



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 112 of 2007

DAVID KAMAU.....PLAINTIFF/APPLICANT

VERSUS

SAVINGS & LOAN KENYA LTD.....DEFENDANT/RESPONDENT

R U L I N G

By a chamber summons filed on 1st March 2007, the Plaintiff/Applicant seeks inter alia

- An order of temporary injunction restraining the Defendant whether by themselves, their servants and agents or Auctioneers or any of them either individually or jointly or otherwise from doing the following acts or any of them, that is to say from interfering with rights of possession, evicting, advertising for sale, disposing off, selling by public auction or otherwise, leasing, letting otherwise howsoever interfering with ownership of Title to and or interest in ALL THAT piece of land known as L.R. No. 3734/142 pending the hearing and determination of this application.
- An order of temporary injunction restraining the Defendant whether by themselves, their servants and agents or Auctioneers or any of them either individually or jointly or otherwise from doing the following acts or any of them, that is to say from interfering with rights of possession, evicting, advertising for sale, disposing of, selling by public auction or otherwise, leasing, letting otherwise howsoever interfering with ownership of Title to and or interest in ALL THAT piece of land known as L.R. No. 3734/1142 pending the hearing and determination of this suit.
- An order that accounts be taken as between the plaintiff and the Defendant.
- THAT costs of this application be provided for.

Filed simultaneously with the application was a plaint which was subsequently amended on 7th March 2006. In the plaint the

Applicant seeks judgement against the Defendants for an order of permanent injunction restraining the Defendant their servants or agents from interfering with the Applicant's right of possession or evicting or selling the suit property.

The Applicant's suit is based on the ground that the Respondent has served the Applicant with a defective notification of sale which gives less than the required 45 days notice and further that the Respondent is fettering or clogging the Applicant's right of redemption by demanding sums not owing.

The Respondent has raised a preliminary objection to the Applicant's entire suit contending that it is

an abuse of the process of the court as the Applicant has failed to disclose to the court the existence of HCCC 1566 of 1999 which is between the same parties as this suit and is also over the same subject matter as the present suit.

Mr. Koech who argued the preliminary objection on behalf of the Respondent invited the court to look at the pleadings in HCCC 1566 of 1999 (which had been called for at his request) and confirm the parties to the suit and the subject matter. He submitted that the current suit was an abuse of the process of the court as the Applicant has failed to disclose to the court the presence of the previous suit. He referred the court to paragraph 31 of the original plaint and the amended plaint wherein the Applicant pleaded that “there

is no other suit pending nor have there been previous proceedings in any court between the Plaintiff and the Defendant over this matter.”

Relying on the case of *Nathakal Monji Rai vs Standard Chartered Bank (K) Ltd & Anor HCCC No. 830 of 1999* (Milimani), Mr. Koech urged the court to find that the current suit was not brought in good faith and was an abuse of the court process.

In so far as an application for an interlocutory injunction in HCCC No. 1566 of 1999 in similar terms as the present application had been heard and dismissed both by the High Court and the Court of Appeal, Mr. Koech, relying on the case of *Omondi vs National Bank of Kenya & Others [2001] 1 EA, 177* submitted that the application was *res judicata* and that the issue of *res judicata* could be raised as a preliminary objection. Mr. Koech also referred the court to Section 6 of the Civil Procedure Act and submitted that in view of the presence of HCCC 1566 of 1999 the court could not proceed with the current suit.

Mr. Muli who appeared for the plaintiff urged the court to dismiss the preliminary objection. He submitted that the same being based on the ground that the Plaintiff’s suit was an abuse of the process of the court could only be brought by way of a formal application under Order VI rule 13 (1) (a) (b) (c) or (d). Mr. Muli sought to distinguish the case of *Omondi vs National Bank of Kenya* (supra) maintaining that in that case the circumstances raised the plea of *res judicata* whereas in the current suit *res judicata* could not arise since HCCC 1566 of 1999 had not been finalised and that in any case the cause of action in the two suits were different as in the previous suits the Plaintiff sought to restrain the Defendant from realizing the security as notice had not been served and also required accounts to be taken whereas in the current suit the

Plaintiff is claiming that the Defendant is in breach of an agreement that the Plaintiff should dispose off the suit premises by private treaty. Mr. Muli urged the court to find that the issue raised was not a pure point of law.

