



REPUBLIC OF KENYA



**Le Savannah Country Lodge and Hotel Ltd v Diamond Trust Bank of Kenya Ltd & another
(Commercial Case E011 of 2023) [2024] KEHC 3541 (KLR) (21 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3541 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE E011 OF 2023
RE ABURILI, J
MARCH 21, 2024**

BETWEEN

LE SAVANNAH COUNTRY LODGE AND HOTEL LTD PLAINTIFF

AND

DIAMOND TRUST BANK OF KENYA LTD 1ST DEFENDANT

STEPHEN KARANJA KANGETHI T/A DALALI TRADERS

AUCTIONEERS 2ND DEFENDANT

RULING

Introduction

1. The plaintiff vide a Notice of Motion application dated 16th March 2023 and filed on the same date under Certificate of Urgency sought the following reliefs against the defendant:
 - a. Spent.
 - b. Spent.
 - c. That pending and hearing and determination of this suit, this court be pleased to issue an order of temporary injunction restraining the defendants/respondents whether by themselves, their servants, agents and/or employees or whomsoever is acting on their behalf from advertising for sale, selling by public auction, transferring, or disposing off Land Title No. L.R. Kisumu/ Municipality Block 9/19, Kisumu Municipality Block 9/20, Kisumu Municipality Block 9/560 and Kisumu Municipality Block 9/565, Kisumu County belonging to the plaintiff/ applicant.
 - d. That this Honourable Court do grant the plaintiff/applicant relief under Section 103 and 104 of the Land Act or any other appropriate relief by suspending the realisation of security by way of sale by public auction of the plaintiff's charged property being Title No. L.R. Kisumu/



Municipality Block 9/19, Kisumu Municipality Block 9/20, Kisumu Municipality Block 9/560 and Kisumu Municipality Block 9/565, within Kisumu County for such period as shall be appropriate to enable the plaintiff comply with the terms of the legal charge registered against the suit properties registered against the said titles or such other relief or reliefs that the courts deem appropriate in the circumstances.

- e. That this Honourable Court be pleased to make any other orders as it deems fit.
 - f. That costs of this application be provided for.
2. It was the applicant's case that it obtained a first legal charge for Kshs. 126,000,000 in 2014 from the 1st respondent which was secured by Land Title No. L.R. Kisumu/Municipality Block 9/19, Kisumu Municipality Block 9/20, Kisumu Municipality Block 9/560 and Kisumu Municipality Block 9/565.
 3. The applicant further averred and that it had been paying all the instalments as required under the charge until the Covid pandemic when all bookings were cancelled and strict conditions enforced by the Ministry of Health and further that the business was hampered following political demonstrations in Kisumu County after the general elections which led it to default in loan repayments to the tune of Kshs. 19,462,508.61.
 4. The applicant averred that it has since obtained a strategic partner ready to clear the debt owed to the 1st respondent for a stake in the business and as such placing up the applicant's business for sale by public auction shall be detrimental to both the applicant and 1st respondent as the intended investor might lose interest.
 5. It is thus the applicant's case that if an interim order of injunction is not granted, the 2nd respondent will proceed to dispose the suit property and thus expose it to irreparable damages. The applicant further averred that this court has jurisdiction pursuant to section 103 (4) and 104 of the Land Act 2012 by postponing the realization of the security.
 6. In response, the 1st respondent filed a replying affidavit sworn on the 20th December 2023 by one Faith Ndonga in which she deposed that Pursuant to a Letter of Offer dated 31st March 2014 the Bank extended to the applicant a Term Loan of Kshs. 104,000,000 which was secured by a First legal charge dated 25th June 2014 over the suit properties and subsequently that pursuant to a Letter of Offer dated 17th October 2014 the Bank extended to the applicant an overdraft facility of Kshs. 4,000,000 which was secured by a Further Legal Charge dated 24th November 2014 over the suit properties.
 7. The 1st respondent further deposed that pursuant to a Letter of Offer dated 9th July 2015 the Bank further advanced a new Term Loan Facility of Kshs. 10,000,000 and extended the Term Loan and Overdraft facility making the total aggregate facilities borrowed to be Kshs. 118,000,000 secured by a second further legal charge dated 3rd August 2015 over the Suit Properties.
 8. It was deposed that by way of a Letter of Offer dated 8th September 2017 the Bank amalgamated and consolidated the two loans which were in arrears at the time, and extended a new Term Loan of Kshs. 126,000,000 which facility was secured by a Third Further Legal Charge dated 20th July 2018 over the suit Properties and a Further Charge dated 20th July 2018 over the Suit Property - Title Number Kisumu/ Municipality/ Block 10/565.
 9. The 1st respondent deposed that in breach of the Letters of Offer and the Charges, the applicant failed to make the scheduled monthly payments punctually as and when the same fell due thus falling into arrears and subsequently the Bank issued a demand notice and subsequent statutory notices.



