



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT KISUMU**  
**ELC CASE NO.10 OF 2015**

**FR. GEORGE MATHENGE**

**FR NICHOLAS ONYACH**

**Both suing as officials of**

**FRANCISCAN FAMILY ASSOCIATION OF KENYA.....PLAINTIFF/APPLICANT**

**VERSUS**

**MICRO ENTERPRISES SUPPORT PROGRAMME TRUST**

**REGISTERED TRUSTEES.....1ST DEFENDANT/RESPONDENT**

**MUGA AUCTIONEERS & GENERAL MERCHANTS.....2ND DEFENDANT/RESPONDENT**

**RULING**

1. By notice of motion dated 20th January 2015, **Fathers George Mathenge and Nicholas Onyanch**, suing as officials of **Franciscan Family Association of Kenya**, hereinafter referred to as the Applicant, sought temporary injunction orders against **Micro Enterprises Support Programme Trust Registered Trustees** and **Muga Auctioneer & General Merchants**, hereinafter referred to as 1st and 2nd Respondents respectively, restraining them from "**advertising for sale, auctioning, selling, disposing, alienating, charging, dealing and or interfering whatsoever with the plaintiff's land parcel East Kisumu/Dago/515 and 516 pending the hearing and determination of this suit**", among others prayers. The notice of motion is based on the six grounds on its face and supported by the affidavit of **Sister Irene Akomba** sworn on 20th January 2015 summarized as follows;

- a) That the plaintiff is the registered proprietor of land parcels **East Kisumu/515 and 516**.
- b) That one of the plaintiff's success is the founding of **Cent Sacco Society** by its members that was registered as a Cooperative Society on 5th September 2002.
- c) That in 2006 the Plaintiff agreed to the request by **Cent Sacco Society Limited** to guarantee it a loan and offered the **East Kisumu/Dago/515 and 516** as securities for the loan from 1st Respondent.
- d) That the plaintiff did not receive any further communication about the loan it guarantee **Cent Sacco Society Limited** until 19th January 2015 when the deponent saw an advertisement dated 12th January 2015 by the 2nd Respondent for a public auction of the two parcels on the 23rd January 2015.

e) That no statutory notice had been served and the advertised auction was therefore illegal.

2. The application is opposed by the 1st Respondent through the replying affidavit of **John Masha**, the general manager, sworn on 2nd February 2015 whose depositions are summarized hereinbelow;

a) That the Applicant has not disclosed that they had with **Cent Sacco Society Limited** filed a similar suit against the Respondent being **Kisumu HC.C.C. No. 8 of 2011** and a notice of motion dated 7th February 2011 for prayers similar to the current one. The deponent has annexed copies of the plaint, verifying affidavit by **Father Nicholas Onyanch**, Certificate of urgency, notice of motion with supporting affidavits of **Father Nicholas Onyanch**, and **Sister Irene Akumba** all dated and sworn on 7th February 2011 among others.

b) That the court granted interim orders of injunction on the 9th February 2011 with an order that they pay the Respondents Kshs.500,000/= on or before the 12th February 2011. That after interpartes hearing, the notice of motion dated 2nd February 2011 was dismissed on 14th November 2012 with costs. The copy of the interim order and the ruling of 14th November 2012 have been annexed to the replying affidavit.

c) That the 2011 suit is still pending in this court.

d) That following the court's ruling of 14th November 2012, the 1st Respondent wrote a letter dated 5th August 2013 to the Plaintiff requesting that their valuer be allowed to carry out valuation on the charged properties for the intended public auction to be held within 90 days on a date to be communicated. The Applicant wrote through their advocate to the 1st Respondent advocates, a letter dated 10th February 2014 requesting for time to sell an alternative property and settle the debt. The 1st Respondent responded to the request through their advocates by letter dated 5th March 2014 undertaking to withhold any action to realise the securities for six months from 25th February 2014. They however warned that if the "**debt is not settled within the said period, auction of the charged properties will be promptly undertaken thereafter**". The three letters referred to above have been attached to the replying affidavit.

