REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL DIVISION

Civil Case 313 of 2005

KANORERO RIVER FARM LIMITED……..…….……1ST PLAINTIFF

MAINA CHEGE……..…..2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA……DEFENDANT

R U L I N G

This application was brought by the Defendant pursuant to the provisions of Order 6 rule 13(1)(b) and (d) of the Civil Procedure Rules, as well as by virtue of Sections 3A and 7 of the Civil Procedure Act. The application seeks the striking out and dismissal of the suit herein. Secondly, the Defendant seeks the costs of both the application and the suit.

When the application came up for hearing, the Plaintiff was not represented in court. However, as I was satisfied that the plaintiff had been duly served, I proceeded to hear the application notwithstanding the Plaintiffs' absence.

In a nutshell, the Defendant's contention is that the suit was an abuse of the court process, as the issues it raises are res judicata, having already been determined in **HCCC No. 699 of 2001, KANORERO RIVER FARM LIMITED & 3 OTHERS V NATIONAL BANK OF KENYA LIMITED,** hereinafter cited as "**the former suit**."

The court's attention was drawn to the prayers in this suit; the principal ones being as follows:-

"(a) **An order of permanent injunction restraining the Defendant by itself, its agents, servants, employees or any of them from selling, advertising for sale, transferring and/or in any manner whatsoever from dealing with the parcels of land known as L.R. No. NGINDA/SAMAR/BLOCK 1/2328, L.R. NO. NGINDA/ SAMAR/BLOCK/2333 and L.R. NO. NGINDA/SAMAR/ BLOCK 2/240**.

(b) A declaration that the intended sale by Public Auction of the parcels in (a) above on 16.,06.05 is invalid, improper, incompetent and illegal.

(c) General Damages."

Those issues were said to have been determined on merit, by a court of competent jurisdiction, in the former suit. The decision in the said former suit was said to have been handed down by the Hon. Azangalala J. on 2nd March 2005.

I have perused the judgement of Hon. Azangalala J., which is dated 2nd March 2005. I noted that the judge clearly brought out the matters that were in issue, as follows:-

"**In an amended plaint filed on 24th June 2002 the Plaintiffs sought a permanent injunction to restrain the Defendant from selling, advertising for sale, transferring and/or in any other manner whatsoever from dealing with the parcels of land known as L.R. Nos Nginda/Samar/block 1/2328, Nginda/Samar/Block 1/2333, Nginda/Samar/Block 2/240, Ruiru/Kiu/Block 3/10, 209/10932 and 209/0933. The Plaintiffs also sought declaration that the intended sale of L.R. Nos Nginda/Samar/Block 1/2328, Nginda/Samar/Block 1/2333 and Nginda/Samar/Block 2/240 by public auction on 17th May 2001 is invalid, improper incompetent and illegal,; and that the purported sale and transfer of L.R. No. Ruiru/Kiu/Block 3/10 was fraudulent and illegal …….."**

In the said former suit, there was also an alternative prayer for damages.

After conducting a full trial, the learned trial judge expressed himself as follows, at page 21 of his considered judgement:

"**At the** trial**, it emerged clearly that the E.I.B. loan was disbursed. For these facility the Plaintiffs inter alia executed a charge in favour of the Defendant in respect of the said parcel of land No. Nginda/Samar/Block/2328. It also emerged quite clearly that the Defendants offered overdraft facilities to the 1st Plaintiff, who secured the same by parcel No. Nginda/Samar/Block2/240 and Nginda/Samar/ Block 1/2328. The Plaintiffs on their own admission only paid what was described as commitment fee before the E.I.B. loan was disbursed. No further payment was made. Even at the trial of this action no proposal for payment was made. The Plaintiff's indebtedness to the Defendant, in my view, is beyond dispute."**

For the foregoing reasons, the learned trial judge held that the Plaintiffs were not entitled to the orders for a permanent injunction. The court also held that the Plaintiffs were not entitled to the declaratory judgement. Therefore, in conclusion, the court made the following orders:-

"1. **That the Plaintiffs' suit be and is hereby dismissed in its entirety.**

2. That the Defendant's Counter-claim succeeds and I hereby enter judgement as prayed in the Counter-claim.

3. The Defendant shall have the costs of the dismissed suit and the Counter-claim."

In the light of the orders made on the Counterclaim, in the former suit, it is perhaps important to point out that the Defendant had sought judgement, against the Plaintiffs, for Kshs. 7,181,588/85, plus interest thereon at the rate of 29% per annum from 28th February 2002. The Defendant had also claimed and was awarded the following further claims:-

(a) U.S. Dollars 542,362.17, with interest at 12% per annum on reducing balance basis, with monthly rests from 2.3.2005, until payment in full.

(b) U.S. Dollars 424,953.74, with interest at 24% per annum on reducing balance basis, with monthly rests, from 2.3.2005, until payment in full.

(c) Kshs. 1,785,238/32, with interest thereon at 12% per annum from 2.3.2005, until payment in full.

When canvassing this application the Defendant's advocate, Mr. Kariuki informed the court that the

Plaintiffs in the former suit had filed a Notice of Appeal, in relation to the judgement of the Hon. Azangalala J. The said Notice of Appeal was filed on 15th March 2005.

In the circumstances, until and unless the decision in the former suit was upset by the Court of Appeal it remains binding on the parties thereto. That fact was recognised by the Plaintiffs in the former suit, hence their decision to lodge an appeal.

The question that then arises is whether the Plaintiffs, who were also the first two Plaintiffs in the former suit, can prosecute this suit, notwithstanding the judgement in the former suit. That question could also be posed as follows; can this court entertain this suit, in the light of the decision already arrived at in the former suit?.

Section 7 of the Civil Procedure Act provides as follows:-

> "**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."**

That statutory provision relays a very clear message, barring a court from hearing a suit or issue if the same was substantially in issue in a former suit, between the same parties; if the issue was determined in the former suit, after a hearing.

In this case, the Plaintiffs were also Plaintiffs in the former suit. They have now sought the very same reliefs as those they had sought in the former suit. Yet, the court had already adjudicated on those issues, in the said former suit. Accordingly, by virtue of Section 7 of the Civil Procedure Act, this suit is barred by the doctrine of res judicata.

For those reasons, I hold that this suit is an abuse of the court process, as it raises issues which had been substantively litigated, and adjudicated upon, by a court of competent jurisdiction. Therefore, the suit herein is hereby dismissed. The Plaintiffs are ordered to pay costs of this application, as well as costs of the suit, to the Defendant.

Dated and Delivered at Nairobi this 17th day of November 2005.

FRED A. OCHIENG

JUDGE