10. It was deposed by the 1st respondent that the applicant apprehensive of its properties being sold approached the Court in Kisumu HCCC No. 9 of 2020 seeking the same injunctive orders sought herein through its Plaint and Notice of Motion of Application both dated 17th July 2020 but the Honourable Court did not grant the Plaintiff any interim injunction as sought in the Plaintiff's Notice of Motion Application dated 17th July 2020 which was subsequently dismissed for want of prosecution following a Notice of Motion application dated 29th March 2023 filed by the 1st respondent.
11. The 1st respondent reiterated that the subject matter in relation to Kisumu HCCC No. 9 of 2020, related to the following properties - Title Number Kisumu/ Municipality/ Block 10/560, Title Number Kisumu/Municipality/ Block 10/20, and Title Number Kisumu/ Municipality/ Block 10/19 which also form the subject matter in this present suit and thus this suit violates the doctrine of res judicata.
12. It was further deposed that if any proposals were made by the Bank for settlement of the matter the same was done on a without prejudice basis and production of such evidence is proscribed by virtue of Section 23 (1) of the *Evidence Act* and reliance on the same by the applicant is intended to merely distract the court from the fact that the applicant was in breach of the Letters of Offer and the subsequent charges.
13. The 1st respondent deposed that following the applicant's default, which stood at Kshs. 358,402,096.15 as at 15th November 2023, it issued the relevant statutory notices over the suit properties, then subsequently issued a 40-day notification of sale and subsequently instructed the auctioneer.
14. It was further deposed that the applicant would not suffer any harm or loss as suggested as the sale of the properties by way of public auction was governed by statute and it was obliged to obtain the market value of the properties.
15. The parties filed submissions to canvass the application.

The Applicant's Submissions

16. The applicant submitted that the court has power under Section 103 and 104 of the *Land Act* to give interim relief to enable the chargor comply with the terms of the charge by giving it a little time of 3 months to enable due diligence be done by the prospective buyers and to have payments done which will assist both parties.
17. Reliance was placed on the case of *Fredrick Kimemia Kimani v Picallilly International Ltd & 2 Others* [2020] eKLR where the court gave interim reliefs under Sections 103 and 104 of the *Land Act*.
18. The applicant submitted that it had met the conditions for grant of interim injunction based on the cases of *Giella v Cassman Brown & Co. Ltd* [1973] EA 358 and *Alwaa Construction Ltd v Synergy Industrial Credit Ltd & Anor* [2014] eKLR.

The 1st Respondent's Submissions

19. It was submitted that the instant suit was res judicata and therefore this Honourable Court should not entertain the application for an injunction as the same is an abuse of process as this Honourable Court in KISUMU HCCC No. 9 of 2020, had occasion to deal with a very similar application dealing with the following properties - Title Number Kisumu/ Municipality/Block 10/560, Title Number Kisumu/ Municipality/ Block 10/20, and Title Number Kisumu/Municipality/ Block 10/19 which also form the subject matter in this present suit.



20. The 1st respondent relied on the Supreme Court case of *Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR as well as the Court of Appeal decision in *Pop-In (Kenya) Ltd & 3 Others v Habib Bank AG Zurich* [1990] eKLR where the court confirmed that the principles of res judicata are applicable even in interlocutory applications.
21. It was submitted that the above notwithstanding the applicant was not entitled to an injunction as it did not meet the requirements set out in the case of *Giella v Cassman Brown* (1973) EA 358 and reiterated by the Court of Appeal in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR.
22. It was further submitted that the applicant's application and Suit was not only res judicata, but also in breach of conditions set out in Order 40 Rule 6 of the *Civil Procedure Rules* and as such, in absence of any reason justifying the delay, the applicant was disentitled to the temporary injunction in this application sought.
23. The 1st respondent further submitted that the applicant was also not entitled nor does it merit the equitable reliefs provided for under Section 103 and 104 of the *Land Act*. It was further submitted that the instant application was an abuse of the Court process and therefore should be dismissed with costs.

Analysis and Determination

24. I have read and considered the pleadings and submissions filed and it is my view that it is vital to determine, as a preliminary point, whether the instant suit is *res judicata*.
25. Section 7 of the *Civil Procedure Act*, 2010 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 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.”
26. In the case of *Christopher Kenyariri v Salama Beach* (2017) eKLR, the court clearly stated the ingredients to be satisfied when determining *res judicata* thus: -

“...the following elements must be satisfied...in conjunctive terms;

 - a. The suit or issue was directly and substantially in issue in the former suit
 - b. Former suit between same parties or parties under whom they or any of them claim
 - c. Those parties are litigating under the same title
 - d. The issue was heard and finally determined.
 - e. The court was competent to try the subsequent suit in which the suit is raised.”
27. This court is therefore called upon to look at the issues raised in the plaint in Kisumu HCCC No 9 of 2020, evaluate the issues in the judgment alleged to have settled the issues in the instant suit and establish whether the instant suit is *res judicata*.
28. The 1st respondent deposed and submitted that the instant suit was res judicata Kisumu HCCC No 9 of 2020 wherein vide an application dated 29th March 2023 it had moved the court to dismiss the



same for want of prosecution after the applicant abandoned the said suit and that subsequently, vide a ruling delivered by this court on the 23rd November 2023, the said suit was dismissed with costs to the 1st respondent.

29. This court is familiar with Kisumu HCCC No 9 of 2020 which indeed involved the same parties herein save for the 2nd respondent and which suit the applicant sought injunctory orders against the 1st respondent herein or his agents from advertising for sale, transferring or in any other way effecting the statutory notices already served upon it, which orders are similar to those sought in the present application.
30. The Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR held that: -

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”
31. It is my finding that the applicant brought the same cause of action with the same parties, inclusive of the 2nd respondent who is simply the auctioneer who was tasked to advertise and sell the security. The applicant is seeking the same remedy that it had sought before another court of competent jurisdiction wherein it failed to prosecute its claim and had the same dismissed for want of prosecution.
32. The action of the applicant is an abuse of the court process. Litigation must come to an end or have finality. That rule is meant to counter the all too human propensity to keep trying until something gives in.
33. I thus find and hold that the Notice of Motion application dated 16th March 2023 is *res judicata* Kisumu HCCC No 9 of 2020.
34. The suit filed herein is dismissed with costs to the 1st respondent. Mention before the Deputy Registrar on 8/5/2024 to confirm settlement of costs as may be agreed upon between the parties or if filed, for taxation.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 21ST DAY OF MARCH, 2024

R.E. ABURILI

JUDGE

