



REPUBLIC OF KENYA



Marete v Pitchcare Marketing Divisions & 2 others (Civil Case E020 of 2024) [2025] KEHC 2817 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2817 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL CASE E020 OF 2024
HM NYAGA, J
FEBRUARY 27, 2025**

BETWEEN

JOSEPH KAIMENYI MARETE PLAINTIFF

AND

PITCHCARE MARKETING DIVISIONS 1ST DEFENDANT

FAMILY BANK LTD 2ND DEFENDANT

VIEW LINE AUCTIONEERS 3RD DEFENDANT

RULING

1. If the term “abuse of the court process” has a face, then this is it. This will come out in this ruling.
2. By an application dated 23rd September, 2024 the Plaintiff/Applicant has sought the following orders:-
 - i. That this matter be certified as urgent and service thereof to be dispensed with at the first instance.
 - ii. That pending the appointment of an independent Mediator or Arbitrator an order of injunction be hereby issued to restrain the Respondents by themselves, their servants, their agents or cronies or any one of them from interfering with the property known as L.R No. Ontulili/Ontulili Block 1(Katheri)/461 either by way of sale, auction, sale by private treaty, transfer or disposal by any means whatsoever and howsoever.
 - iii. That pending the final hearing and determination of the mediation process an order of injunction be hereby issued to restrain the Respondents by themselves, their servants, their agents or cronies or any one of them from interfering with the property known as L.R No. Ontulili/Ontulili Block 1(Katheri)/461 either by way of sale, auction, sale by private treaty, transfer or disposal by any means whatsoever and howsoever.



- iv. That costs of this application be provided for.
3. The application is supported by the Applicant's affidavit sworn on even date.
 4. In a nutshell, the Applicant avers that the 1st Respondent approached him, seeking to be his guarantor for a loan it intended to take from the 2nd Respondent. That he duly accepted the request for a loan facility of Kshs. 6,500,000/- but what was disbursed tot the 1st Respondent was only Kshs. 4,697,464.69/-. In return he presented his properties which were duly charged by the 2nd Respondent. Those were:-Ontulili/Ontulili Block 1(Katheri)461.Ntima/Ntakira/2233.Ltd/Kimana-Tokondo/6440.
 5. The Applicant further avers that the 1st Respondent failed to update him on the progress of the loan and of any letters sent to him by the 2nd Respondent. That upon enquiry, he discovered that the 1st Respondent had defaulted on the loan for a long time.
 6. The Applicant further avers that the 2nd Respondent did not notify him of the default and proceeded to instruct the 3rd Respondent to sell the property known as Ontulili/Ontulili Block 1(Katheri)461 through a public auction.
 7. The Applicant avers that he was never served with the statutory notices as required.
 8. It is further averred that the 2nd Respondent did not exercise its duty of care and did not do enough under its obligations to recover the loan from the 1st Respondent. That the charge document provides for an arbitration clause and therefore he seeks interim relief pending arbitration or mediation. That his property is in danger of wastage unless the orders sought are granted.
 9. In response, the 2nd Respondent filed a replying affidavit sworn by Shane Ngechu, a legal officer therein, on 20th October, 2024.
 10. In a nutshell, it is the 2nd Respondent's case that this application and suit is an abuse of the court process because previously, the Applicant had filed Meru ELC case No. E013 of 2021 where the Applicant was directed to proceed to set the main suit for hearing within 6 months otherwise the interim orders granted therein would lapse as stand vacated. That for one year, the Plaintiff never set down the said suit for hearing prompting the court to dismiss the suit for want of prosecution. That subsequently the Applicant filed an application dated 29th April 2024 seeking to reinstate the dismissed suit and grant of an injunction. That the court dismissed the said application.
 11. It is further averred that in a view to frustrate the 2nd Respondent the Applicant filed yet another suit, Meru ELC case No. E015 of 2024 and the same was dismissed for want of jurisdiction on 23rd September, 2024.
 12. The 2nd Respondent avers that from the history, it is clear that the Applicant is out to frustrate it from recovering the loan disbursed to the 1st Respondent.
 13. The 2nd Respondent further avers that the application has been overtaken by events since the suit property has already been sold vide a public auction conducted on 13th April, 2021 as evidenced by the annexure marked 'SN6'.
 14. It is further averred that the Applicant is guilty of non-disclosure of material facts and hence is not entitled to any orders.
 15. As regards the loan disbursed to the 1st Respondent, it is averred that the Applicant agreed to charge his property for a loan disbursed to the 1st Respondent and individual charges are as follows:-



