



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.25 OF 2016

AGNES AWINJA OKONGO.....PLAINTIFF

VERSUS

K-REP BANK LTD DEFENDANT

RULING

1. **Agnes Awinja Okongo**, the Plaintiff commenced these proceedings through the plaint, dated 9th February 2016, against **K-Rep Bank Ltd**, the Defendant, seeking for taking of accounts and permanent injunction restraining the Defendant from selling the Charged property **Kisumu/Pandpieri/1032**. The Plaintiff also filed the notice of motion, under certificate of urgency, dated 9th February 2016 seeking for among others temporary injunction orders pending the hearing and determination of this suit.

2. The Defendant filed a replying affidavit sworn on 16th February 2016 in opposition to the application and filed a notice of preliminary objection, also dated 16th February 2016, seeking to have the application and suit struck out as the issues therein have been determined in the following three cases:

a) **Kisumu CMCC NO.452 of 2009, Agnes Awinja -V- K-Rep Bank Ltd.**

b) **Kisumu Environment & Land Court Case No.294 of 2013, Agnes Awinja – V- K-Rep Bank Ltd.**

c) **Kisumu High court civil Appeal No.138 of 2010, Agnes Awinja -V- K- Rep Bank Ltd.**

3. The application dated 9th February 2016 came up for hearing on the 17th February 2016, when the court heard the counsel appearing for the parties and directed that the preliminary objection be heard first. The court also ordered that the status quo obtaining then be maintained. The court then fixed the 8th March 2016 as the date for hearing the preliminary objection. On that date counsel agreed to file written submission on the preliminary objection.

4. The counsel for the Defendant filed their written submission, dated 9th March 2016, while counsel for the Plaintiff filed theirs, dated 12th April 2016, on the 13th April 2016. The submissions are as summarized below:

a) **DEFENDANT COUNSEL'S SUBMISSIONS:**

The learned counsel submitted that the issues subject matter of this suit, and the application have been determined in **Kisumu CMCC No.452 of 2009**,

Agnes Awinja -V- K-Rep Bank Ltd, Kisumu ELC No.294 of 2013, Agnes Awinja -V- K-Rep Bank Ltd and Kisumu HCCA No.138 of 2010, Agnes Awinja -V- K-Rep Bank Ltd. That under the principle of res judicata and **Section 7 of Civil Procedure Act**, the suit and notice of motion herein filed should be struck out with costs.

b) **PLAINTIFF COUNSEL'S SUBMISSIONS;**

The learned counsel submitted that **Kisumu CMCC No.452 of 2009**, which gave rise to **Kisumu HCCA No.138 of 2010**, did not decide the substantive issues on merit but had the case dismissed for lack of Jurisdiction on the part of the learned Magistrate. The counsel further submitted that in **Kisumu ELC No.294 of 2013**, the application for injunction was dismissed but the main suit has not been heard, and therefore the main suit and notice of motion herein do not offend the principle of res judicata. The counsel submitted that the preliminary objection dated 16th February 2016 lacks merit and should be dismissed with costs to the Plaintiff.

5. The issues for determination are as follows:

- a) Whether the suit and notice of motion herein offends **Section 7 of the Civil Procedure Act** in view of the decisions in the cited decisions between the parties.
- b) Whether the preliminary objection raised by the Defendant should be upheld.
- c) Who pays the costs of the preliminary objection.

