



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

ENVIRONMENT & LAND CASE NO. 269 OF 2014

KEITH NGALA KAZUNGU.....PLAINTIFFS

versus

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

JOEL TITUS MUSYA T/A MAKURI ENTERPRISES2ND DEFENDANT

RULING

Introduction

1. By a Plaint dated 24th October 2014 and filed on 30th October 2014, the Plaintiff brought this suit against the Defendants seeking to bar them, their agents and/or servants from making any transactions involving the piece of land known as **Plot No. 2830/1 Mainland North** (hereinafter “the suit property”) on the basis that the sale of the suit property by public auction was done fraudulently and the property was undervalued.
2. Sometime in June 1995, the Plaintiff applied for and was given a loan facility of Kshs. 400,000/- by the 1st Defendant against the title of the suit property as security. On 19th June 2008, the 2nd Defendant, acting on instructions of the 1st Defendant, sold the suit property in a public auction to one GABRIEL MUTISO MAANDA at Kshs. 2,800,000/-. The Plaintiff pleads that the Defendants committed acts of fraud by selling his property without notifying him, at an undervalue and in violation of the Rules and Regulations of Public Auction. That the suit property is valued at Kshs. 23,400,000/-yet the Defendants sold it at Kshs. 2,800,000/-. The Plaintiff therefore prays that the said sale be set aside and he be awarded general damages and costs of the suit.
3. The Defendants filed their joint Statement of Defence dated 12th December 2014 but curiously filed on 9th December 2014. They state that the suit property was sold for good value and the Plaintiff was duly notified.
4. On 12th March 2015, the Defendants filed a Notice of Motion dated 10th March 2015 seeking to strike out the Plaintiff's suit on the ground that the same is *res judicata* and is an abuse of the court process. It is the Defendants' said Notice of Motion that is under consideration.

The Defendants'/Applicants' Case

5. The Defendants' case is that the Plaintiff's suit has been heard and determined by a court of competent jurisdiction in **MSA HCCC No. 245 of 2003: KEITH KAZUNGU -V- KENYA COMMERCIAL BANK** (hereinafter “Case No. 245 of 2003”) and **MSA HCCC No. 508 of 2001:**

KEITH KAZUNGU NGALA T/A KENFIN AGENCIES -V- KENYA COMMERCIAL BANK LIMITED AND MAKURI ENTERPRISES (hereinafter “Case No. 508 of 2001”). That in Case No. 508 of 2001, the Plaintiff did not set the same for hearing as a result of which the Defendants' counterclaim against the Plaintiff on account of outstanding loan of Kshs. 2,278,271.36 was allowed when the 1st Defendant made a request for judgment for the same. That Case No. 245 of 2003 was struck out for being an abuse of the court process.

6. The Defendants submitted that the Plaintiff is a vexatious litigant who has filed suit after suit and all the issues raised in the present suit have either been determined or could have been determined in the previously filed suits. That the present suit is therefore bad in law for being **res judicata**. That the issues raised in this suit are similar and identical to the issues raised in the two previous suits. The Defendants relied the following cases, which I have duly considered, in which the doctrine of *res judicata* was discussed:

- i. Judith Gathoni Willie v. George Kihara Muchuki & 2 Others [2010] eKLR
- ii. Eunice Wanjiru Gathithi v. Cannon Assurance Kenya Ltd [2012] eKLR
- iii. Francis Wamburu Njau v. Bernard Kagia Njuguna [2009] eKLR
- iv. M.W.K v. A.M.W [2015] eKLR
- v. Kamunye & Others v. The Pioneer General Assurance Society Ltd (1971) E.A 263

7. The Defendants further addressed the court on the prayers sought by the Plaintiff in the Plaint and submitted that the order of inhibition does not lie and the sale by public auction was not fraudulent and should not be set aside. These are however issues that cannot be properly addressed in the instant application. They are issues for determination in the main suit and I wish to say no more about them.

The Plaintiff's Case

8. The Plaintiff's case is that the issues raised in this suit are not similar or identical to the issues raised in Case No. 508 of 2001 and Case No. 245 of 2003.
9. The Plaintiff further submitted that an advocate should not be allowed to depose on behalf of his client in contentious matters and relied on the case of **East Africa Foundry Works (K) Ltd v. Kenya Commercial Bank Ltd [2002] 1 KLR**. However, the Plaintiff has not urged the court to find that the Defendants' application is defective for having been supported by an affidavit sworn by an advocate on behalf of the clients and I wish not to render any opinion on that issue.

