



REPUBLIC OF KENYA



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Koech v Equity Bank Limited & 2 others (Environment & Land Case E021 of 2022) [2023] KEELC 445 (KLR) (30 January 2023) (Ruling)

Neutral citation: [2023] KEELC 445 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE E021 OF 2022
MN MWANYALE, J
JANUARY 30, 2023

BETWEEN

JESANG KOECH PLAINTIFF

AND

EQUITY BANK LIMITED 1ST DEFENDANT

ANTIQUA AUCTIONEERS 2ND DEFENDANT

BETHWEL KIMUTAI 3RD DEFENDANT

RULING

1. This ruling is in respect to a Notice of Motion application dated 14th July 2022 wherein the Plaintiff/Applicant seeks the following orders;
 1. Spent
 2. Spent
 3. That pending the hearing and determination of this suit, the Honorable Court do issue an order of injunction against the Defendants/Respondents herein to restrain them and other agents from attaching, auctioning and/or selling the Plaintiff's property known as Chepsiro/Kibuswa Block 1/Kelchinetand Nandi/Kamobo/1122.
 4. That, the costs of this application be awarded to the Applicant.
2. The application is premised on fourteen (14) grounds on the face of it and supported by affidavit sworn by Jesang Koech, the Plaintiff/Applicant, on 13th July 2022. The gist of the application is that the Applicant being the legal wife of the 3rd Defendant/Respondent, did not give spousal consent to charge the suit properties in favour of the 1st Defendant/Respondent. The Applicant further alleges that no statutory notices were served upon her husband, the charger, as is required by law.



3. The Application was opposed by the 1st Defendant/Respondent vide Replying Affidavit by Shamin Chibole, Credit Manager, who swore the same on 22nd August 2022. It was deponed that in the year 2014, the 3rd Defendant was granted a loan amount of kshs 10,850,000/= for the purchase of property known as Nandi/Kamobo/1122 which was used as security for the loan. That the Plaintiff, in turn, executed spousal consent dated 10th March, 2014 and consented to the said property being charged. Further that on 8th July 2015 the 3rd Defendant approached the 1st Defendant for a loan of kshs 30,100,000 for purchase of property known as Chepsiro/Kibuswa/Block/Kelchinet/223. This was granted and the said property secured the loan. Equally the Plaintiff consented to the charge by signing spousal consent.
4. It is stated that the 3rd Defendant failed to service the loan through monthly instalments and by 9th June 2022 the arrears amounted to a total of kshs 55,701, 849.83. That the 1st Defendant consequently made demands for payment and issued all the statutory notices which were served upon the charger, 3rd Defendant.
5. It is as a result of service of Statutory Notices that the 3rd Defendant filed a suit on 19th October 2020 *vide* Eldoret HCC no. E003 of 2020 – [*Bethwel Kimutai v Equity Bank Kenya Limited and Antique Auctions Agencies*](#), as alleged by the 1st Defendant. An application for injunction was filed, heard and determined by the High Court in the said suit to the effect that the same was dismissed.
6. No further affidavit or Supplementary Affidavit was filed by the Plaintiff/Applicant.
7. On 28th July 2022, I directed parties to file submissions in respect to the instant application. Both parties complied and this Court took into consideration these submissions.

Analysis and Determination: -

8. I have considered the application, replying affidavit and the submissions of Counsel’s and take the following view of this application.
9. The 1st Defendant/Respondent raised a pertinent issue in this matter which I wish to dispense first. It was stated that a similar application was filed by the 3rd Defendant, charger, *vide* Eldoret HCC No. E003 OF 2020 [*Bethwel Kimutai v Equity Bank, Kenya Limited and Antique Auctions Agencies*](#). A ruling in respect to the said Application was delivered on 28th February 2022 dismissing it.
10. From the above, it is clear that the issue raised by the 1st Defendant is whether the instant application is resjudicata owing to the fist injunction application filed at the High Court and ruling delivered on 28th February 2022.
11. In order for the Court to determine whether this application is resjudicata, it is vital to cite the law relating to this doctrine of resjudicata which is captured under Section 7 of the [*Civil Procedure Act*](#). It provides as follows;

“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 (1)

Explanation (2).....



Explanation (3).....

Explanation (4)....any matter which might and ought to have been made ground of defence or attach in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

12. Does this doctrine of res judicata apply to interlocutory applications? This question was answered in the affirmative by the Court of Appeal in the case of *Uburu Highway Development Limited v Central Bank of Kenya and 2 others* (1996) eKLR where it was stated that;

“That is to say, there must be an end to applications of similar natures; that is to say further, wider principles of res judicata apply to applications..... if that was not the intention, we can imagine that the Courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation.”

