IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIHARA KARIUKI, OKWENGU & AZANGALALA, JJ.A)

CIVIL APPEAL NO. 30 OF 2011

BETWEEN

DR. KAVIN AGGREY WAKOLI & ANOTHER……….....................................APPELLANT

AND

HOUSING FINANCE COMPANY KENYA LTD. & 2 OTHERS……………………… RESPONDENT

(An appeal from Ruling & Order of the High Court of Kenya At Nairobi (Lady Justice Ruth Sitati) dated 1st October, 2010

in

CIVIL SUIT NO. 585 OF 2009)

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JUDGMENT OF THE COURT

This is an appeal against the decision of **Sitati J**, in High Court [Land and Environment] Case No. 585 of 2009 [HC (L&E) case] in which the learned Judge struck out the appellants' suit against the respondents on a preliminary objection that the suit was *res judicata*; that it was an abuse of the process of the court and that the 1st appellant's equity of redemption had been extinguished. The *res judicata* finding was made on the ground that the 1st appellant had previously instituted High Court Civil Case No. 468 of 2004 against the 1st respondent and the issues raised in HC(L & E) case No. 585 of 2009 had conclusively been determined in the former suit. The learned Judge was also of the view that given the decision, in the former suit, the appellants' new suit was also an abuse of the process of the court as it infringed **Section 7** of the **Civil Procedure Act (Cap 21 Laws of Kenya)**. Finally, according to the learned Judge, as the 1st appellant's property had been sold pursuant to the 1st respondent's statutory power of sale, the 1st appellant's equity of redemption had been extinguished.

High Court Civil Case No. 468 of 2004 (hereinafter "the earlier suit") was filed by the 1st appellant on 24th August, 2004. The defendant was Housing Finance which is the 1st respondent to this appeal. The claim was for special damages, general damages, interest and an order discharging the 1st appellant from liability under a charge created over title number **Dagoretti/Riruta/3085** (hereinafter "the suit property"). The foundation of the 1st appellant's claim was that the 1st respondent was in breach of a condition of the

said charge by failing or refusing to disburse the full amount of the loan offered to him as a result of which the 1st appellant had been unable to complete construction of a house on the suit property and had thereby lost rental income thereof. The 1st appellant also claimed that the 1st respondent had declined to consider a recommendation from his employer (University of Nairobi) to advance him a loan with more favourable terms over the same property which refusal occasioned him loss of benefits.

That suit was eventually heard by **Kimaru J**, who dismissed it on 2nd September, 2009. The 1st appellant has lodged an appeal against that dismissal which appeal is said to be pending disposal in this Court.

On 5th November, 2009 the 1st appellant lodged an application in the dismissed suit substantially under the then **Order XXXIX rule (1), Sections 3A** and **63(e)** of the **Civil Procedure Act** and **Section 74** of the **Registered Land Act** (now repealed). He sought the following orders:

> **(i) A declaration that the intended sale of the suit property was null and void**
>
> **(ii) An Order directing the 1st respondent to furnish him with a true statement of account**
>
> **(iii) An order preserving the suit property**
>
> **pending the disposal of an intended appeal.**

That application was dismissed by **Kimaru, J** on 9th November, 2009. The dismissal, no doubt, precipitated the process of realization of the suit property by the 1st respondent under its statutory power of sale. The suit property was eventually sold by the 1st respondent through the 2nd respondent **Joseph Mungai Gikonyo** t/a Garam Investments (hereinafter "the 2nd respondent") to the 3rd respondent, **Dorothy Thenya**, (hereinafter "the 3rd respondent").

On 18th November, 2009 the appellants**, Dr. Kavin Aggrey Wakoli** and **Martha Nyakaini Wakoli,** commenced **Nairobi HC (L&E) case (**"the later suit"). The appellants in that suit sought declarations that *"the purported sale conducted by public auction was null and void abinitio, their property was grossly undervalued, interest charged was arbitrary and unjustified"*. The appellants further sought an order restraining the respondents from adversely dealing with the suit property. Also claimed were general and aggravated damages for alleged unlawful acts of the respondents.