The Issue for Determination

10. The only issue for the court's determination is whether this suit is bad in law for being *res judicata*.

Analysis and Determination

11. The doctrine of *res judicata* is based on **section 7** of the Civil Procedure Act, Cap. 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 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. The circumstances under which *res judicata* applies were discussed by Osiemo, J. in the case of **FRANCIS WABURURU NJAU V BERNARD KAGIA NJUGUNA [2009] eKLR** as follows:

“To constitute res judicata the following conditions must concur.

(1) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue either actually or constructively in the former suit.

(2) The former suit must have been between the same parties or between parties under whom they or any of them claim.

(3) The parties aforesaid have litigated under the same title in the former suit.

(4) The court which decided the former suit must have been a court competent to try the subsequent suit in which such issue is subsequently raised.

(5) The matter directly and substantially in issue in the subsequent suit must have been heard and finally decided in the first suit.

In order that a decision in a former suit may operate as res judicata in a subsequent suit, it is necessary that the court which tried the former suit must have been a court competent to try the subsequent suit.”

13. I have taken time to scrutinize the pleadings in the two previous cases as availed by the parties herein. In Case No. 508 of 2001, the issue raised by the Plaintiff was that the sale of the suit property by public auction that was scheduled to take place on 18th October 2001 was premature and illegal because the Plaintiff had not been served with Chargees Statutory Notice of Sale. The case was also that the interest charged by the Defendant was unconscionable and oppressive. The Plaintiff prayed for a declaration that the intended sale was illegal, irregular and contrary to the provisions of the law and sought injunction to restrain the Defendants from proceeding with the intended sale. In Case No. 245 of 2003, the Plaintiff sought an injunction against the Defendants to restrain them from selling the suit property on the basis that the Plaintiff had cleared the loan. The Plaintiff sought an account of all monies received by the Defendant from the Plaintiff on account of the loan.

14. In the instant suit the plaintiff prayed for orders that ;

- i) An inhibitory order be issued against the defendants, their agents and/or servants inhibiting them from making any transactions involving plot No 2830/1/MN at Shanzu
- ii) The said sale of the Plaintiff's property be set aside for irregularity and payment of general damages
- iii) Costs of the suit and interest
- iv) Any other relief this Court may deem just to grant.

15. The parties to this suit are the same as the ones in HCC 508 of 2001 and HCCC No 245 of 2003. The question is previous suits were heard and determined by a Court competent to hear them and the parties ligigated under the same title. The only question for this Court to answer to determine whether this suit is res judicata is whether the subject matter is directly and subsequent suit must have been heard and finally decided in the first suit.
16. From the documents annexed by the defendants in their affidavit in support of the application, are pleadings from HCCC 508 of 2001. Amongst the pleadings in this former suit are the following documents ;
- i) Request for judgement notice for the sum of Kshs 2,278,271.36
 - ii) Certificate of costs for Kshs 149,874.01
 - iii) Decree for the sum of Kshs 2,824,564.56 issued on 1st July 2002
 - iv) Warrants of attachment of the plaintiffs moveable property dated 17.7.2002 issued to Matchet Auctioneers
 - v) A newspaper cutting advertising the sale of the suit property.
17. These documents show and it is not denied that the subject matter in dispute all along in the two former suits and this one is sale of the suit property by the 1st defendant through the 2nd defendant. The plaintiff did not file any appeal against the outcomes of the two former suits. In the replying affidavit, the Plaintiff/Respondent depose that this suit is different because the current suit is based on fraud as the sale price was an undervalue of the market price of the suit property.
18. In the plaint, the fraud is particularised as
- i) Selling the property without notifying the plaintiff
 - ii) Selling the property below the market value
 - iii) Violating the rules and regulations for public auctions

In suit No 508 of 2001, the issue of notification before sale was raised which was dealt with and decided. In whichever way I look at the plaintiff's pleadings, I am unable to construe otherwise other than the entire claim is about the sale of the suit property. If the subject matter is sale then besides being res judicata it is an abuse of the process of the Court because the sale being challenged was in execution of a Court decree that the plaintiff was aware of. Instead of challenging the decree in the manner provided, he instead filed this suit.

19. I am therefore in agreement with the defendants that this suit is both res judicata and an abuse of the Court process. The applicant's advocate deposed to matters within his knowledge and I find no wrong in the supporting affidavit. Consequently I grant the prayers sought in this application and hereby order the plaintiff's suit herein be struck out with costs to the defendant. The defendant is also awarded costs of this application.

RULING DATED AND DELIVERED IN MOMBASA THIS 8TH DAY OF DECEMBER 2015

A. OMOLLO

JUDGE



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