From the above it is evident that the following issues arise.

- (1) whether the preliminary objection raises a pure point of law.
- (2) whether the preliminary objection ought to have been brought by way of a substantive application under Order VI rule 13 (1) (a) (b) (c) and (d) of the Civil Procedure Rules
- (3) whether the application is *res judicata*.
- (4) whether the application and entire suit is an abuse of the process of the court.
- (5) whether Section 6 of the Civil Procedure Act applies and whether the current suit should be stayed

As to the issue whether the preliminary objection raised by Mr. Koech is a pure point of law, I can do no better than refer to the case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors [1969] EA 696* where Law, J.A. observed as follows:

“so far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings which if argued as a preliminary point may dispose of the suit”

The statement of Sir Charles Newbold, P in the same judgement is also instructive:

“A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

I am in entire agreement with these propositions and do accept them to espouse the correct legal position.

I have no doubt that the issue as to whether the application and suit are *res judicata* or an abuse of the process of the court or should be stayed under Section 6 of the Civil Procedure Act are all points of law which arise out of the pleadings and which if determined against the plaintiff would effectively determine the suit. In the case of *Omondi vs. National Bank of Kenya* (supra) where Ringera J dealt with a similar issue. He concurred with counsels for the Defendants that a plea of *res judicata* was a pure point of law which was properly brought as a preliminary objection. Ringera J. pointed out that the court is perfectly at liberty to look at the pleadings and other relevant matters which are on record in order to determine such a point of preliminary objection provided the facts are not contested.

In this case it is not disputed that HCCC 1566 of 1999 exists or that it involves the same parties to this suit. What seems to be contested is whether the subject matter of the two suits is the same. That is a matter of interpretation to be made by the court upon examining the pleadings in the two suits.

Similarly as concerns the issue of abuse of the process of the court in failing to disclose the existence of the previous suit, no evidence is required save for the court to examine the pleadings.

I have considered whether the preliminary objection which has been raised ought to have been brought by way of a substantive application under Order VI rule 13 (1) (a) (b) (c) or (d) of the Civil Procedure Rules. I concur that an application for striking out pleadings under that order could easily have been founded on the issues now raised as a preliminary objection. That however does not preclude the Defendant from canvassing such issues by way of a preliminary objection. Indeed it is only prudent for the Defendants to avoid extra costs that would be incurred in bringing an application if they can otherwise have the matter dealt with as a preliminary objection. I do therefore reject Mr. Muli's arguments in this regard and find that the preliminary objection has been properly raised before this court.

In the original plaint in civil suit HCCC 1566 of 1999 and the amended plaint in the present suit, paragraph 31, the Plaintiff has pleaded that there is no other suit pending nor has “there been previous proceedings in any court between the Plaintiff and the Defendant over this matter.” In each case the Plaintiff swore an affidavit verifying what was stated in the plaint and amended plaint as true.

An examination of the pleadings in HCCC No. 1566 of 1999 and the current suit confirms that the two suits involve the same parties who are the Plaintiff and the Defendant.

The two suits are essentially seeking the same relief i.e. judgment for an injunction to restrain the Defendant by itself its agents servants or Auctioneers by whomsoever, from selling, advertising for sale or disposing or in any way alienating land known as LR 3754/1142.

Both suits arose from the exercise of Defendant's statutory power of sale arising from a mortgage agreement entered into between the Plaintiff and the Defendant.