13. Applying the foregoing provision of the law and decision to the instant application, the first issue that needs to be determined is whether the parties are the same or suing under those whom they claim? I have perused the ruling in Kapsabet HCC No. E002 of 2021 formerly Eldoret HCC no. E 003 of 2020 and the parties were as follows; - Bethwel Kimutai (as Plaintiff) v Equity Bank (K) Limited (as 1st Defendant) and Antique Auctions Agencies (as 2nd Defendant). Moving to the present application, the Plaintiff is Jesang Koech (wife to chargor) v Equity Bank Kenya Limited (as 1st Defendant). Antique Auctioneers (as 2nd Defendant and Bethwel Kimutai (as 3rd Defendant).

14. It is clear that the parties in the former application are the same in the instant application save for Jesang Koech who is a new party now suing the Defendants. In my view this addition of a new party in the new application was a clever way of drafting to circumvent the doctrine of res judicata. I am ably persuaded by the decision in the case of *Diocese of Eldoret Trustees (Registered) v Attorney General (on behalf of the Principal Secretary Treasury) and another* (2020) eKLR where the Court observed that;

“Courts must always be vigilant to guard against litigants who metamorphosize to bring suits as new litigants or add others to circumvent the doctrine of resjudicata. Adding or subtracting litigants in a suit that is substantially or directly related to a previous suit with the same subject matter does not sanitize the suit to make it a fresh suit. It actually worsens the situation by making the suit terminate prematurely.”

15. I say no more regarding this issue.

16. As regards the other elements of res judicata it is not in dispute that the High Court that determined the former application is competent to hear and determine the previous application for injunction as the dispute related to a Commercial Transaction.

17. The last element on similar issues and subject matter, it is evidence that the former and present applications sought for temporary injunction restraining the Defendants from dealing and disposing suit properties known as Chepsiro/Kibuswa Block 1 Kelchinetand Nandi/Kamobo/1122 pending the hearing and determination of the suit. The end result of the two applications would be to stop the sale by public auction by the 1st and 2nd Defendants/Respondents until final determination of the suit (s).

18. In as much as the Plaintiff/Applicant in the instant application claims to have not given/signed spousal consent to charge, this is an issue which in my view is ordinarily within the chargor’s knowledge and I see no reason why it was not raised in the former application for injunction. The Applicant also claims



under paragraph 10 and 11 of her Supporting Affidavit that she inquired from the 3rd Defendant/ Respondent over the imminent sale and was informed that statutory notices had not been served. This confirms that indeed this was not an estranged couple but one that had knowledge of the transaction all through until the sale by the 1st and 2nd Defendant. I am therefore guided by Explanation 4 under Section 7 of the Civil Procedure Act and conclude that the issue as to whether spousal consent was issued or not was an issue which ought to have been substantially raised in the former application. By the Applicant raising the same now in a new suit with similar parties and over the same subject matter connotes bad faith on her part and that of the 3rd Defendant/Respondent who is unsparingly not opposed to the instant application.

19. That said, I wish to also point out that this Court is not sitting and cannot sit as an appellate Court over a decision made by a Judge of equal status. In the event the chargor was dissatisfied with the High Court decision his recourse laid with the Court of Appeal or review before the High Court.
20. I must also state that an application for injunction is an equitable remedy. One of the maxims of equity demands that he who comes to Court must come with clean hands. Having found that the matter herein ought to have been substantially raised in the former application and that the issue of service of Statutory Notices had already been raised in the former application, I am of the opinion that the Applicant has approached this Court with unclean hands for failure to disclose material facts hence underserving of the orders sought.
21. This Court therefore finds that the first injunction application determined in Kapsabet HCC No. E002 of 2021 formerly Eldoret HCC No. E003 of 2020 *Bethwel Kimutai v Equity Bank (k) Limited & Another* is substantially similar to the instant application before me. This application is res judicata and is dismissed with costs to the 1st and 2nd Defendants/Respondents.
22. The Interim Orders issued herein are hereby vacated.
23. In view of this finding and in order to avoid two parallel proceedings and decision over the same subject matter, this Court proceeds to find this matter subjudice and strikes the same with costs to the Defendants/Respondents.
24. Orders accordingly.

DATED AT KAPSABET THIS 30TH DAY OF JANUARY, 2023.

HON. M. N. MWANYALE,

JUDGE

In the presence of;

Ms. Karuga for the Defendant/Respondent

Mr. Kipsamo for the Plaintiff/Applicant

