Case Number:	Environment and Land Appeal 18 of 2019
Date Delivered:	17 Dec 2020
Case Class:	Civil
Court:	Environment and Land Court at Nakuru
Case Action:	Judgment
Judge:	John Mutungi
Citation:	Julia Muthoni Githinji v African Banking Corporation Limited [2020] eKLR
Advocates:	-
Case Summary:	-
Court Division:	Environment and Land
History Magistrates:	Hon. Magistrate J. B Kalo - CM
County:	Nakuru
Docket Number:	-
History Docket Number:	Civil Suit ELC No.21 of 2019
Case Outcome:	Appeal dismissed
History County:	Nakuru
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC APPEAL NO. 18 OF 2019

JULIA MUTHONI GITHINJI.....APPELLANT

VERSUS

AFRICAN BANKING CORPORATION LIMITED..... RESPONDENT

(An Appeal arising from the ruling of the Honourable Magistrate J. B Kalo (CM) delivered on 23rd July 2019 in Civil Suit ELC No.21 of 2019 in the Chief Magistrate Court at Nakuru)

J U D G M E N T

1. This appeal arises from the ruling of Hon. J M Kalo Chief Magistrate delivered on 23rd July 2019 in Nakuru CMCC ELC No.21 of 2019 on an interlocutory application for injunction by the appellant who was the plaintiff before the Lower Court. The learned trial Magistrate dismissed the application on the ground that a similar application had been dealt with in Nakuru ELC No. 272 of 2017 and dismissed by Hon. Justice D. Ohungo. It was the learned Magistrate view that the application before him was resjudicata.

2. The appellant dissatisfied and aggrieved by the ruling of the Hon. Chief Magistrate has appealed to this Court and has set out seven grounds of appeal which are set out hereunder:-

1. That the Learned honourable Magistrate erred in fact and law in dismissing the appellant's application for being res judicata as the issues and cause of action were completely different in the instant suit where the Plaintiff was alleging she had already paid more than double the principle sum.

2. *That the Learned Honourable Magistrate erred in fact and law in failing to note* that the plaintiff had made further payments of almost Kshs.1 million since dismissal of the previous application.

3. *That the learned Honourable Magistrate erred in fact and law in misdirecting himself on the proper interpretation of Section 7 of the Civil Procedure Act.*

4. *That the learned Honourable Magistrate misapplied the conditions pertaining to the grant of temporary injunction.*

5. That the learned honourable Magistrate erred in fact and law by finding that the appellant was not entitled to orders of temporary injunction pending the hearing and determination in the subordinate court.

6. That the learned Magistrate erred in fact and law in failing to note that the Appellant's application had been provoked by the respondent's instructions to auctioneers who were advertising vide public auction for the sale of the appellant's land.

7. That the Learned Honourable Magistrate erred in fact and law by failing to consider the weighty evidence and the written submissions made by the Appellant in response to the claim that the suit and the Application was res-judicata to the one already decided in ELC No.272 of 2012.

3. The grounds of appeal can conveniently be condensed into two grounds thus:-

(i) Whether or not the application for injunction before the learned trial magistrate was resjudicata by reason of the determination of a previous similar application in Nakuru ELC No. 272 of 2017.

(ii) Whether or not the appellant had in the suit before the lower court satisfied the conditions for grant of a temporary injunction to warrant being granted one.

4. In order to contextualise the basis of the present appeal, it is necessary to set out, albeit briefly, the facts of the case before the subordinate Court. The appellant by way of a plaint dated 29th January 2019 filed on the same date sought permanent injunctive orders against the respondent restraining any sale, disposal or alienation and/or interference with land parcel **Nakuru Municipality Block 1/1201 (Langalanga)**; a declaration that the loan had been paid in full; and declaration that the notification of sale of the suit property was illegal null and void. Simultaneously with the plaint the Appellant filed a Notice of Motion application praying for injunction basically to forestall advertisement and sale of the charged suit property by the respondent in exercise of its statutory power of sale. The appellant/applicant contended that the respondent was acting in bad faith when it sought to advertise the suit property for sale by public auction in view of the fact that the appellant had fully repaid the loan advanced. The appellant contended that the amount repaid was double the principal sum advanced and argued that any further payment would offend the Banking Act Cap 488 Law of Kenya (the duplum rule).

