted that the defendant will be paid its money in due cause and that the delay in payment was due to delayed disbursement of government funds. She urged the court to allow the application.

7. Mr. Ocharo, learned counsel for the defendant argued that the issue of whether or not the defendant can be stopped from exercising its power of sale is res judicata in view of the fact that the said issue had been determined in Milimani CMCC No. 801 of 2017. He referred the court to a ruling of the subordinate court dated 5th October 2017 wherein the said court noted that the application for injunction had been dismissed. He added that the said suit is between the same parties as those in this suit and that the subject matter is the same. Consequently, he urged the court to find that this suit is an abuse of court process and to strike it out. As regards the merits of the application for injunction, he submitted that there having been default and the suit properties being commodities for sale, an injunction should not issue.

8. I have considered the application and the submissions. Three issues emerge for determination. Firstly, whether the suit is res judicata; secondly whether the suit is an abuse of court process and thirdly, whether an injunction should issue as prayed. It will only be necessary to determine the third issue if the answers to the first two issues is in the negative.

9. 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.

10. For the principle 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 bis 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.

11. It is deposed in the replying affidavit that there exists another case, being Milimani Commercial Courts CMCC No. 801 of 2017 wherein the parties and the relief sought are the same as those in the present suit and wherein the plaintiffs sought an injunction to restrain the defendant from exercising statutory power of sale. I have perused the plaint herein and the plaint in Milimani Commercial Courts CMCC No. 801 of 2017 and I note that the parties in the two suits are the same and that both suits concern the question of whether or not the defendant could exercise statutory power of sale in respect of the suit properties. I have also perused Notice of Motion dated 10th February 2017 filed in Milimani Commercial Courts CMCC No. 801 of 2017 and note that an injunction was sought therein to restrain the defendant from among others selling and disposing of the suit properties.

12. Counsel for the defendant has argued that Notice of Motion dated 10th February 2017 was heard on the merits and dismissed. Consequently, the present application is res judicata. In response, Ms. Kimure learned counsel for the plaintiffs conceded that the application was dismissed but added that for that reason res judicata does not apply. I am afraid that it is precisely for that reason of dismissal that res judicata becomes applicable. The whole philosophy behind res judicata is that there should be an end to litigation and that no one should be vexed twice for one and the same cause. Though none of the parties has exhibited a copy of the ruling wherein the application was dismissed, I note from another ruling of the subordinate court made on 5th October 2017 that the court considered an application for review of orders made on 9th May 2017 and that one of the payers that was sought consequent upon review being granted was an order to restrain the defendant from selling the suit properties. In the circumstances, I find and hold that the question of whether or not the defendant can exercise statutory power of sale in respect of the suit properties was determined in Milimani Commercial Courts CMCC No. 801 of 2017 and is therefore res judicata.

13. The second issue for determination is whether the suit is an abuse of court process. As already pointed out, counsel for the defendant admits that Milimani Commercial Courts CMCC No. 801 of 2017 exists. I have already reviewed the plaint herein and the plaint in Milimani Commercial Courts CMCC No. 801 of 2017 and I have come to the conclusion that the parties in the two suits are the same and that both suits raise the same issue, namely whether or not the defendant could exercise statutory power of sale in respect of the suit properties. Yet in the face of all those facts and similarities, the plaintiffs herein aver at paragraph 10 of the plaint that “there is no case pending in court between him (sic) and the defendant herein”. That is clearly a misleading statement. Worse still, the 2nd plaintiff herein swore a verifying affidavit deposing that all the averments in the plaint are correct.

14. The plaintiffs filed this suit knowing fully well that they have another suit between them and the defendant in the subordinate court in Nairobi. Filing of a multiplicity of suits over the same subject matter is abuse of the court's process. It is an even worse abuse when the cases are filed at different court stations. The court has a duty to bring such a state of affairs to an end, as soon as it is brought to its attention. Faced with a similar situation, Angote J. had the following to say in **Chairman District Alcoholic Drinks Regulation Committee & 4 Ors & 2 Ors ex-parte Detlef Heier & Anor (2013) eKLR:**

38. A party who wishes to file a suit which is similar to an existing suit must withdraw the first suit first. This court cannot allow parties to be filing a multiplicity of suits on the basis that they have found that the previous suit(s) wanting either in content or form. The court must and should invoke its inherent jurisdiction to stop such abuse of the court process.

39. Abuse of court process includes a situation where a party improperly uses judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the administration of justice.

15. In view of the foregoing, I have no hesitation in finding, as I hereby do, that the present suit is an abuse of the court's process and is therefore for striking out. That being the case, it is not necessary for me to determine the last issue as whether an injunction should issue as prayed.

In the end, I strike out this suit. Costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 19th day of December 2017.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Biko holding brief for Mr. Ikua for the plaintiffs/applicants

No appearance for the defendant/respondent

Court Assistant: Gichaba