



**Shah (Suing on Behalf of the Estate of Janendra Raichand Shah) & another
v Fidelity Commercial Bank [SBM Bank Limited] (Environment & Land
Case E041 of 2023) [2024] KEELC 4447 (KLR) (5 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4447 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E041 OF 2023**

SM KIBUNJA, J

JUNE 5, 2024

BETWEEN

**VIKESH JENENDRA SHAH [SUING ON BEHALF OF THE ESTATE OF
JANENDRA RAICHAND SHAH] 1ST PLAINTIFF**

NESFOOD INDUSTRIES LIMITED 2ND PLAINTIFF

AND

FIDELITY COMMERCIAL BANK [SBM BANK LIMITED] DEFENDANT

RULING

[NOTICE OF MOTION DATED 9TH NOVEMBER 2023 AND PRELIMINARY
OBJECTION DATED THE 8TH DECEMBER 2023]

1. The plaintiffs moved the court through the notice of motion dated the 9th November 2023 seeking for an order of injunction restraining the defendant by itself or through others “from advertising, auctioning, or offering for sale, or selling, or purporting to sell, or in any other way disposing, alienating or intend to alienate or deal with the property or proprietary interests in the property known as Mombasa/BlockXX1/562 together with L.R No. MN/11/10426 [CR.43700], the suit properties, pending the hearing and determination of this suit.” The application is premised on the fourteen (14) grounds on its face marked (a) to (n) and supported by the affidavit of Vikesh Janendra Shah, sworn on the 9th November 2023. It is the plaintiffs’ case that the 1st plaintiff has obtained limited grant ad litem in respect of the Estate of Janendra Raichand Shah, the deceased, issued in Mombasa CM Misc. Succession Cause No. E142 of 2023. Kamal Janendra Shah, the deceased, and 1st plaintiff are the registered proprietors of Mombasa/Block/XX1/562, while the 2nd plaintiff owns parcel L.R No. MN/11/10426 [CR.43700]. That the deceased had charged the suit properties to secure financial facilities for the 2nd plaintiff. That subsequently thereto, Mombasa/Block/XX1/562 was compulsorily acquired by the Government of Kenya, for the Mombasa Gate Bridge Project-Bridge Approaches in



2022. That upon the compulsory acquisition, the property vests in the state and is not available for the defendant to divest to third parties through auction and or private treaty. That the deceased died on the 8th June 2023, and his right of redemption devolved to his personal representatives. That the defendant advertised the suit properties for auction on the 14th November 2023 in exercise of its power of sale. That as the defendant had not served notices upon the legal representative of the deceased, the advertised auction was illegal and void, and the defendant should be restrained.
2. The defendant responded to the application by filing the notice of preliminary objection dated the 8th December 2023 raising four grounds that:
 - a. That the suit is *subjudice* Mombasa HCCC NO. 28 OF 2017, *Nesfood Industries Limited & Janendra Raichand Shah versus Fidelity Commercial Bank Limited*.
 - b. The application dated 9th November 2023 is *res judicata* that dated the 14th March 2017 that has been decided in the previous matter.
 - c. That the 2nd plaintiff had filed a similar suit being Mombasa HCCC No. E015 of 2022, *Nesfood Industries Limited versus SBM Bank Limited* that was struck out on 3rd October 2023 on grounds of being *res judicata*.
 - d. That the averments at paragraph 19 of the plaint that there does not exist a suit between the parties and over same properties is falsehood and amounts to perjury.
 3. The defendant also opposed the application through the replying affidavit of Stephanie Kioko, Senior Legal Officer, sworn on the 7th December 2023 deposing inter alia that, if parcel Mombasa/Block/XX1/562 was acquired by the Government as alleged, then the plaintiffs have no business suing over a property that they have no title over; that compulsory acquisition of a property does not relinquish the financial liabilities of the property owner, that it was subject to; that the gazette notice for the said plot's acquisition shows the ownership is yet to be determined; that the plaintiffs did not approach the court with clean hands and concealed material facts to obtain *ex parte* orders; that the suit is *subjudice* Mombasa HCCC NO. 28 OF 2017, *Nesfood Industries Limited & Janendra Raichand Shah versus Fidelity Commercial Bank Limited*, which was coming up on 8th February 2024 to show cause why it should not be dismissed for lack of prosecution; that the orders sought in the application herein dated the 9th November 2023 are a complete replica of those sought by the plaintiffs through the application dated the 14th March 2017 in that previous suit, and was dismissed; that the plaintiffs also filed Mombasa HCCC No. E015 of 2022, *Nesfood Industries Limited versus SBM Bank Limited* seeking similar orders in which the defendant filed preliminary objection that was upheld, and the suit was struck out on 3rd October 2023; that the plaintiffs filed a notice of appeal on 4th October 2023 but have not taken any other step, and instead filed this suit seeking similar orders to those in the previous suits; that the plaintiffs have perjured themselves by deposing at paragraph 19 of their plaint that HCCC No. 28 of 2017 is over parcel No. C.R 39208 L.R No. 890 [original number 284/99] Section 111/MN, while the truth as borne by the pleadings in both Mombasa HCCC Nos, 28 of 2017 and E015 of 2022, that are annexed show the suit properties therein are the same in this instant matter; that the plaintiffs have not disclosed that they are indebted to the defendant in excess of Kshs.238 million, which they have not been servicing, but they seek for orders to stop the defendant recover the debts through the securities.
 4. The court gave directions on filing and exchanging submissions on the 11th December 2023, and set the matter for mention of the 15th February 2024. On that dated, only the learned counsel for the defendant had filed their submissions dated the 14th February 2024, which the court has considered.