e) That the Applicant is not the registered proprietor of **East Kisumu/Dago/ 516** as the copy of the title deed and certificate of official search annexed shows the registered proprietor as **C.C.F.M.C WOMEN'S PROJECT**.

f) That the Plaintiff and **C.C.F. M.C. Women's Project** were respectively served with the statutory notice as found by the court in the ruling of 14th November 2012 in **Kisumu HCC NO.8 OF 2011** and the Plaintiff has all along been aware of the indebtedness to the 1st Respondent since.

g) That the Plaintiffs were served with a notification of sale and a 45 day redemption notice by the 2nd Respondent. That the service was received by **George Misore Rabiik**, an official of the Plaintiff on 25th October 2014.

h) That the entire proceedings should be struck out with costs to the Respondent.

3. That prayer 1 and 2 which are for certifying the application as urgent and interim orders of stay were granted *ex parte* on 21st January 2015. The counsel for the parties appeared in court on 25th May 2015 and agreed to file written submissions. The Applicant's counsel filed theirs dated 17th August 2015 on the 9th October 2015 while counsel for the 1st Respondent filed theirs dated 12th November 2015 on the same date.

4. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both deponents and rival submission by counsel for the Applicant and 1st Respondent and come to the following determinations;

a) That the pleadings, order and ruling relating to **Kisumu H.C.C.C. No.8 of 2011** annexed to the replying affidavit clearly shows that the two suits are over the same subject matter, same prayers and between the same parties in the same capacities. The only party in **Kisumu HCC NO. 8 of 2011** who is not a party in the current suit is **CENT SACCO SOCIETY LIMITED**, who was the third Plaintiff in that other case. The existence of **Kisumu HCC NO.8 of 2011**, which is reportedly pending before this court, was not disclosed by the Applicant when they filed this suit. Instead at paragraph 18 of the plaint dated 20th January 2015, the Applicants averred as follows;

**" The Plaintiffs avers that there have been no previous proceedings in any court of law between the Plaintiff and the Defendants over the same subject matter".**

The absence of **Cent Sacco Limited** as a party in this current suit does not make this suit any different from **Kisumu HCC No.8 of 2011** as the other parties are the same and appear in the same capacity. The subject matter and prayers are also the same. The only differences are the dates of the advertised auction. This suit is therefore sub judice in view of the provision of **Section 6 of the Civil Procedure Act, Chapter 21 of Laws of Kenya** which states:

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

The court finds that as the parties and subject matter in this suit are the same to those in the pending **Kisumu HCCC No.8 of 2011**, the proper route for the Applicants was to pursue their claim against the Respondent in that pending suit and not to file a fresh suit and mislead the court by their claim that there has been no previous proceedings between the parties over the same subject matter.

b) That the Applicants had made a similar application to the current one in **Kisumu HCC NO.8 of 2011** through the notice of motion dated 7th February 2011, which was dismissed with costs in the ruling of 14th November 2012. There has been no appeal to that ruling. In that ruling **Chemitei J.** cited the case of **Pama Holdings Ltd -V- Tropical Laval Management (Kenya) Ltd & Another** (2008) eKLR on the position that disputes as to the amounts outstanding cannot stop a mortgagee from exercising its power of sale once the same has arisen. The Honorable Judge also addressed the question whether the Applicants have a critical say in protecting the Charge properties from being auctioned by the Respondent and found as follows:

**" The sum total of my finding is that having surrendered their securities to the 3rd Plaintiff for charging Charge, they relinquished any say over the same. The 3rd Plaintiff is their creature. The distinction between them is a matter of registration regimes but their purposes are the same, namely to alleviate the poverty from the sick, the poor and the downtrodden. If the 3rd Plaintiff did not notify them of the defendants and the problems they are facing in recovering the loan from their members, then the Respondent has no blame to carry. As a matter of fact they failed to monitor the activities of the 3rd Plaintiff."**

The Honorable Judge also addressed the Applicants locus in the suit and citing in the case of **Nairobi Mamba Village -V- National Bank of Kenya Milimani Commercial Court Case No.1838 of 2011** held as follows;

**" My understanding however is that it is only the principal debtor in this case the 3rd Plaintiff who has the real locus to sue the Defendant as it has the contractual capacity with the Defendant."**

As pointed out earlier the ruling of 14th November 2012 in **Kisumu HCCC No.8 of 2011** has not been set aside, reviewed or successfully appealed against.

