



Ogola t/a Diri Enterprises v NCBA Bank Kenya PLC (Civil Case E014 of 2023) [2025] KEHC 11289 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11289 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE E014 OF 2023
A MABEYA, J
JULY 31, 2025**

BETWEEN

AUGUSTINE OGOLA T/A DIRI ENTERPRISES PLAINTIFF

AND

NCBA BANK KENYA PLC DEFENDANT

RULING

1. This ruling is in respect of the plaintiff's application dated 20/2/2025. The same was brought under sections 1A, 1B, 3A, of the Civil Procedure Act, Section 97 of the Land Act, Order 40 rules 1 & 2 of the Civil Procedure Rules & Rules 11 (1)(b) (vi) (vii) and (x) of the Auctioneer Rules.
2. The plaintiff sought orders to restrain the respondents from selling by public auction or private treaty his property known as Kisumu Municipality/ Block 8/105 ('the suit property') and further an order that a fresh valuation be undertaken on the suit property.
3. The application was based on the grounds set out on the face of the Motion as well as the supporting affidavit of Augustine Ogolla sworn on 21/02/2024. It was the applicant's contention that he used the suit property as collateral to secure a loan facility from the defendant in the sum of Kshs. 30,000,000/-. He acknowledged that the facility had gone into arrears and the defendant was in the process of exercising its statutory power of sale.
4. That the defendant intended to sell the suit property at a value not commensurable with current market value contrary to the provisions of section 97 (2) of the Land Act as the defendant had not undertaken any valuation on the suit property.
5. The defendant opposed the application vide its Grounds of Opposition stating that the instant application violated the doctrine of res judicata as there was a similar application heard and determined by this Court.



6. The application was disposed off by written submissions. The plaintiff submitted that the defendant did not carry out a valuation of the suit property as required by section 97 (2) of the *Land Act* and therefore did not have the reserve price indicated on the face of the Notification of Sale thereby flouting the provisions of section 21 (3) of the *Auctioneers Act*.
7. That a joint valuation should be undertaken to prevent the defendant from selling the suit property at a price below its market value thus proving its prima facie case to warrant grant of temporary injunction. That the intended sale has no legal import and is therefore null and void.
8. On its part, the defendant submitted that the instant application is res judicata the application dated 30/10/2023 that was determined vide a ruling made on 24/6/2024. The ruling dismissed the plaintiff's application and is still binding and valid as it has not been appealed against or set aside.
9. That defendant had followed all the due process for recovery of its defaulted loan and that on the issue of valuation, it contracted its own valuers who valued the suit property prior to the intended forced sale whereas the plaintiff has not tendered any evidence that it is poised to sell the property at an under value.
10. I have considered the application, the responses filed thereto and the submissions by Learned Counsel. The first issue for determination is whether the application is res judicata.
11. Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya defines the doctrine of res judicata in the following terms: -

“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.”
12. In re Estate of Riungu Nkuuri (Deceased) [2021] eKLR, the court stated as follows:

“The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

 - a. The suit or issue was directly and substantially in issue in the former suit.
 - b. That former suit was between the same parties or parties under whom they or any of them claim.
 - c. Those parties were litigating under the same title.
 - d. The issue was heard and finally determined in the former suit.
 - e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
13. In this regard, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merit by a court of competent jurisdiction.



14. I have considered the plaintiff's prior application dated 30/10/2023. In that application, the plaintiff sought an injunction to stop the defendant from exercising its statutory power of sale on grounds amongst others that he was not issued with the requisite notices and that a valuation of the same suit property was not carried out. The said application was found to be without merit by this Court (Aburili J) and dismissed on the 19/6/2024 with no pending appeal preferred.
15. In the circumstances, I find that the application dated 20/2/2025 is res judicata and as such, this court has no jurisdiction to entertain it. The same is therefore struck out with costs to the defendant.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 31ST DAY OF JULY, 2025.

A. MABEYA, FCI Arb

JUDGE