The final prayers in the later suit were expressed in these terms:-

> **"(a) A declaration that the sale by Public Auction of the plaintiff's LR No. DAGORETTI/RIRUTA/3085 conducted on 10th November, 2009 was illegal, null and void abinitio and be set aside.**
>
> **(b) A permanent injunction restraining the Defendant's and/or their agents from transferring accessing/gaining entry to the plaintiff's (sic) property LR NO. DAGORETTI/RIRUTA/3085 or in any other way interfering with the Plaintiff's (sic) lawful possession of the said property unless lawfully ordered to do so.**
>
> **(c) A declaration that interest charged by the 1st Defendant on the loan is illegal and unjustified and same should be waived**
>
> **(d) A declaration that the Plaintiff's (sic) property LR NO. DAGORETTI/RIRUTA/3085 was grossly undervalued hence the sale was unlawful……Plaintiffs are entitled to damages assessed at the current value of the property.**

(e) Aggravated damages and general damages for unlawful acts.

(f) Costs and interest of suit"

It is now clear from the foregoing that the two suits were not identical. There were, of course, many similarities between them. The 1st appellant and the 1st respondent were common; **Title No. Dagoretti/Riruta/3085** was the focus of both suits; the relationship between the 1st appellant and the 1st respondent remained that of chargor and chargee and interest was claimed in both suits.

We have not been able to trace, in this record, the written statement of defence delivered by the 1st respondent in the earlier suit.

With regard to the later suit, we have traced the written statement of defence delivered on behalf of the 1st and 2nd respondents in which the appellants' claim was denied. The 1st and 2nd respondents specifically averred as follows in paragraph 1:

> **"(i) that no cause of action lies against them arising from the Plaint and Verifying Affidavit sworn in support thereof;**
>
> **(ii) that the Plaint and Verifying Affidavit sworn in support thereof are incompetent, frivolous and reserves (sic) the right to strike out the said Plaint and the entire suit with costs at the appropriate time;**
>
> **(iii) that this Defence is filed under protest as the suit is an abuse of the court process**
>
> **(iv) that this suit is *res judicata* and this Court has no jurisdiction to entertain the same.**
>
> **(v) that the Plaintiff's equity of redemption has been extinguished for all purposes."**

This record does not seem to incorporate the 3rd respondent's written statement of defence.

On 18th November, 2009, the appellants, contemporaneously with their plaint, under a certificate of urgency, lodged an application by way of Chamber Summons seeking, among other reliefs, the following orders:

> **(a) An order restraining the respondents from accessing, gaining entry or transferring, wasting damaging or in any other way adversely interfering with the suit property.**
>
> **(b) An order restraining the Land Registrar Nairobi from effecting and/or making any entry in the Register against the suit title pending the hearing and determination of the application and the suit**
>
> **(c) An order directing the 1st respondent to furnish the 1st appellant with a statement of account to justify the amount in its notification of sale dated 8th September, 2009.**

When served, the 1st respondent filed a replying affidavit and its advocates filed a Notice of Preliminary Objection on its behalf and on behalf of the 2nd respondent. The 3rd respondent, on her part, in opposition to the application, filed a replying affidavit. As the appellants' suit and application were struck out on the preliminary objection, the grounds thereof are pertinent and were expressed as follows; that the

"(i) suit is *re judicata* and this Court has no jurisdiction to entertain the same.

(ii) suit is a flagrant abuse of the court process.

(iii) plaintiff's equity of redemption is extinguished and this suit does not lie.

(iv) plaintiffs failed to disclose in their application that the suit property was sold after full hearing of HCCC 468 of 2004 in which the plaintiffs case was dismissed with costs."

After hearing the application **Sitati J.,** upheld the preliminary objection raised by counsel for the 1st and 2nd respondents. The learned Judge said this in her ruling:-

> ***"Applying the above principles to the instant case, I am satisfied that this whole case is res judicata Milimani HCCC No. 468 of 2000 (sic). Under explanation 4 of Section 7 of the Civil Procedure Act, any matter which might or 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. The 1st Plaintiff herein was the Plaintiff in HCCC No. 468 of 2004. The suit was heard and determined by a court of competent jurisdiction. The fact that the appeal to the Court of Appeal has not been heard and determined does not in any way obliterate the fact that the issues herein were heard and determined by a court of competent jurisdiction.***

The plaintiff's application of 05/11/2009 seeking to set aside the public auction sale was dismissed on 9/11/2009. The present suit is anchored on that public auction, which auction the plaintiffs allege was illegal and fraudulent. For the reasons above given, I am satisfied that the first ground of the 1st and 2nd defendants' Preliminary objection succeeds.