That court was satisfied that the 1st Respondent power of sale had arisen and declined to issue the temporary injunction sought. The 1st Respondent counsel has submitted that the issues raised in the notice of motion dated 20th January 2015 is resjudicata under the Provision of **Section 7 of the Civil Procedure Act** which states:

**" 7. 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 formally decided by such court."**

The counsel referred to the cases of **Uhuru Highway Development Ltd -V- Central Bank of Kenya & 2 others** (1996) eKLR and **Vevet EPZ Limited -V- Sameer EPZ Limited & Another** (2012) eKLR in support of his submission, which the court agrees with, that the principal of res judicata applies to applications before the court. The application dated 20th January 2015 is therefore res judicata in view of the ruling of 14th November 2012 in **Kisumu HCCC No.8 of 2011**.

c) That the superior courts have in various cases held that the Chargee will not be restrained from executing its power of sale merely because the amount outstanding is in dispute or where the Chargor has commenced the redemption action or is uncomfortable with the way the Chargee is arranging the sale. That the courts will however restrain the Chargee if the Chargor shows that he has completed the redemption or has paid the whole amount claimed by the Chargee to the court. {See **Erick Booker Oitieno Ogutu - V- Kenya Commercial Bank Kisumu E.L.C. NO. 45 of 2015** (unreported), **Morris & Co. Ltd -V- Kenya Commercial Bank Ltd & Another** {2003} E.A. 605, **Maltex Commercial Supplies Ltd & Another -V- Euro Bank Ltd** (in liquidation) (2007) eKLR, **Mrao Ltd -V- First American Bank of Kenya & 2 others** [2004] eKLR , **Elijah Kipngeno Arap Bii – V- Kenya Commercial Bank Ltd** {2004} KLR 458 **Hyundai Motors Kenya Ltd -V- East African Development Bank Ltd** (2007) eKLR, **Maurice Okelo Alata -V- Kenya Commercial Bank Ltd Kisumu ELC No.44 of 2014** (Unreported). The Applicant herein had made an offer to liquidate the date when they appeared before the court for the hearing of the notice of motion dated 7th February 2011 in **Kisumu HCC NO.8 OF 2011** exparte. The court granted them interim restraining orders on 9th February 2011 pending the hearing and determination of the application. The court further order as follows:

**" 3. The Plaintiffs do pay the 1st Defendant the sum of Kenya Shillings Five hundred Thousand only (Kshs.500,000/=) on or before the 10th February 2011 at 12.00 noon."**

The Applicant did not comply with that order. The court also notes from the 1st Respondent's replying affidavit that the Applicant had requested for time to sell another property and realise monies to settle the debt. Though the 1st Respondent gave them six months from 25th February 2014, no payment was made. The 1st Respondent was therefore entitled to proceed with their right to realise the securities as their power of sale had arisen.

d) That the orders the Applicant seeks from this court are equitable reliefs. However from the forgoing findings, the conduct of Applicant of filing a fresh suit without disclosing the existence of **Kisumu HCC NO.8 of 2011** and obtaining interim orders on 21st January 2015 is not an equitable conduct. Equity requires that those who seek equitable reliefs **must** have clean hands. They **must** make full disclosure of all facts that have some relevance to the issues raised even if such disclosure be unfavourable to their cause. All parties coming to the court have a duty to assist the court accomplish its overriding objective to facilitate the just, expeditious, proportionate and affordable resolution of the Civil disputes before it. The provision of **Section 1A (3) of the Civil**

**Procedure Act** provides as follows;

**" 1A (3) A party to Civil proceedings or an advocate for such a party is under a duty to assist court to further the overriding objective of the Act and, to that effect, to participate in the processes of the court and to comply with the directions and orders of the court."**