5. The following are the issues for the court's determinations:
- a. Whether the defendant's preliminary objections raises pure points of law that if upheld would determine the application and or suit.
 - b. Whether the application herein is *res judicata*.
 - c. Whether this suit is *sub judice*.
 - d. Whether the plaintiffs have established a *prima facie* case upon which the order of injunction sought may be granted at this interlocutory stage.
 - e. Who pays the costs?

6 The court has carefully considered the grounds on the notice of motion and preliminary objection, affidavit evidence, submission by the learned counsel, superior courts decisions cited thereon and come to the following findings:

- a. That preliminary objection was defined in the case of *Mukisa Biscuit Manufacturing Company Limited versus West End Distributors Limited* (1969) EA 696 in the following words;

“a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract, giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It 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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

The defendant raised four grounds in their notice of preliminary objection dated the 8th December 2023. The grounds are primarily that the court is without jurisdiction as this suit is subjudice; that the application is *res judicata*, and the plaintiffs perjured themselves. In view of the decision in *Mukisa's case* on what constitutes a preliminary objection, the court finds the grounds in the defendant's objection are not raising pure points of law, as they would require evidence to be called and considered for the court to make a determination. The court would have proceeded to dismiss the said grounds of preliminary objection at this stage, had it not been the fact that the same grounds are raised through the defendant's replying affidavit sworn on the 7th December 2023. The court will therefore proceed to determine them as part of the defendant's reply to the plaintiffs' application.

- b. In determining whether the court has jurisdiction in this matter, the court has to consider what section 6 of the [Civil Procedure Act](#), Chapter 21 of Laws of Kenya states about *sub judice*. The section states as follows:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is



pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

In the case of *Margaret Wachu Karuri Vs John Waweru Ribiro* (2021) eKLR, the Court was faced with a similar question on whether *sub-judice* can be raised as a preliminary point and it held as follows;

“For the Court to determine whether the issues herein were directly and substantially in issue with the other suit, it is this court’s considered view that it will have to ascertain facts and probe evidence by ascertaining whether the issues raised in the instant suit are the same as the ones in the Appeal aforesaid and further interrogate the prayers sought whether they are the same and relate to the same issues. On whether or not the same is sub-judice, facts have to be ascertained and a preliminary objection cannot be raised on disputed facts. Therefore, this court holds and finds what has been raised by defendant/objector does not amount to a preliminary objection, and thus the preliminary objection is not merited.

Consequently, the court finds and holds that the notice of preliminary objection dated 30th August, 2019, by the defendant/objector is not merited and the same is dismissed entirely with costs to the plaintiff/Respondent”.

Unlike that suit, the defendant has in this matter availed evidence in support of the grounds through the replying affidavit, and the court has to consider them as part of the reply to the plaintiff’s application dated the 9th November 2023 and make a determination.