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16. Whichever way the parties look in this matter, the facts that stare then in the face in Milimani HCCC No. 468 of 2004 are the same facts staring them in the face in the instant suit. And because the Plaintiffs are trying to bring back the same issues that have already been determined by a court of competent jurisdiction, I am satisfied that their attempts are a clear and flagrant abuse of the court process since the matter has already been heard and determined by a court of competent jurisdiction the same should not be allowed to stand. The second ground of the Preliminary Objection succeeds.

17………………………………………..once the property is sold, the Plaintiffs equity of redemption also goes and consequently the Plaintiffs cannot claim to have any other or further rights in the suit property.

18……………….

19. For the above reasons both the Plaintiffs' suit filed on 18/11/2009 and the Chamber Summons application dated 17/11/2009 and filed in court on 18/11/2009 are hereby dismissed….."

That decision triggered the appeal before us premised upon six grounds which were argued together by **Mr. Momanyi**, learned counsel for the appellant. The gist of his submissions was that the two suits were not similar. In support of that submission, learned counsel made reference to the parties in the two suits, the causes of action, the pleadings and the bases of the two suits and contended that there was no similarity in them.

Mr. Karungo, the learned counsel for the 1st and 2nd respondents, supported the decision of the High Court and posited that the two suits were in reality the same and that the *res judicata* plea was properly upheld.

Mr. Wena, the learned counsel for the 3rd respondent, concurred with Mr. Karungo in supporting the decision of the High Court. In his view, as the appellants in the later suit did not challenge the process leading to the auction sale, the suit was clearly *res judicata* by reason of the earlier suit.

We have considered the record, the pleadings in the two suits, the ruling of the High Court, the grounds of appeal and the submissions of learned counsel. Having done so, we think this appeal turns on whether the plea of *res judicata* was properly upheld by the learned Judge of the High Court. In this regard **Section 7** of the **Civil Procedure Act (Cap 21 Laws of Kenya)** and particularly explanations (3) and (4) are pertinent. The Section reads:-

> 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 finally decided by such court."**

Explanation (3) reads:

> **"The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other."**

And explanation (4) is in the following terms:-

> **"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."**

Of significance is the phrase *"the matter directly and substantially in issue"*. That phrase appears in both the section and explanation (4). So, what the court hearing the subsequent suit has to determine is whether the matter directly and substantially in issue in the former suit is the same as the matter directly and substantially in issue in the subsequent suit.

We have already observed that the two suits were not identical. In the earlier suit the only parties were the 1st appellant and the 1st respondent. The 1st appellant in that suit claimed that the 1st respondent had acted in breach of the loan agreement by not disbursing the entire loan sums offered to him and further that the 1st respondent, declined, to consider the appellant's employer's loan proposal, which event resulted in the 1st appellant incurring loss. The 1st appellant prayed for damages for breach of contract. It is plain that at the time of filing the earlier suit, the suit property had not been sold.

The later suit was instituted not only by the 1st appellant but he was joined by the 2nd appellant. The suit was against the three respondents. The 1st respondent exercising its statutory power of sale, had instructed the 2nd respondent to sell the suit property and the 3rd respondent was the successful bidder at the public auction conducted by the 2nd respondent. It is the sale of the suit property which provided ammunition for the later suit. The appellants indeed made some allegations which the 1st appellant had made in the earlier suit. However, the similarities in those allegations did not detract from the fact that the later suit crystallized when the suit property was auctioned by the 2nd respondent on the instructions of the 1st respondent. The 2nd respondent and the 3rd respondent to whom the suit property was sold could not have been joined in the earlier suit. It cannot therefore be said that the claims arising from the sale of the suit property were matters directly and substantially in issue in the earlier suit. It cannot also be said that the

1st appellant could have alleged anything about the sale which could have either been denied or admitted expressly or impliedly by the 1st respondent or the other respondents as required in explanation (3) of **section 7** of the **Civil Procedure Act**. We also do not see how the appellants could have made any matter arising from the auction sale a ground for attack nor could the 1st respondent raise the same as a ground of defence as stated in explanation 4 of the same section 7 of the Civil Procedure Act. The appellants had no legal duty to bring action against parties who came into existence only as a result of the auction sale.

