



**Keter & another v Ecobank Kenya Limited (Civil Case E459 of 2024)
[2025] KEHC 1332 (KLR) (Commercial and Tax) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1332 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E459 OF 2024
AA VISRAM, J
FEBRUARY 27, 2025**

BETWEEN

TONY JOHN KIPLIMO KETER 1ST PLAINTIFF

KWALITI FOODS AFRICA LIMITED 2ND PLAINTIFF

AND

ECOBANK KENYA LIMITED DEFENDANT

RULING

1. The genesis of this dispute can be traced back to a loan facility of Kshs. 20,000,000.00/- advanced by the Defendant (“the Bank”) to the 2nd Plaintiff Company sometime in the year 2010. This facility was secured inter alia by a charge over the 1st Plaintiff’s properties; LR No.s 9399/32,9399/34 and 9399/36 situated in Nandi County (“the Suit Properties”). Soon after the facility was granted, the 2nd Plaintiff’s loan account fell into arrears, and the Bank commenced the realization process by issuing various demand and statutory notices, and threatened to sell the Suit Properties if the default was not regularized. This prompted the Plaintiffs to move to Court in 2011 to forestall the sale signaling the beginning of various legal and Court battles between the parties spanning close to 14 years now.
2. The Plaintiffs first moved the Court in Eldoret in HCCC No. 221 of 2011 where their attempt to stop the Bank from selling the Suit Properties was unsuccessful as per the Court’s ruling of 18th September, 2012. The Plaintiffs’ attempt to appeal against this ruling was also unsuccessful as evidenced by the Court of Appeal’s ruling of 22nd February, 2013, in Civil Application No. NAI 250 of 2012(UR 181/2012). Undeterred, one Charity Keter, who stated that she was the wife of the 1st Plaintiff, sought to restrain the Bank from selling the Suit Properties claiming inter alia that the same was matrimonial property, and that she had no notice that the properties had been charged. This suit was filed in the



Environment and Land Court (ELC) in Eldoret (ELCC No. 512 of 2013) where the Bank also filed an Application seeking to strike out this suit for being an abuse of the Court process.

3. The ELC agreed with the Bank in its ruling of 23rd April, 2014 (Charity Keter v Eco Bank Kenya Ltd [2014] KEELC 411 (KLR) where it was noted that Charity's Application for an injunction "... was a clever way of obtaining an injunction, which had been considered and declined in the previous suit" and that the Court would "...be circumventing the order of the Court of Appeal issued in the previous suit which denied the Chargor an injunction if I am to consider and allow the Application for injunction filed in this suit by Charity Keter. The Application for injunction of 12th November, 2013, is therefore an abuse of the process of Court." The Court also noted that there was in existence another suit, ELCC No. 240 of 2013, which raised similar issues as those of that suit.
4. The Plaintiffs filed yet another suit, ELCC No. 139 of 2014, by Daphine Belinda Keter, who also deposed that she was the 1st Plaintiff's wife and sought an injunction based on the same grounds sought by the 1st Plaintiff's other wife, Charity, in the previous suit. The ELC, in its ruling of 10th March, 2017 (Daphine Balinda Keter v ECO Bank Kenya Limited [2017] KEELC 3274 (KLR) noted that a Consent order was filed in the Court and adopted in the following terms:-
 - a. Kwality Foods Africa Limited (the borrower) shall pay to Eco Bank Kenya limited (the defendant) a sum of Kenya Shillings Twenty Three Million in full and settlement of the debt. (Agreed sum).
 - b. The borrower shall pay the defendant's advocates legal charges and the Auctioneer's charges.
 - c. The agreed sum of Kenya Shillings Twenty Three Million (Kshs.23,000,000/=) payable under clause (a) above will be paid by the borrower to the defendant as follows:
 - i. Kshs.700,000/= per month for the next 6 months with effect from 5th June, 2014 to November, 2014 and which installments shall be payable on or before the 5th day of each succeeding month.
 - ii. Kshs.1 Million per month with effect from 5th December, 2014 until full payment and which installments shall be payable on or before 5th day of each succeeding month.
 - iii. The said agreed sum of Kshs. 23,000,000/= shall continue accrue interest at the rate of 23% per annum with effect from the date of recording of this Consent order until full payment and which interest shall be paid by the borrower to the defendant alongside the payments delineated in clause (c) above.
 - iv. In default of payments of any one (1) installment the terms of the Consent order herein shall automatically lapse and the entire outstanding sum as at the date of recording of the Consent order together with accrued and accruing interest less any payments made shall become due and payable and the defendant bank shall be at liberty to exercise its statutory power of sale and sell the charged properties. The defendant shall not proceed with the exercise of the statutory power of sale over parcels number 9399/32, 9399/34 and 9399/36 so long as the plaintiff honours the terms of the Consent herein.
 - v. The Consent order herein shall apply and be adopted in HCCC ELC No. 240 of 2013.
5. The ELC found that the issues raised in that suit were similar to those in ELCC No. 240 of 2013 and as such, found that the said Application was res judicata having been compromised by the aforementioned Consent. This still did not stop the Plaintiffs. The 2nd Plaintiff filed a suit in the subordinate Court in Kapsabet CMCC No. E047 of 2024 where a temporary injunction was issued



pending the hearing and determination of the Application. However, the suit was later struck out for want of pecuniary jurisdiction as evidenced by the subordinate Court's ruling of 3rd July, 2024. The above ruling precipitated the filing of the present suit by the Plaintiffs together with the Notice of Motion dated 9th August, 2024, where they seek an injunction restraining the Bank from selling the Suit Properties pending the hearing and determination of the suit.

