



NCBA Bank Kenya PLC v Said & 2 others (Sued as Administrators of the Estate of the Late Tahir Sheikh Said Ahmed pursuant to Grant issued in Mombasa Succession Cause No. 64 of 2017, in the Matter of the Estate of Tahir Sheikh Said Ahmed) (Civil Suit E088 of 2021) [2023] KEHC 27535 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KEHC 27535 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E088 OF 2021**

F WANGARI, J

JULY 28, 2023

SUED AS ADMINISTRATORS OF THE ESTATE OF THE LATE TAHIR SHEIKH SAID AHMED PURSUANT TO GRANT ISSUED IN MOMBASA SUCCESSION CAUSE NO. 64 OF 2017, IN THE MATTER OF THE ESTATE OF TAHIR SHEIKH SAID AHMED

BETWEEN

NCBA BANK KENYA PLC PLAINTIFF

AND

SAID TAHIR SHEIKH SAID 1ST DEFENDANT

AMINA TAHIR SHEIKH SAID 2ND DEFENDANT

OSMAN TAHIR SHEIKH SAID 3RD DEFENDANT

SUED AS ADMINISTRATORS OF THE ESTATE OF THE LATE TAHIR SHEIKH SAID AHMED PURSUANT TO GRANT ISSUED IN MOMBASA SUCCESSION CAUSE NO. 64 OF 2017, IN THE MATTER OF THE ESTATE OF TAHIR SHEIKH SAID AHMED

RULING

1. The Plaintiff instituted suit against the Defendants jointly and severally for the following reliefs: -
 - a. United States Dollars Sixteen Million Two Hundred Thousand (USD. 16,200,000) at the exchange rate of Kshs. 110 as at 30th August, 2021 and Kenya Shillings Seven Hundred Million (Kshs. 700,000,000) being the sum specified under the Guarantee Instruments by the late Tahir Sheikh Said Ahmed securing loan facilities advanced to TSS Grain Millers Ltd



- b. United States Dollars Eighteen Million (USD. 18,000,000) at the exchange rate of Kshs. 110 as at 30th August, 2021 and Kenya Shillings One Hundred Million (Kshs. 100,000,000/=) being the sum specified under the Guarantee Instruments by the late Tahir Sheikh Said Ahmed securing loan facilities advanced to Juja Coffee Exporters Ltd;
 - c. Interest on (a) and (b) above at the rate of 8.5% per annum with effect from 5th January, 2016 until payment in full;
 - d. Costs of this suit and interest thereon.
2. Upon service of the pleadings, the Defendants entered appearance and filed a joint statement of defence. In their defence, the Defendants denied the claim and further raised an issue that the present case was sub-judice since their exist another matter being Mombasa HCC 107 of 2018, TSS Investments Ltd & Juja Coffee Exporters Ltd v NIC Bank Ltd & KAAB Investments Ltd and HCC No. 9 of 2016.
 3. The Defendants went ahead to file an application dated 27th April, 2022 seeking that the suit be struck out for being sub-judice. The Plaintiff opposed the application through a replying affidavit dated 28th June, 2022 and sworn by one Stephen Atinya. This is the application which is the subject of this ruling.
 4. Directions were taken that the application be canvassed by way of written submissions. Both parties duly complied by filing submissions and cited various authorities in support of their rival positions. I am grateful to Counsel for complying with the directions by filing detailed submissions and citing various authorities from this court and other superior courts to urge their respective positions. I appreciate their industry as the said submissions and authorities would go a long way in determining the application one way or another.
 5. The genesis of the dispute is a loan facility the Plaintiff states that it extended to Juja Coffee Exporters Limited and TSS Grain Millers Limited. The loans were secured by personal guarantees given by one Tahir Sheikh Said Ahmed (deceased). The borrowers having defaulted in repaying the loans, the Plaintiff has preferred a suit against the Executors of the Will of Tahir Sheikh Said Ahmed in order to enforce the guarantee.
 6. In their defence, the Defendants contend that the borrowers have disputed the entire lending on grounds of fraud in Mombasa HCC No. 107 of 2018. According to them, it is not permissible for the Plaintiff to bring a suit against the guarantor before the liability of the principal debtor is established. In equal measure, the Defendants submit that the Plaintiff has sued TSS Grain Millers Limited in Mombasa HCC No. 9 of 2016 to recover a sum of Kshs. 2,282,734,385.56.
 7. According to the Defendants, this is the same sum that is being sought against the guarantor but in United States Dollars (USD). Therefore, the Defendants contend that the present suit seeks the same or similar remedies as sought in HCC No. 9 of 2016 and thus there is a risk of conflicting decisions on same or similar issues.
 8. According to the Plaintiff, the claim in Mombasa HCC No. 9 of 2016 and Mombasa HCC No. 107 of 2018 are quite distinct from those made in the present suit. One is a claim between the bank and the borrower while the other is between the bank and the guarantor.
 9. It further contends that the claims made in the present suit could not be conveniently made in Mombasa HCC No. 9 of 2016 or Mombasa HCC No. 107 of 2018. It further submitted that even if the claims are similar, the option is to stay the suit and not to strike it out.



