REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 239 of 2006

BENJAMIN OLE TINA…….....……
PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED….....……
DEFENDANT

R U L I N G

On 8th May 2006, the plaintiff brought these proceedings, by way of a Plaint. On that same date, the plaintiff filed an application for an interim injunction to restrain the defendant from selling-off the suit property, L.R. No. NAROK TRANSMARA/OLALOI/14.

In response to the application, the defendant filed a replying affidavit together with a Notice of Preliminary Objection. This ruling is in relation to the said preliminary objection, which was dated 17th May 2006, which is in the following terms:-

"**1. The Honourable Court has no jurisdiction to entertain the said application and the entire suit on the ground that the issues raised herein were also raised in a previous application being HCCC No. 882 of 2000 (O.S.) which was heard and finally determined by a competent court. The Respondent will pray that the entire suit be struck off.**

2. The Plaintiff/Applicant is guilty of non- disclosure of material facts in utter abuse of the due process of the Court. "

When the matter came up before me on 18th May 2006, the plaintiff was not represented by an advocate, whereas the defendant was represented by Mr. Rachuonyo Advocate.

Although it is not on record, but I clearly recall that Mr. Rachuonyo did notify the court, when the case was first called out, that a clerk to Mr. Hassan Advocate had asked him (Mr. Rachuonyo) to have the case placed aside until 10.00 a.m. Much as the court was not amused by the advocate's decision to allocate to himself a choice as to the time when he should be heard, by the time I got round to dealing with this case, it was already past 10.00 a.m. Thus, by default, the wish of the plaintiff's advocate was granted.

But alas! the advocate was still not in court, and there was no word from him. At that point, I permitted the respondent to canvass the preliminary objection.

Basically, the defendant did submit that the whole suit was res judicata, as the issues raised in it had already been heard and determined in the case of **BEJAMIN OLE TINA & SAGRAM COMPANY LIMITED Vs NATIONAL BANK of KENYA LIMITED, HCCC NO. 882 of 2000 (O.S.) (At the**

Milimani Commercial Courts).

The defendant drew the court's attention to the fact that on 12th July 2000, the HON. HEWETT J. dismissed an application for an injunction. From an extract of the order made by the learned judge it is clear that the application was dismissed after the court had given due consideration to an affidavit of Benjamin Ole Tina sworn on 18th May 2000; the replying affidavit of Mrs Z. K. Mogaka sworn on 12th June 2000; the supplementary affidavit of Benjamin Ole Tina sworn on 23rd June 2000 and the supplementary affidavit of Mrs Z.K. Mogaka sworn on 30th June 2000. The court also gave consideration to the submissions of counsel for the plaintiffs and counsel for the defendants.

In other words, the order for the dismissal of the application was made after it had been given a substantive hearing by the court.

The other document which the defendant drew the court's attention to is a Decree issued in HCCC No. 882 of 2000 (O.S.), which shall hereinafter be cited as "**the earlier case**." To my mind, the substance of the Decree in the said earlier case ought to be spelt

out herein, for a better appreciation of what the earlier case was about. In pertinent part it reads as follow:-

" **DECREE**

CLAIM FOR:

1 Whether the defendant has a valid legal charge over L.R NO NAROK/TRANSMARA OLALOI/14 which property is registered in the name of the plaintiffs.

2 Whether the plaintiffs are under any obligation to pay any monies to the defendant under the charge.

3 Whether the defendant did provide any consideration for the charge created over L.R. NO. NAROK/TRANSMARA/OLALOI/14, and in the alternative whether there is total failure of consideration on the part of the defendant.

4 Whether the plaintiffs authorised or consented to the defendant paying stamp duty and legal costs in respect of L.R. NO. NAROK/TRANSMARA/OLALOI/14

5. Whether interest is payable in law as regards Advocates costs and stamp duty in respect to the charge over L.R. No. NAROK TRANSMARA/ OLALOI/14

6. Whether the defendants are under a duty to deliver title documents in respect of L.R. NO. NAROK/TRANSMARA/OLALOI/14 free from any encumbrance and in particular the defendant's charge over the aforesaid property; which questions are based on the ground that the defendant did not provide any consideration for the charge created by it over L.R. No. OK/TRANSMARA/OLALOI/14."

From the face of the Decree, the Originating Summons in the earlier case came up for hearing on 22nd October 2002, before the

Hon. Ringera J. (as he then was). After the learned judge had heard both counsel for the plaintiffs and counsel for the defendant, he dismissed the suit, with costs to the defendant.

