



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

ELRC NO. 10 OF 2016

**KENYA UNION OF DOMESTIC HOTELS, EDUCATIONAL INSTITUTIONS, HOSPITALS
AND ALLIED WORKERS (KUDHEHIA).....CLAIMANT/RESPONDENT**

-VERSUS-

THE MANAGEMENT OF TEA HOTEL.....APPLICANT

AND

RAVJI DEVJI CHHABHADIA

KANJI DEVJI CHHABHADIA

CHANDRAKANJI DEVJI CHHABHADIA

SHASHIKANT KANJIBHAI PINDORIYA.....PURCHASERS/RESPONDENTS

AND

YAS ANGWAN HOLDINGS LIMITED.....PROPOSED INTERESTED PARTY

TEA HOTEL LIMITED.....PROPOSED INTERESTED PARTY

RULING

1. The Applicant herein has filed a Notice of Motion Application dated 26th April, 2021 under Certificate of urgency seeking inter alia for; injunctive order do issue against the respondents from interfering with title number L.R No. KERICHO MUNICIPALITY BLOCK 4/ 295, to compel the registrar of land to cancel any entries on the said title and set aside any purported transfer and or sale to the purchasers herein. Further that the Auctioneer, Hezron Getuoma onsongo T/A Hegeons Auctioneers who conducted the public auction be compelled to file in this court details of the said auctions and the license by the auctioneer be revoked forthwith and that this Honourable Court exercise disciplinary control vested upon it under section 56 of the Advocates Act against Kemboi Gilbert Kiprono Advocate.

2. In response to the Application, the claimant/ Respondent filed a replying affidavit dated 7th May, 2021 together with Notice of preliminary Objection on even date which was based on the following grounds;

1. THAT the issues decided in the previous Applications to wit application:

a. Application dated 9/3/2019 and 16/12/2019 whose Ruling was delivered on 3/4/2020;

b. Notice of Appeal dated 14/4/2020 whose Ruling was delivered on 29/1/2021;

c. Application dated 14/6/2018 dismissed with costs vide Ruling delivered on 9/10/2018:

d. Application withdrawn with costs on 16/3/2021 under the direction of this Honourable court filed by Counsel Siele Sigira on Behalf of Yas Angwan Holdings Limited/Proposed Interested party/Respondent: and the present

Application dated 26/4/2021 is substantially similar with all the above Applications going by the definition in Section 7 (Res Judicata) of the Civil Procedure Act, 2010 therefore this Honourable Court lacks jurisdiction to grant the orders prayed for.

2. THAT this Honourable court lacks jurisdiction to entertain and grant the orders (g) and (h) by virtue of Section 18 of the Auctioneers Act, 2012 and Section 60 of the Advocates Act, 2012 respectively.

3. THAT the Honourable Court should invoke its inherent jurisdiction under Section 3A of the Civil Procedure Act, 2010 to ensure the ends of justice are met and to prevent continuous/unending abuse of the court process by the proposed interested party/Respondent.

4. That the Application is therefore frivolous, fatally defective, misconceived and bad in law and an egregious abuse of the court process.

5. That the proposed interested party/respondent has failed to reflect the true position of facts and has chosen to bring lies to court to defeat the obvious and further approached this Honourable Court with dirty hands with immense malafides.

3. The Ruling herein is therefore in respect of the said Preliminary Objection which the court found ought to be heard before the aforementioned Notice of Motion.

4. The respondent/ Purchasers filed their submissions on 18th May, 2021 while the Claimant/ Respondent filed their dated 18th May, 2021 both in support of the preliminary objection while the Respondent/ Applicant filed their on 21st June, 2021.

Claimants' submissions

5. The claimants submitted that the application dated 26th April, 2021 is Res judicata the issues raised therein for determination had already been raised in previous applications being application dated 14th June, 2018 seeking to stay sale of land Reference number Kericho Municipality/ Block/4/313 which application was dismissed by the Court, Proposed interested parties/Respondents' Application dated 16th December, 2019 seeking to stay the sale of LR No. Kericho Municipality Block 4/295 which application was equally disallowed. He argues further that when the interested parties were unable to secure stay Order in this Court, They Appealed to the Court of Appeal in Nyeri and equally filed stay application dated 11th May, 2021 which sought orders similar to the orders sought in Application dated 26th April, 2021 which Application was dismissed by the Judges of Court of Appeal by a ruling dated 29th January, 2021.

6. Counsel buttressed his argument by citing the cases of **James Katabazi & 21 others –v- the Attorney General of the Republic of Uganda, EACJ** which was quoted with approval in the case of **Nicholas Njeru –v- Attorney General & 8 others [2013] eKLR** where the court stated that for the doctrine of res judicata to apply; the matter must be directly and substantially in issue in the two suits, the parties must be the same or parties under whom any of the claim, litigating under the same title and the matter must have been finally decided in the previous suit'

7. Accordingly, Counsel submitted that the issue for determination in the Application dated 26th April, 2021 are issue that have already been determined as such the application is res judicata.