5. The respondent filed a replying affidavit through its legal officer Evalyn Gachoki in opposition to the applicant's application for injunction. Principally the respondent contended there was an earlier suit namely Nakuru ELC No.272 of 2017 where the parties were similar and the subject matter the same and a similar application as the one filed before the subordinate court was heard and determined. The respondent averred the application before the Court was *resjudicata* and the suit was in essence subjudice. The respondent further averred the Appellant /applicant had previously filed a similar application being Nakuru, CMCC No.173 of 2018 where the parties were the same but withdrew the application on grounds that the application and the suit was res judicata ELC No. 272 of 2017 that was pending and on-going before the Court. The Respondent stated the injunction application having been determined on merits by Hon. Justice D O Ohungo on 20th March 2018, the application before the learned Chief Magistrate was *resjudicata* rendering the same incompetent.

6. The parties before the lower court argued the application by way of written submissions and the learned Chief Magistrate in a rather brief ruling delivered on 23rd July 2019 dismissed the Appellant's application for injunction. The relevant part of the ruling was in the following terms:-

"Proceedings in Nakuru ELC 272 of 2017 have been exhibited to show that this suit is similar to another one pending before the ELC. It has been deponed in the Replying Affidavit that the application herein is resjudicata, the same having been heard and determined by Justice D O Ohungo. The plaintiff has chosen studions silence in the face of such serious allegations. That can only be taken as an admission of the application being resjudicata. The application is dismissed with costs to the defendant.

7. The learned trial magistrate was of the view that the injunction application was *resjudicata* and proceeded to order the same dismissed with costs to the defendant/respondent consequently provoking the instant appeal.

8. In determining whether or not the learned trial magistrate was justified to reach the decision that he did, this court is obligated and indeed under a duty to re-evaluate the evidence and material that was placed before the subordinate court to determine whether the learned magistrate made the correct determination. As an appellate court of first instance the court is not bound with the findings of fact and law made by the lower court and may on re-evaluation reach its own conclusion and findings. This principle was aptly enunciated the case of ***Selle & Another -vs- Associated Motor Boat Co. Ltd & others (1968) EA 123*** where the court of Appeal stated thus:-

" this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in this respect".

9. In the matter before the lower court in the present matter there was no oral evidence and the application was ruled upon on the basis of the pleadings, affidavit evidence and submissions of the parties. The appellant when she filed the plaint in the lower court did not make disclosure there was a pending suit Nakuru ELC No. 272 of2017 involving the same land that was the subject matter in the suit and where the parties were the same. The respondent vide the replying affidavit disclosed the existence of Nakuru ELC

No. 272 of 2017 where the present appellant was the plaintiff and the respondent was the defendant. The respondent annexed the pleadings in Nakuru ELC No. 272 of 2017 which included the plaint, the Notice of Motion application for injunction filed simultaneously with the plaint and the ruling delivered by Hon. Justice D O Ohungo on 20th March 2018 on the application.

10. In the Notice of Motion application filed in ELC No. 272 of 2017 prayers (2) & (3) were the same as prayers (2) & (3) in the Notice of Motion application in the suit before the subordinate Court. The Appellant's response to the plea of res judicata by the respondent was that the suit in the subordinate Court raised different issues to the issues raised in the suit pending before the ELC. The Appellant in particular contended that she had in total paid an aggregate sum of Kshs 3,400,000/= which constituted double of the loan of Kshs1,700,000/= which was advanced to her and her late husband against the security of the suit land. She contended having paid double the principal sum advanced any further demand for payment or any additional payment would offend and would be contrary to the Banking Act (duplum rule). The Appellant had in mind section 44A of Banking Act, Cap 488 Laws of Kenya which she referred to in her submission section 44A (1) (2) & (3) of the Act provides as follows:-

Limit on interest recovered on defaulted loans

(1) An institution shall be limited in what it may recover from a debtor with respect to a non-performing loan to the maximum amount under subsection (2).