The first point which now comes across is that the plaintiff herein was not candid when he asserted, at paragraph 14 of his Plaint, that:

"**there is no suit pending between the parties hereto or previously instituted suit on the subject matter of this suit."**

Secondly, the prayers in the plaint herein are for declarations as follows:-

"**(a) <u>THAT</u> a declaration that the defendant is not entitled to charge the plaintiff any penalties by whatsoever name called and cumulative interests thereon and that such penalties that the defendant has charged the plaintiff, as the defendant, is in breach of the charge contract.**

(b) <u>THAT</u> a declaration that the sum claimed by the Defendant is not recoverable at all from the plaintiff."

In my considered opinion those two declaratory reliefs were subsets of the claims numbered 2 to 6 in the earlier suit. For instance when the plaintiff asserts that penalties and cumulative interests were not chargeable to his account, he is implying that the said sums were therefore not recoverable from him. Therefore such debits as penalties or cumulative interest would fall under the heading of "**any monies"** which the plaintiffs, in the earlier case, had sought to have declared as not payable by them.

Following the dismissal of the suit in which the learned judge declined to make a declaration that the plaintiffs were under no obligation to pay any monies to the defendant, under the charge, I hold the considered view that that issue is res judicata. That would be the position whether or not in the earlier case, the plaintiffs had actually delved into the specific issue of penalties or cumulative interests, when they were dealing with the issue of "**any monies under the charge"**

And as regards the declaration that the sum claimed by the defendant was not recoverable, I note that in the earlier case, the learned judge did dismiss the prayer which sought the delivery up of the title documents to the suit property, free of any encumbrances. By dismissing that prayer, which was premised on the ground that the defendant had not provided any consideration for the legal charge over the suit property, the learned judge was saying that he was satisfied that the defendant had provided some consideration. Therefore, unless the plaintiff was to demonstrate that he has paid off the defendant, subsequent to the Decree dated 22nd October 2002, he cannot sustain this suit.

In **REV. MADARA EVANS OKANGA DONDO V HOUSING FINANCE COMPANY of KENYA (NKU) HCCC No. 262 of 2005**, the HON. L. KIMARU J. expressed himself thus:-

"**Having found that the plaintiff's suit is res judicata, and further having found that the plaintiff concealed material facts from this court and further having found that the plaintiff made false averments and swore a false affidavit, this court invokes its inherent jurisdiction and orders the plaintiff's application together with the entire suit struck out with costs to the defendant."**

In this case, I have come to the conclusion that the suit was res judicata. I have also come to the conclusion that the plaintiff did conceal the material fact, to wit that there was a previous suit between the same parties, over the same subject matter.

I have arrived at that conclusion notwithstanding the plaintiff's protestation that the earlier case was not filed by him, but by the squatters who were on the suit property. The plaintiff's said protestations came after the defendant's advocate had concluded his submissions, and I had already set down the date for my ruling. It is then that the plaintiff, who had been in court all along, sought to address the court.

In my assessment, the plaintiff failed to persuade me that he was not party to the earlier suit. If it were true that the suit was filed by squatters, I would have expected the plaintiff to demonstrate his honesty by volunteering that kind of information in the plaint and in his affidavit. I would also have expected him to demonstrate to the court, the steps he had taken after discovering that the squatters had used his name in a suit to which he was not party. But none of those things came to pass.

Instead, it transpired that the plaintiff had personally sworn an affidavit and a supplementary affidavit

in the earlier case. The plaintiff was also represented by an advocate in the said earlier case. Therefore, in my considered view, his protestations herein were only serving to make a bad situation worse. In other words the plaintiff was further compounding his dishonesty.

Another issue which I need to mention herein is the fact that on 19th May 2006, which was the day after I had heard this matter, the plaintiff's advocates filed a certificate of urgency, seeking an injunction pending the ruling.

As the Duty-Judge on that day was my sister, the HON. KASANGO J., I did release this file to her, so that she could attend to the urgency cited. The learned judge heard the submissions by counsel for the plaintiff, and then directed that the case be mentioned before me on 22nd May 2006, for appropriate orders.

Notwithstanding the court's direction that the case be mentioned before, me on 22nd May 2006, the plaintiff did not attend before me on that date.

However, I only mention this issue as a matter of record.

Finally, I do uphold the preliminary objection, on the grounds of both material non-disclosure, as well as the fact that the suit is res judicata. Accordingly, the application dated 8th May 2006, as well as the Plaint of like date, are struck out. The costs of the suit are awarded to the defendant.

Dated and Delivered at Nairobi this 6th day of July 2006.

FRED A. OCHIENG

JUDGE