8. It was submitted that the numerous times the Applicant have sought to have the stay of sale in Court is warring, which actions amounts to an abuse of Court process which should not be tolerated under any circumstance and cited the case of **Republic- v- chairman district alcoholic drinks regulations committee & 4 others EX-parte detlef Heier & another[2013] eKLR** where the court defined what is meant by abuse of court process to include where a party uses the judicial process to harass, irritate and annoy his opponents and interfere with the administration of Justice.

9. On whether the application herein offends the provisions of section 60 of the Advocates Act,2012 and section 18 of the Auctioneers Act, 2012, Counsel submitted that section 60 of the Advocates Act provides for disciplinary mechanism of an advocates that ought to be filed at the Advocates Disciplinary committee established under Section 57 of the Advocates Act, a fact that the applicant is aware and has never raised any complaint with the said tribunal as such the order sought therein is without any basis. Similarly, the complaint against the Auctioneers which the applicant sought for this Court to exercise disciplinary control is misplaced as section 24 of the Auctioneers Act vests disciplinary control of auctioneers upon the Auctioneers Board, which complaint has not been filed by the applicant with the said Board. Therefore he submitted that this Honourable Court is not the proper forum to hear and determine the issue of disciplinary action against the advocate and the auctioneer.

10. It was argued that since tribunals have been created to handle disputes of specific nature it behooves court to ensure that dispute of specific nature which have specific tribunals established to hear such matter are directed to such tribunals. He cited the case of **Francis Mutuku –v- Wiper democratic Party Movement-Kenya & 2 others[2014] eKLR** where Justice Mumbi while dismissing the petition for want of jurisdiction held that;

“it would be to undermine and defeat the mechanisms and institutions provided by law, which are underpinned by the constitution to hold otherwise”

11. Counsel in conclusion submitted that the Preliminary Objection satisfies the test set out in law as it is based on pure point of law as was held in the celebrated case of **Mukhisa Biscuits** and urged this Court to allow the P.O and dismiss the application for being res-judicata.

Purchasers' submissions

12. The purchasers herein in support of the preliminary Objection submitted that the applicant filed an application dated 9th March, 2019 seeking to stay execution of the consent order of 25th July, 2016 and to strike out the warrant of attachment and sale, however since the public auction had been conducted on 24th January, 2019 the said orders had been overtaken by events. Further that the applicant filed other applications as already submitted by the Claimant's Counsel including the Appeal Application dated 11th May, 2020 which were all dismissed.

13. He submitted in concurrence with the claimant submissions that the application dated 26th April, 2021 is *res judicata* which issues raised have already been litigated upon therefore the applicant is estopped and barred from re-litigating a cause of action which has been conclusively determined by the rulings delivered by the Court in respect of the application dated 9.3.2019 and 16.12.2019 and the Appeal application dated 11.5.2020.

14. On the issue of Tea Hotel Limited being proposed as the interested party to be enjoined, in the application, counsel submitted that the said Tea Hotel and the Management of Tea Hotel, Applicant herein, are proxies as the management of Tea Hotel are the directors of the Tea Hotel Limited therefore the enjoining of the proposed Tea Hotel Limited is a decoy employed by the Applicant to frustrate the claimant/respondent and to further delay the matter. He terms the said actions as amounting to abuse of court process as was held in the case of **Muchanga investment limited –v- safaris unlimited (Africa) ltd & 2 others civil appeal number 25 of 200[2009] eklr.**

15. It was also submitted that the applicant in their application of 26th April, 2021 failed to disclose material fact i.e. the previous applications including the court of Appeal application, which is a mandatory requirement of any applicant seeking for an equitable remedy such as an injunction, he cited the case of **Johnson Kimeli –v- Barclays Bank of Kenya Ltd, Kisumu HCCC No. 171 of 2003.**

16. He thus urged this court to allow the Preliminary Objection and dismiss the Applicant Application.

Applicant's Submissions

17. The Applicant submitted that, the claimants contrary to law sold the entire parcel of land being Kericho Municipality Block/ 4/296 which was valued at Kshs. 423,512,500/- instead of an acre in BLOCK 4/313 that was valued at Kshs. 100,000,000/- to satisfy the decree therefore argued that the Preliminary objection raised is meant to subvert its legitimate prayer in the application dated 26th April, 2021 which seeks to ascertain whether execution proceedings in the matter were conducted in accordance with law.

18. It was submitted that the preliminary objection raised does not raise pure points of law as envisaged by the supreme court decision in **Independent and Electoral & Boundaries Commission –v- Jane Cheperenger & 2 others [2015] eklr.** He cited paragraph 5 of the preliminary objection raised by the Claimant and contends that the said issues are argumentative that need this court to interrogate factually to arrive at a decision as such cannot be an issue on pure point of law.