- a. First legal charge of Kshs. 1,500,000/- over L/R No. Ontulili/Ontulili Block 1(Katheri)461.
 - b. First legal charge of Kshs. 1,500,000/- over L/R No. Ntima/Ntakira/2233.
 - c. First legal charge of Kshs. 3,500,000/- over LR No. LTD/Kimana-Tokondo/6440.
16. It is further averred that contrary to the allegations made by the Applicant, the 2nd Respondent disbursed the full amount of Kshs. 6,500,000/- to the 1st Respondent. That subsequently the 1st Respondent fell into arrears, and the 2nd Respondent issued the requisite notices to the Applicant. That the notices did not elicit any response from the applicant or the 1st Respondent and consequently, under the terms of the charge, it exercised to powers of sale, which was duly advertised and the property was sold to the highest bidder for Kshs. 1,650,000/-.
 17. It is further averred that once the property was sold, the Applicant's equity of redemption was extinguished and the Applicant's only remedy now lies in general and special damages.
 18. The 2nd Respondent further avers that the 1st Respondent's loan arrears stood at Kshs. 4,097,329/-, which amount continues to accrue interest and penalties.
 19. It is further averred that the Applicant has not met the threshold for the grant of the orders sought.
 20. The 1st Respondent, unsurprisingly did not file any response.
 21. The 3rd Respondent an agent of the 2nd Respondent did not file a response either.
 22. The parties filed their respective submissions which I summarise as hereunder.
 23. For the Applicant, it is submitted that the issue for determination is whether the court has jurisdiction to grant an order to adopt the mediation proceedings and decision as a decree of this court. It is submitted that parties are bound by their own agreement and it is only in exceptional circumstances that a court can rescind it. Cited in support of this submission was the case of National Bank of Kenya Ltd Vs Pipe Plastic Samkilit (K) Ltd (2011) eKLR.
 24. It is submitted that the agreement provides for a party to obtain interim relief pending arbitration and such this court has jurisdiction to hear the matter. The Applicant thus relied on Article 159 of *the Constitution* and Section 59 of the *Civil Procedure Act* and cited Order 46 Rule 20 of the Civil Procedure Rules. To buttress this point, cited was Patel Tours and Another Vs Family Bank and Another (2019) eKLR and the case of Kenya Pipeline Company Limited Vs KenolKobil Limited (2013) eKLR.
 25. Citing the decision in Council of County Government Vs Lake Basin Development Authority (2017) eKLR, the Applicant urges the court to consider the application and submit the dispute for mediation or arbitration.
 26. The 2nd Respondent submitted that the application has not met the threshold set out in *Giella Vs Cassan Brown* (1973) EA 358. That the Applicant's case has not set out a prima facie case which was described in the case of *Mrao Ltd Vs First American Bank of Kenya Ltd* (2003) eKLR and *Jubiland Engrevire Ltd Vs EASTEND Uganda Ltd* (2023) eKLR.
 27. It is submitted that the 2nd Respondent has duly complied and exercised its duty as set out in Section 97 of the *Land Act*.
 28. It is further deponed that having offered his property as a security for the loan, no irreparable harm will be suffered by the applicant. To buttress this point the 2nd Respondent cited *Kassaman & 6 Others Vs Agricultural Finance Corporation and Another* (2024) eKLR.



29. It is further submitted that even on a balance of convenience, the Applicant is not deserving of the orders sought. That having sold the property in a legal and lawful manner, the application has been overtaken by events.
30. The 2nd Respondent urged the court to dismiss the application.

Analysis and determination

31. From the pleadings filed the annexures thereto and the submissions by the parties, I opine that the following issues fall for determination:-
 - a. Whether this suit is res judicata.
 - b. Whether the Applicant has met the threshold for the grant of the orders of injunction.
 - c. Who should bear the costs of this application.
32. It goes without saying that should this court find that the current suit is res judicata, then it will not serve any purpose to delve into the other issues.
33. The principle of res judicata is set out under Section 6 of the *Civil Procedure Act* which provides 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.’
34. In *Republic v Registrar of Societies - Kenya & 2 Others Ex-Parte Moses Kirima & 2 Others* [2017] eKLR the court set out conditions for the principle to apply. It was held that:

“...Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title; and such suit or proceeding must pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed...”
35. From the replying affidavit filed by the 2nd Respondent, it is clear that the Applicant had moved the ELC Court at *Meru vide case No. E013 of 2021* in which he sought an injunction against the 2nd Respondent. A cursory look at the pleadings therein show that the plaint, and the application filed in that suit are a replica of the present suit and application. It is clear that the same issues raised therein are the same ones herein, although the Applicant, evidently in an attempt to be clever, has added the issue of mediation.
36. Looking at the two suits, they are based on the same set of facts and alleged cause of action, which was the sale of LR No. Ontulili/Ontulili Block 1(Katheri) 461.
37. It is not disputed that the ELC delivered a ruling on January 26, 2022, where it issued an injunction and ordered the Applicant to set down the suit for hearing within 45 days. That did not happen and the suit was dismissed. Through his current advocates, the Applicant sought to reinstate the suit but in a ruling delivered on July 3, 2024, the application was dismissed. In its ruling, the ELC ruled that it had



directed the parties to pursue Alternative Dispute Resolution and then report back to it. The Applicant never acted upon the court's directives and has now come to court seeking the same directives it failed to comply with.

38. It is also noted that the Applicant, through the current advocates also moved the ELC court at Meru vide case No. E015 of 2024, seeking the very same orders sought herein. On 31st July 2024, the ELC gave directions that the Applicant serves the application and the suit pleadings. The Judge did not give any interim orders and directed the parties to submit on the jurisdiction of the court to handle the suit. It is not clear if the ELC has determined that case, although the 2nd Respondent states that the suit was dismissed for want of jurisdiction.
39. What is clear is that the Applicant has been a frequent visitor to the courts whenever the 2nd Respondent attempts to exercise its powers of sale under the charge. Having filed a previous suit, obtained interim orders and then failed to prosecute the suit, the same was dismissed.
40. For purposes of the principle of res judicata, the matter in issue was substantially dealt with by the ELC court in case No. E013 of 2021. The applicant cannot now come back to this court to seek a second bite at the cherry.
41. I find that this suit is res judicata. It is a gross abuse of the court process, which ought to be highly discouraged by the court.
42. Consequently, this suit is struck out with costs to the 2nd Respondent.
43. That being the case, I need not even look at the application on its merits. It suffices to state that even on merits, having looked at the previous proceedings in the ELC, the application has no chance of success.
44. In order to bring sanity to the matter between the parties, I direct that the Applicant shall not be allowed to prosecute any other suit regarding the same subject matter until he has paid the full costs to be taxed herein.
45. Orders accordingly.

SIGNED, DATED AND DELIVERED AT MERU THIS 27TH DAY OF FEBRUARY, 2025.

H. M. NYAGA

JUDGE