A similar provision to the foregoing is found in **Section 3 of the Environment and Land Court Act No.19 of 2011**. The court is obligated **under subsection 2** to give effect to the principal objective in **subsection (1)** in its discharge of its functions. The provision of **Section 1B of the Civil Procedure Act** provides for the duty of the court

as follows:

**" 1 B (1) For the purpose, of furthering the overriding objective specified in 1 A, the court shall handle all matters presented before it for the purpose of attaining the following aims-**

- a) **the just determination of the proceedings;**
- b) **the efficient disposal of the business of the court;**
- c) **the efficient use of the available judicial and administrative resources.**
- d) **the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties, and**
- e) **the use of suitable technology.**

The Applicant and their counsel's conduct of filing a fresh suit while they knew that the 2011 suit is still pending does not assist the court further its overriding objective as it would impact negatively on the timely disposal of cases and the efficiency of the court.

e) That the Applicant are reported not to have pursued to prosecute **Kisumu HCCC No.8 of 2011** after being unsuccessful in their pursuit of the temporary injunction orders in the ruling of 14th November 2012. The forging findings shows that the Applicant must fail in their pursuit for temporary injunction in their application dated 20th January 2015. They are likely to also go silent as they did in **Kisumu HCC NO.8 of 2011** after today's ruling. The net effect will be that the two different cases will remain pending in the same court for the same subject matter between the same parties litigating in the same capacities. This is an undesirable result. This court may chose to issue stay orders under **Section 6 of the Civil Procedure Act** on one of the suits or give other appropriate orders to prevent the abuse of the process of the court pursuant to its inherent power under **Section 3 A of the Civil Procedure Act** which states;

**" 3 A. Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of Justice or to prevent abuse of the process of the court."**

The 1st Respondent had in their replying affidavit at paragraph 20 and 21 deponed as follows:

**" 20. That I verily believe and pray that not only should the application and the suit be struck out/dismissed for the foregoing reasons but penal consequences should attach on the advocate for the Plaintiffs to safeguard the integrity of the court, the legal profession and the legal system.**

**21. That I am advised by our advocate on record, which advice I rely believe to be sound, that the only appropriate course of action that should be taken by this Honorable Court in the circumstances set out above is to strike out in their entirety these proceedings with costs**

**thereon to the Defendants."**

The court takes the position that the dismissal or striking, out of this suit will not prejudice the Applicants rights in any way as they will be at liberty to pursue their claim if any in the earlier filed suit that is still pending being **Kisumu HCCC No.8 of 2011**. This is therefore an appropriate instance for this court to exercise its inherent power under **Section A of the Civil Procedure Act** to stop the abuse of the process of the court by the Applicant and their counsel.

5. That in view of the foregoing the court finds that the notice of motion dated 20th January 2015 is without merit for being res judicata. The court further finds that the suit commenced through the plaint dated 20th January 2015 is subjudice and an abuse of the process of the court as the earlier filed suit, being **Kisumu HCCC No.8 of 2011**, is still pending. The court therefore issues the following orders:

- a) That the notice of motion dated 20th January 2015 is hereby dismissed with costs.
- b) That the suit commenced by the Applicant through the plaint dated 20th January 2015 is hereby struck out with costs to the 1st Defendant.

It is so ordered.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**DATED AND DELIVERED THIS 19TH DAY OF APRIL 2016**

In presence of;

Applicant Absent

Respondent s Absent

Counsel Mr Odeny for Applicants

Mr Ouma for Wavuliu Kowade Advocate for Respondent.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**19/4/2016**

19/4/2016

**S.M. Kibunja J.**

Parties absent

Mr Odeny for Plaintiff/Applicant

Mr Ouma for Wavuliu for Kowade for Defendant/Respondent

Court: Ruling delivered in open court in presence of Mr Odeny for the Defendants and Mr Ouma for Wavuliu Kowade for the Respondents.

**SM. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**19/4/2016**