(2) The maximum amount referred to in subsection (1) is the sum of the following—

(a) the principal owing when the loan becomes non-performing;

(b) interest, in accordance with the contract between the debtor and the institution, not exceeding the principal owing when the loan becomes non-performing; and

(c) expenses incurred in the recovery of any amounts owed by the debtor.

(3) If a loan becomes non-performing and then the debtor resumes payments on the loan and then the loan becomes non-performing again, the limitation under paragraphs (a) and (b) of subsection (1) shall be determined with respect to the time the loan last became non-performing.

11. It is clear from the above provisions that the principal sum is stipulated in reference to the time the loan became non-performing and not as at the time the loan was advanced. It does appear the Appellant has misconceived the application of the duplum rule as there is no evidence as to what the principal sum was when the loan became non-performing and/or when the loan was determined to be non-performing so that the duplum rule could be applied.

12. The Appellant's assertion that the suit before the subordinate court raised issues that were different from the issues raised in ELC No. 272 of 2017 in my view cannot pass close scrutiny. There is no dispute that in both suits the parties were the same; the land the subject matter was the same and that the suit concerned the realisation by the chargee of its security (in this case the suit property) for default in payment of the loan advanced to the appellant and her late husband in 2011 which was secured by a charge registered over the suit property on 9th September 2011. It is not entirely correct for the appellant to state the issue of the duplum rule was not an issue in the earlier suit in ELC No.272 of 2017. Paragraph 8 and 11 of the plaint (ELC No.272 of 2017) show that the application of the duplum rule was an issue. I reproduce the same hereunder:-

8. From the sum paid by the plaintiff on the loan account and the sum now being demanded by the defendant the total payable would add up to Kshs.4,606,977.06 which demand is contrary to the provisions of the Banking Act (duplum rule) which provides that the sum due to a lender inclusive of interest and costs incurred in recovering the loan should never be beyond double the principal. The sum now being demanded by the defendant is more than double the principal and clearly against the provisions of the law.

11. The plaintiff's claim against the defendant is for a declaration that the defendant's demand is illegal, null and void and for a declaration that the total sum payable to the defendant should not be beyond double the principal under any circumstances.

13. Apart from the fact that the Appellant may have paid some additional monies towards the redemption of the loan account as at

the time she filed the suit before the subordinate court, all the other factors and circumstances giving rise to the suit remained the same. If the payment of the additional sum of Kshs900,000/= that the appellant claimed to have paid changed the circumstances so that she could approach the court with a fresh application for injunction why did she not file the application in the suit that was already pending before the Court" I find no viable reason other than perhaps forum shopping and maybe attempt to steal a match through non-disclosure of relevant material facts. The appellant managed to have the scheduled sale by public auction suspended as she obtained a temporary injunction restraining the same. If there was total disclosure the Court may very well have declined to give the exparte temporary injunction that it did.

14. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was *resjudicata* and the entire suit was subjudice as there was an active pending suit before a court of competent jurisdiction being Nakuru ELC No. 272 of 2017. All issues raised in the suit before the subordinate court could be properly litigated in the suit pending before the ELC. The filing of the suit by the appellant in the subordinate court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.

15. As must have become evident by now, this appeal lacks any merit and is for dismissal. Considering that I have held the suit pending in the subordinate court being Nakuru CM ELC No.21 of 2019 to be subjudice by reason of the pendancy of Nakuru ELC No. 272 of 2017, no purpose will be served by having the same stayed as all the issues that arise in that suit can and will be determined in ELC No 272 of 2017 which is the superior court.

16. In the premises I order the instant appeal dismissed with costs to the respondent and further order Nakuru CMC ELC No. 21 of 2019 struck out for being subjudice but with no orders as to costs.

18. Orders accordingly.

Judgment dated signed and delivered at Nakuru virtually this 17th day of December 2020.

J M MUTUNGI

JUDGE