- c. This suit was commenced through the plaint dated the 9th November 2023, and the plaintiffs are seeking for declarations *inter alia* that parcel Mombasa/Block/XX1/562 was not available for the defendant to divest to a third party as it had been compulsorily acquired; that the said parcel was free property for purposes of succession and the legal representative of the Estate of the deceased retained a right of redemption; that the intended realization of the suit properties is unlawful and void ab initio, and defendant breached its contractual and statutory duty owed to the plaintiffs. The plaintiffs also seek for permanent injunction restraining the defendant from among others, auctioning, selling or in any other way dealing with the suit properties and costs of the suit.
- d. At paragraph 19 of the plaint, the plaintiffs averred that “There is no other suit pending in this court, and there have no previous proceedings in this court on the same cause or subject matter involving the parties. Save that Janendra Raichand Shah instituted Mombasa HCC NO. 28 OF 2017, *Nesfood Industries Limited & Another versus Fidelity Commercial Bank Limited*, over all that parcel of Land known as Land Title Number C.R 39208 being Land Reference Number 890 (original Number 284/99) Section 111 Mainland North.” In paragraph 3 of the verifying affidavit filed with the plaint, the deponent, Vikesh Janendra Shah, deposed “That there is no other suit pending in this court on the subject matter involving parties herein.” The defendant has taken an issue over the above averment and deposition through the preliminary objection and replying affidavit, disclosing that there has been two previous suits, being Mombasa HCCC NO. 28 OF 2017, *Nesfood Industries Limited & Janendra Raichand Shab versus Fidelity Commercial Bank Limited* and Mombasa HCCC No. E015 of 2022, *Nesfood Industries Limited versus SBM Bank Limited*, that were over the same suit properties and between the same parties. The defendant has exhibited the plaint, certificate of urgency, notice of motion and supporting affidavit, all dated 14th March 2017 filed in Mombasa HCCC No. 28 of 2017, and it is evident Nesfood Industries Limited and Janendra Raichand Shah



were the 1st and 2nd plaintiffs, while Fidelity Commercial Bank Limited was the defendant. In the instant suit, Nesfood Industries Limited is the 2nd plaintiff while the 1st plaintiff is Vikesh Janendra Shah suing on behalf of the estate of Janendra Raichand Shah. The defendant in the instant suit and that former suit is the same. The suit properties subject matter of Mombasa HCCC No. 28 of 2017 are described as Title No. C.R. 39208, being L.R. No. 890 (original No. 284/99) Section 111/MN, as can be seen at paragraphs 7, 8, 9 and 12 of the plaint among others. Paragraphs 26 and 27 of the plaint contains properties described as herein below; Plot No.890 and 889/Section 111/MN; Mombasa Island/Block XX1/562; and Subdivision No. 10426/Section 11/MN (Original No.805/125) Section 11/MN.

The above leaves no doubt that it is evident the two suit properties in the instant suit, were among the properties subject matter in Mombasa HCCC No. 28 of 2017, and the parties in both matters are the same. It should be noted that though Vikesh Janendra Shah was not a party in the previous suit, he appears in the current suit as legal representative of Janendra Raichand Shah, the deceased, who was 2nd plaintiff. That apart from the sequence of paragraphs and phraseology, the prayers in the plaint and notice of motion dated the 14th March 2017, filed in Mombasa HCCC No. 28 of 2017, are more or less the same as those in the plaint and notice of motion dated 9th November 2023.