6. The Application is supported by the grounds on its face and the supporting affidavit of the 1st Plaintiff sworn on 9th August, 2024. It is opposed by the Bank through the replying affidavit of its Remedial Officer, Edith Wanjiku, sworn on 24th September, 2024. The Bank has also filed the Notice of Motion dated 20th September, 2024, seeking to strike out the Plaintiffs' suit and Application for being res judicata. The Plaintiffs have responded to this Application through Grounds of Opposition dated 30th September, 2024, and the 1st Plaintiff's replying affidavit sworn on 8th October, 2024. The two Applications were disposed by way of written and oral submissions by the parties' respective counsel, which I have considered together with the pleadings and I will make relevant references to them in my analysis and determination below.

Analysis and Determination

7. From the parties' pleadings and submissions, two issues arise for determination; whether the suit should be struck out for being res judicata? And if not, whether the Plaintiffs have made out a case for an injunction order?
8. The principle of res judicata and the law in respect of the same is common ground, and the parties have aptly submitted on the same. Section 7 of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) which provides that:-

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 can 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.

9. Therefore, for the doctrine of res judicata to apply; the issue was directly and substantially in issue in the former suit; the former suit was between the same parties or parties under whom they or any of them claim; the parties were litigating under the same title; the issue was heard and finally determined in the former suit; and the Court that previously heard and determined the issue was competent to try the suit in which the issue is raised (see *Gichuki v Gichuki* [1982] KECA 37 (KLR) and *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] KECA 477 (KLR)). It is also not lost that the same principles apply with equal force to Applications. In this regard, the Court of Appeal, in *Uhuru Highway Development Limited v Central Bank of Kenya, Exchange Bank Ltd (Involuntary Liquidation) & Kamlesh Mansukhlal Pattni* [1996] KECA 102 (KLR) held that:-

“.....once an Application for injunction within a suit has been heard and determined under the principles laid down in *Giella v. Cassman-Brown*, a similar Application cannot be brought unless there are new facts, not brought before the Court earlier after exercise of due diligence, which merit a re-hearing and possible departure from the previous ruling.” (Emphasis mine)

10. The Supreme Court, in *Kenya Commercial Bank Limited & another v Muiiri Cofee Estate Limited & 3 others* [2016] KESC 6 (KLR) summed up the above aptly by stating that the doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under



the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

11. Based on the chronology of events set out above, it is evident to me, that even though the various suits filed by the Plaintiffs raised different issues at different stages, the purpose is one and the same. The suit and various applications all center around the same facility in question, and related to the same security charged for advancement of that facility, being the Suit Properties. That property is all the Plaintiffs have been trying to preserve in each and every suit, by whatever means necessary.
12. For instance, in ELCC No. 139 of 2014, the Court, (*Daphine Balinda Keter v ECO Bank Kenya Limited*(supra), the Court considered the following argument by the 1st Plaintiff, namely;

that the 2nd Plaintiff had paid more than Kshs. 24,000,000/- after the Consent was entered into, and that the Plaintiffs were not parties to the Consent. They also stated that the Bank had applied compound interest on the loan account contrary to the Consent order and that it had refused to adjust the interest rate in conformity with the current legal regime.
13. The 1st Plaintiff challenged the auction that was scheduled to take place on 30th November, 2016, that no current valuation of the Suit Properties had been undertaken as envisaged by the law, and that the Bank was clogging the equity of redemption. He also stated that he had never been served with the redemption notice. A ruling was issued in respect of this Application on 10th March, 2017.
14. Looking at the present Application, it is evident that no new grounds have been raised. The Application is no more than a regurgitation of the same grounds set out in the previous applications referred to above. There is already a finding by the ELC that those issues are *res judicata*. I do not intend to depart from this finding.
15. Having stated the above, I take note of the Applicant's submission that it was never served with the auctioneer's Notification of Sale dated 15th July, 2024. The Plaintiffs alleged that the same was delivered to their old, and closed, address of the 2nd Plaintiff. I agree that this is an issue that has not been previously canvassed in court, and may of qualify as a new issue because it arose after the subordinate court's determination of 3rd July, 2024.
16. However, I take note that other than Kapsabet CMCC No. E047 of 2024, the Plaintiffs failed to disclose the existence of the other suits between the parties involving the same Suit Properties, and facility, and the outcome of the same in securing *ex -parte* interim injunctive orders on 13th August, 2024. This is contrary to the principle that in *exparte* proceedings, an Applicant bears the responsibility to make full and frank disclosure to the Court of all material facts known to it, and that injunctions are equitable remedies. The Applicant ought to have come to the Court with clean hands by disclosing every relevant fact in the case. (See the Court of Appeal in *Bahadurali Ebrahim Shamji v Al Noor Jamal & 2 Others* [1998] eKLR). It did not, and I do not think that it may now seek refuge from the Court, on one hand, and deliberately mislead it, on the other.
17. Turning to the issue of service of the redemption notice, while I agree that the same has to be served upon the Plaintiffs, I find no merit in their contention that the said postal addresses indicated therein were old and closed. The Applicant did not deny that the notices were served at the appropriate addresses indicated in the facility agreement, and known to the Bank. No evidence was provided to



show where the notices ought to have been served, if elsewhere, and no evidence was provided to show that the Applicant informed the Bank of a change in address on their part.

18. Based on the reasons set out above, I find and hold that the issues raised are res judicata.

19. The orders of the Court are as follows:-

- i. The Application dated 9th August, 2024 is dismissed with costs.
- ii. The Application dated 20th September, 2024 is allowed with costs payable by the Respondent to the Applicant.
- iii. The suit is hereby struck out with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 27TH DAY OF FEBRUARY, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

..... Court Assistant

..... For 1st Plaintiff

..... For the 2nd Plaintiff

..... For the Defendant