6. The court has carefully considered the grounds on the preliminary objection, the written rival submissions by counsel and come to the following conclusions:

a) That the provision of **Section 7 of the Civil Procedure Act** places in the Kenyan Statute law the principle or doctrine of res judicata which both counsel submitted is designed to ensure there is an end to litigation on a subject of litigation between the same parties once a decision is made by a court of competent jurisdiction.

b) That the parties herein were the same parties in **KISUMU CMCC No. 452 of 2009, Agnes Awinja -V- K-Rep Bank Ltd**, where the learned Magistrate dismissed the application for injunction on finding that he had no jurisdiction in view of **Section 159** of the then Registered Land Act Chapter 300 of Laws of Kenya, which has since been repealed. The Plaintiff in that case, who is also the Plaintiff in this case filed **Kisumu HCCA No.138 of 2010, Agnes Awinja -V- K-Rep Bank Ltd**. The appeal was dismissed. The court finds that even though the parties in the lower court matter and the appeal preferred therefrom were the same to the parties in this matter and the subject matter was more or less the same, the issues in those matters were not decided on merit. The decision in this two matters do not make this current suit or the notice of motion res judicata. [see **Lilian Njeri Muranja & another -V- Viginia Nyambura & another** {2014} eKLR].

c) That Kisumu ELC No.294 OF 2013, **Agnes Awinja -V- K-Rep Bank Ltd**, was a matter between the same parties as in the instant case and appearing in the same capacities. Like in the current case, the Plaintiff had filed a suit on 23rd October 2013 contemporaneously with a notice of motion under **Order 40 Rules 1 and 2 of the Civil Procedure Rules, Section 1A,1B and 3A of the Civil Procedure Act** seeking for restraining orders against the realization of her charged property **Kisumu/Pandpieri/1032**. Even though the actual plaint and notice of motion filed in that case have not been availed to this court, the ruling delivered on 10th December 2015 dismissing the application carries all the details the court has set out above. The court therefore find that the prayers sought in the current notice of motion dated 9th February 2016 are more or less similar to the prayers in the notice of motion dated 23rd October 2013 that was dismissed on 10th December 2015 by this court. That the ruling of 10th December 2015 has not been successfully challenged on appeal, and or review, and the issues decided thereon cannot be raised again as between the same parties, appearing in the same capacities, as to do so offends **Section 7 of the Civil Procedure Act Chapter 21 of Laws of Kenya**. The court therefore agrees with the

Defendant's counsel's submissions that the Notice of motion dated 9th February 2016 raises issues that have already been determined between parties by a court of competent jurisdiction and the application is therefore an abuse of the process of the court. The preliminary objection raised by counsel in respect of the notice of motion is upheld and the application is hereby struck out for being res judicata.

d) That the counsel for the Plaintiff submitted that the main suit in **Kisumu ELC 294 of 2013** is still pending. The counsel for the Defendant did not avail any judgment to show that the main suit has been decided by a court of competent jurisdiction and until such a time proof of a final decision is availed, the suit filed in this matter cannot be said to be res judicata or to offend **Section 7 of the Civil Procedure Act**. The court notes that in view of the ruling dated 10th December 2015, in **Kisumu ELC No.294 of 2013**, the issues in the main suit must be similar to the issues herein. This suit should therefore be stayed in terms of **Section 6 of the Civil Procedure Act** awaiting the determination of **Kisumu ELC No.294 of 2013** that is between the same parties.

7. That having found as above the court orders as follows:

a) That the Defendant's counsel's preliminary objection in respect of the notice of motion dated 9th February 2016 is upheld and the application is hereby struck out with costs.

b) The status quo order issued on 17th February 2016 is hereby vacated.

c) That the main suit herein, being similar to the suit in **Kisumu ELC 294 of 2013** which is still pending, is hereby stayed in terms of **Section 6 of the Civil Procedure Act** pending the hearing and determination of that other suit.

It is so ordered.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 25TH DAY OF MAY 2016

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr Omondi for Plaintiff/Respondent

Mr Emukule for Defendant/Applicant

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

25/5/2016

25/5/2016

S.M. Kibunja J

Oyugi court assistant

Parties absent

Mr Omondi for Plaintiff/Respondent

Mr Emukule for Defendant/Applicant

Court: Ruling delivered in open court in presence of Mr Omondi for Plaintiff/Respondent and Mr Emukule for Defendant/Applicant.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

25/5/2016