In order to appreciate the cause of action in the two suits it is appropriate to set out the salient paragraphs of the plaint dated 17th March 1999 in Milimani HCCC No. 1566 of 1999 (originally HCCC No. 541 of 1999) which captures the Plaintiff's cause of action.

“7. The Plaintiff with the consent of the defendant advertised part of the suit on the 16th day of October, 1997 but the intended sale did not materialise as no buyer was forthcoming.

8. Sometimes in December 1998, he managed to get a buyer who was willing to buy half of the suit property and duly communicated and agreed with the defendant that the suit property will have to be subdivided into two equal portions and further that the defendants would still hold the other half as security. The plaintiff had further indicated to the defendants that the entire proceeds of the sale would be used to clear the arrears and the balance to be used in reducing the mortgage.

9. In pursuance to this understanding the plaintiff had entered into a binding sale agreement with the interested buyer and an agreement for sale has duly been executed with the full knowledge and consent of the defendant.

10. The defendant in breach of the said arrangement appears reluctant to give sufficient time for completion and realisation of the plaintiff's projects for raising funds to redeem the account. Instead, it has proceeded to instruct a firm of auctioneers to advertise the same for a forced sale on 23rd March, 1999 yet the plaintiff has reached an advanced state of selling the same to a third party who is paying a very good price of Kshs. 12m which cannot be obtained in such an auction.”

In the present suit the cause of action is captured by the following paragraphs of the amended plaint dated 7th March 2007.

“12 (a) the plaintiff and the defendant are still negotiating on the reasonable and in any event I have been willing to sell the same at the reserve price stated by the defendant of KShs. 18.5 million but the defendant insists that I do get a buyer for KShs. 25 million which is unrealistic as the defendants themselves through the auctioneers have given themselves a reserve price of KShs. 18.5 million.

(b) That the plaintiff should also be allowed to redeem at the same reserve price.

(c) That there were ongoing discussions between the plaintiff and the defendant and the notification of sale given is merely meant to frustrate my efforts to redeem.

13. On or about the 21st day of February 2007, the defendant unlawfully served the plaintiff with a notification of sale of the Plaintiff's property by public auction scheduled for 15th March 2007 without any colour of right whatsoever.

14. The said notification of sale is defective and unlawful as it was drawn and served on the 21st of February 2007 for a sale meant for 15th March 2007 thus giving the applicant only 22 days instead of the statutory 45 days.”

In my considered view, a comparison of the above pleadings show that the Plaintiff's claim in the current suit bears a striking resemblance to the previous suit. The matter directly and substantially in issue is basically the same. Notwithstanding the few cosmetic changes which make the current suit appear to be based on subsequent events, the substratum of both suits is the exercise of the Defendant's statutory power of sale and the Plaintiff's attempts to determine how that power should be exercised. Moreover the issue of accounts and statutory notice (which are being introduced in the present suit) are issues which could well have been raised in the previous suit.

The plaintiff is therefore in breach of Order VII rule 1 (2) of the Civil Procedure Rules in failing to disclose the existence of the previous suit. I find that the current suit is an abuse of the process of the

court as it is only intended to circumvent the ruling of Azangalala J. in High Court Civil Case No. 1566 of 1999 and that of the Court of Appeal in Civil Application No. Nai 255 of 2005 dismissing the plaintiff's application for an injunction pending the hearing of its intended appeal against the ruling of Azangalala J in HCCC 1566 of 1999. On this ground, I do uphold the preliminary objection and strike out the Plaintiff's suit as being an abuse of the process of the court.

I find further that since HCCC 1566 of 1999 has not been fully heard and determined, a plea of res judicata is not applicable but Section 6 of the Civil Procedure Act bars – this court from proceeding with this suit. The upshot of the above is that I strike out the present suit as being an abuse of the court process. The Plaintiff shall pay costs of this suit and costs of the application to the Defendant.

Dated Signed and Delivered this 14th day of March 2007.

H. M. OKWENGU

JUDGE