19. He argues that if the preliminary objection is allowed as it is, it will condemn the respondent/ Applicant unheard contrary to Article 25(c) of the Constitution and reinforce in **the Appeal case of Patriotic Guards Ltd-v- James Kipchirchir Sambu [2018] eklr.**

20. It was submitted that the claimant has asked this Court at paragraph 3 of its preliminary objection to invoke its inherent jurisdiction under section 3A, which jurisdiction can only be invoked by this Court after interrogating facts of the case which is not in line with issue to be canvassed in a Preliminary Objection. Further that the call by the claimant for this Court to find the respondent/ Applicant in abuse of Court process is an evidentiary issue that this court will be required to interrogate facts making the P.O invalid as was held in **JSK –V- WKW [2019] eklr.**

a. It was submitted further that Justice Obaga in **George Kamau Kimani & 4 others –v- County Government of Tran nzoia and another [2014] eklr** held that one cannot raise an issue of *Res Judicata* in a preliminary objection. Also that the Court in **Dobson Chiro Mwangi –V- Independent Electoral and Boundaries Commission & another [2013] eklr** held that a preliminary objection which merges with both point of law and facts is not on pure points of law capable of disposing the matter completely therefore the Preliminary objection was dismissed.

21. It is the Applicant's case that their application date 26th April, 2021 is not *res judicata* as envisaged under Section 7 of the civil procedure Act as it does not meet all the conditions required as held in the Court of Appeal case of **Independent Electoral and Boundaries Commission –v- Maina Kiai & 5 others [2017] eklr** since parties herein are different in that the Management Tea Hotel is suing herein while in initial application Tea Hotel limited a legal entity sued. Further that the issue to be canvassed is on the fraudulent nature in which the claimant disposed of Block 4/295 which is still unresolved and therefore need the consideration of this Court to unravel the fraud in the sale of Block 4/ 295 and do justice to parties as was held in **Kwanza Estate –v- Dubai Bank Limited [2014] eklr.**

22. With regard to disciplinary action against the auctioneer herein, it was submitted that this Court has been given power to discipline any errand auctioneer under section 28 of the Auctioneers Act them being officers of Court as envisioned under section 23 of the said act. He reinforced his argument by citing the case of **Labhsons Ltd –v- Monura Hauliers Ltd [2004] eklr** where the Court revoked the license of an auctioneers under section 28 of the Auctioneers Act.

23. With regard to the disciplinary action against the Advocate it was submitted that Advocates are officers of Court by dint of section 55 of the Advocates Act and that this Court has complimentary powers to sanction misconduct or offense by and Advocates as provided for under Section 56 of the Advocates Act. He reinforced his argument by citing the Supreme Court decision in **Republic –v- Ahmad Abolfadhi Mohammed & Another [2019] eklr** where the Court held that, the court bears responsibility for exercising disciplinary procedure against an advocate who, in its full view, displays conduct unbecoming of an Advocate.

24. In conclusion, it was submitted that the claimants have failed to account for the proceeds of sale from the impugned sale of Block 4/295 and have now raise this Preliminary Objection to scuttle these proceedings and defeat the hearing of their application of 26/4/2021.
25. The respondent /applicant prayed that the preliminary objection be dismissed and their application be heard on merit.
26. I have considered the averments of the parties herein. The applicant had sought an array of order herein including one to compel the Registrar of Lands to cancel any entries in the title No. LR No. Kericho Municipality Block 4/295.
27. The respondents filed a preliminary objection on this issue averring that the matter is *res judicata* having been handled in previous rulings as listed in their response.
28. The respondents also submitted that this court lacks jurisdiction to handle the matter.
29. From the pleadings before me, this matter has been adjudicated upon up to the Court of Appeal where the appeal was dismissed.
30. From my analysis of this application, the issues herein relate to some execution proceedings given that the matter was heard and determined up to the Court of Appeal level. It is not clear whether execution per se has already been handled.
31. However, from my reading of the proceedings, the initial debt owed by the respondent was kshs.4,662,314/=. Later on by consent the amount was at 33,142,600/= as at 14/6/2018. Vide an application filed on 18/5/2016, respondents were compelled to pay money owing as per a court order of 26/7/2016 in which Marete J allowed execution to proceed. The application was withdrawn.
32. Execution proceedings on the consent order commenced where Hegeon Auctioneers were instructed by claimant who applied for execution of the decree and was granted on 4/6/2018 against LR No. Kericho Municipality Block 4/313.
33. Attempt to stay execution was denied by court on 9/10/2018 and what is not clear is why there is still unsettled amounts and why now Block 4/295 is also being sought to be sold.
34. In my view there is more than meets the eye and this preliminary objection cannot resolve the matter.
35. This court would need to appraise itself of the matters pending and which must be argued for determination.
36. The preliminary objection as raised therefore goes beyond the purview of Mukisa Biscuit case where facts must be discussed and proved.
37. I find the preliminary objection not merited and I dismiss accordingly.

RULING DELIVERED VIRTUALLY THIS 8TH DAY OF JULY, 2021

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:-

Midenga for respondent – present

Kemboi for claimant – present

Court Assistant - Fred