In the plaint, in the later suit the appellants claimed that the 1st and 2nd respondents fraudulently, without giving them notice, failed to follow proper procedures and illegally sold the suit property at a throw away price. Particulars of fraud were enumerated. The respondents were also alleged to have conspired to deprive the appellants of the suit property and occasioning them loss and damage. For the alleged wrongful acts, the appellants claimed, *inter alia*, general and aggravated damages and the setting aside of the sale. Those are not claims the appellants could have made in the earlier suit.

It cannot also be said that the same parties in the later suit were the same ones who had litigated in the earlier suit under the same title. In the earlier suit the focus of the suit was the alleged breach of the contract created by the charge over the suit property whilst in the later suit the focus was the alleged wrongful sale of the suit property. The appellants further prayed for the setting aside of the auction sale and an order restraining the respondents from transferring and/or accessing the suit property unless lawfully ordered to do so.

In our view, at the stage the 1st and 2nd respondents' preliminary objection was canvassed before the learned Judge of the High Court, the merits or demerits of the appellants' claims could not be determined conclusively and could not have been so determined in the earlier suit. *Res judicata* plea can be successfully pleaded only where a court of competent jurisdiction has exercised its judicial mind and has, after argument and consideration, come to a final decision on a contested matter. According to *Mulla* on the Code of Civil Procedure 16th Edition, Volume one, one of the tests is to ascertain if the party aggrieved by a finding could challenge it. Observation made by the court, when there was no pleading nor evidence, could not operate as *res judicata.* The mere fact that a matter directly and substantially in issue in a suit was directly and substantially in issue in a former suit is not sufficient to constitute the matter *res judicata*, it is also essential that it should have been heard and finally decided.

The authors of the same edition of *Mulla (supra)* state, at page 293, as follows:

> ***"Where a decree is appealed from, it is the appellate decree that must be looked to, to determine the question of res judicata and not the decree appealed from. A decision liable to appeal may be final…until the appeal is preferred; but once that appeal is filed, the decision loses its character of finality, and what was once res judicata again becomes sub judice, that is matter under judicial inquiry."***

We agree with the views expressed in that treatise especially as our Civil Procedure Act and Rules trace their origin to the Indian Civil Procedure Rules and Practice. It is not in contention that the 1st appellant has lodged an appeal against the earlier suit. The decision therein cannot therefor be final and could not defeat the later suit for being *res judicata.*

For the above reasons we find that section 7 of the Civil Procedure Act did not bar the later suit, which could not therefore be struck out as being *res judicata.* The other grounds of the preliminary objection flowed from the upholding of the *res judicata* plea. Having found that that plea was not available to the respondents, we cannot say that the appellants' suit was an abuse of the process of the court. We also find that the appellants' suit went beyond the issue of redemption of the charge over the suit property.

As we conclude this judgment we observe that the learned Judge of the High Court, with all due respect to her, may not have adequately appreciated the purview of a preliminary objection which raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained (See **Mukisa Biscuits Manufacturing Co. Ltd. –v-**

West End Distributors [1969] EA 696). In this case the preliminary objection was not argued on the presumption that all the facts pleaded by the appellants were correct. Indeed there was controversy over most facts. Further, a determination of the preliminary objection was not possible without ascertaining facts. In any event at the time the preliminary objection was canvassed before the learned Judge, pleadings were not closed. We were informed from the bar that the 3rd respondent was yet to deliver her defence to the appellants' suit.

In the end we allow this appeal, set aside the order of the learned Judge of the High Court striking out the appellants' suit and substitute therefor an order dismissing the 1st and 2nd respondents' preliminary objection. The appellants' suit is hereby reinstated and should be disposed of in the usual manner by any judge of the High Court other than **Sitati J.** The appellants shall have the costs of this appeal to be borne by the 1st and 2nd respondents.

Judgment accordingly.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2015.

P. KIHARA KARIUKI (PCA)

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JUDGE OF APPEAL

H.M. OKWENGU

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

I certify that this is

a true Copy of the original

DEPUTY REGISTRAR

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