- e. The defendant has also attached a copy of the ruling delivered on 30th June 2022, in respect of *inter alia* plaintiffs' application dated 16th December 2020 for injunction restraining the defendant from proceeding with the auction over parcels Mombasa/Block XX1/562 and LR. No. 10426, Section 11/MN, and defendant's application dated 15th January 2021, to among others have the plaintiffs' suit dismissed for want of prosecution. At paragraph 33 of the said ruling, the two applications were dismissed.
- f. Also attached to the defendant's replying affidavit is the plaint, certificate of urgency, notice of motion and supporting affidavit all dated the 21st March 2022, filed in Mombasa HCCC No. 15 of 2022, *Nesfood Industries Limited versus SBM Bank Limited*. Paragraphs 3, 7, 9, 11 and prayer b shows the suit properties are Mombasa Island/Block XX1/562, Subdivision No. 10426 (original No. 805/125) Section 11/MN and Plot Title No. 890 Section 111/Mombasa, now subdivided. The prayers on the plaint are for inter alia declarations that the defendant was in breach, permanent injunction against selling the properties, general damages and costs. The prayers on the notice of motion are for inter alia injunction restraining the defendant from selling or in any other way dealing with the suit properties. From the copy of the ruling delivered on the 3rd October 2023, that is also attached to the defendant's replying affidavit, the said plaintiff's application for injunction dated 21st March 2022 and another dated 16th December 2022 for similar prayers were dismissed, the defendant's preliminary objection dated 11th May 2023 upheld, and the suit filed through the plaint dated the 21st March 2022, struck out. It is clear parcel Mombasa/Block XX1/562 that is subject matter in the instant suit was also subject matter in Mombasa HCCC No. 15 of 2022. The 2nd plaintiff in the instant suit was the plaintiff in the previous suit while the defendant was the same in both matters.
- g. That from the foregoing, it is obvious the plaintiffs were not entirely candid when they averred as they did in the plaint dated the 9th November 2023, that there has been no other suit pending or previous one over the same cause of action or subject matter and between the parties. The 1st plaintiff deposition in the verifying affidavit that the contents of the plaint are true, and there was no other pending suit over the same subject matter and between the parties is also evidently far from the truth.



- h. Section 7 of the *Civil Procedure Act* chapter 21 of Laws of Kenya provides for the *res judicata* principle as follows:

“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.”

The issues in the instant suit are by their nature similar to those raised in Mombasa HCCC No. E015 of 2022, *Nesfood Industries Limited versus SBM Bank Limited*, that was struck out on 3rd October 2023 upon the defendant’s preliminary objection, and Mombasa HCCC NO. 28 OF 2017, *Nesfood Industries Limited & Janendra Raichand Shah versus Fidelity Commercial Bank Limited*, that is reportedly still pending. The plaintiffs have not shown, or attempted to establish that the courts before which the Mombasa HCCC No. E015 of 2022 was decided, or Mombasa HCCC No. 28 of 2017, is pending are courts without jurisdictions. In that case, there is no reasons why the plaintiffs did not approach those courts to have any related novel issue that may have discovered, or arose after the filing of the previous suits, introduced as appropriate through amendments of pleadings. The filing of this suit, without disclosing the existence of the similar previous litigations that had been decided, and or pending before the High Court amounts to an abuse of the process of the court.

- i. The defendant has annexed to their replying affidavit, a copy of the Notice of Appeal dated the 4th October 2023, in respect of the ruling delivered on the 3rd October 2023, filed by the plaintiff in Mombasa HCCC No. E015 of 2022. The fact that the plaintiffs have an appeal and Mombasa HCCC NO. 28 OF 2017, *Nesfood Industries Limited & Janendra Raichand Shah versus Fidelity Commercial Bank Limited*, that are pending before the respective courts, is evidence enough that they are not without recourse if the instant suit and application were struck out for being an abuse of the court process, sub judice and or *res judicata*.
- j. That having come to the foregoing determinations, it follows that the plaintiffs have failed to establish a prima facie case with a probability of success, upon which the injunction order they sought could be based. That in terms of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya that provides for costs to follow the events, unless otherwise ordered for good cause, I find no reason to depart from that edict. The defendant will have costs in the application and suit.

7. In view of the above conclusions, the court find and order as follows:

- a. That the plaintiffs’ notice of motion dated the 9th November 2023 is *res judicata*.
- b. That this suit is sub judice Mombasa HCCC NO. 28 OF 2017, *Nesfood Industries Limited & Janendra Raichand Shah versus Fidelity Commercial Bank Limited*, that was filed earlier and is reportedly still pending determination before the High Court.
- c. That the application dated 9th November 2023 and suit commenced through the plaint of even date are hereby struck out.
- d. The plaintiffs to pay the defendant costs.



Orders accordingly.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF JUNE 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiffs : M/s Takah for Kariuki

Defendant : M/s Ronald for Gikandi

Leakey – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