Analysis and Determination

10. I have duly considered the application, the response, submissions together with the authorities relied upon by the parties as well as the law and in my view, the following issues are for determination;
 - a. Whether the application is merited;
 - b. If the answer to (a) above is in the affirmative, what orders shall issue?
 - c. Who bears the costs?
11. On the first issue, it is imperative to make a determination whether this matter is sub judice or not. According to Black Law Dictionary 9th edition, sub judice means-“before a court for determination.....”. This doctrine prevents a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially the same with the previously instituted suit between the same parties pending before same or another court with jurisdiction to determine it.
12. Section 6 of the [Civil Procedure Act](#) is the substantive provision on the issue. It provides as follows: -

“No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed”
13. The Plaintiff has clearly indicated that one claim is between the bank and the borrower while the other is between the bank and the guarantor. Can the two be pursued concurrently? I am afraid not. It is settled that the liability of a guarantor only arises once the liability of the principal debtor is established.
14. In the persuasive authority of *Martin Kirima Baithambu v Jeremiah Miriti* [2017] eKLR, it was held as follows: - “...As a matter of the law, guarantor’s liability will not arise before the default by the principal debtor to pay the debt...” In this context, the Defendants stated that the guarantee is not enforceable if there is prima facie evidence that the primary contract is affected by fraud.
15. In *Geonet Communications Limited v Safaricom Plc* [2021] eKLR, the court while dealing with the issue of when a bank guarantee can be challenged had the following to say: -

“...One is in the event of fraud of an egregious nature as to vitiate the entire underlying transaction of which the bank has notice. The only exception to the rule that the guarantor is bound to pay without demur is where fraud on the part of the beneficiary has been established. The party alleging fraud has to establish it clearly on a balance of probabilities...”
16. I note that in *Mombasa HCC No. 7107 of 2018*, the court formed a view that there are elements of the charge instruments which can be successfully challenged. The ruling was interlocutory in nature but the fact that prima facie fraud could be proved on a full hearing has a huge bearing on the issue of the guarantee. What this means therefore is that considering that the primary contract is under challenge, it was imperative for the Plaintiff to hold its horses before pursuing the guarantor.
17. I take note that though bringing two separate suits, that is, one against the principal debtor and another against the guarantor is not in itself impermissible, the scarce judicial resources tend to an approach where one suit is brought to avoid stretching judicial resources and also to avoid conflicting decisions on the same or similar facts.



18. In *Esther Sarange Nyang'au v Moses Nyabuto Moreka & Others* [2021] eKLR, the court while citing the Supreme Court's decision in *Kenya National Commission on Human Rights VS Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR had the following to say: -

“The basic purpose and the underlying object of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the parties to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed at preventing multiplicity of proceedings...”

19. I have noted elsewhere in this ruling that it is not entirely wrong to bring multiple actions as preferred by the Plaintiff herein but good practice and order demands that the Plaintiff brings all the parties concerned under one roof when a similar issue is being ventilated against multiple parties such as a principal debtor and a guarantor.

20. The Plaintiff has not disputed the fact that there already exists two other matters between the same parties or parties under whom any of them claim to be litigating. Can this be termed as abuse of process? In answering this question, I shall consider the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya* [2020] eKLR where Mativo, J (as he then was) while considering what abuse of process entails had to say. The court stated as follows: -

“...The Court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The Black's Law Dictionary defines abuse as everything, which is contrary to good order established by usage that is a complete departure from reasonable use. An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use. The situations that may give rise to an abuse of Court process are indeed in exhaustive, it involves situations where the process of Court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of Court process in addition to the above arises in the following situations: -

- a. Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.
- b. Instituting different actions between the same parties simultaneously in different Court even though on different grounds.
- c. Where two similar processes are used in respect of the exercise of the same right.
- d. Where an application for adjournment is sought by a party to an action to bring another application to Court for leave to raise issue of fact already decided by Court below.
- e. Where there no iota of law supporting a Court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action



- f. Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.
- g. Where an appellant files an application at the trial Court in respect of a matter which is already subject of an earlier application by the Respondent at the Court of Appeal.
- h. Where two actions are commenced, the second asking for a relief which may have been obtained in the first.

21. The Court went ahead to quip as follows: -

“...Abuse of Court process creates a factual scenario where a party is pursuing the same matter by two-Court process. In other words, a party by the two Court process is involved in some gamble; a game of chance to get the best in the judicial process. A litigant has no right to pursue paripasu two processes, which will have the same effect in two Courts at the same time with a view of obtaining victory in one of the process or in both. In several decisions of this Court, I have stated that litigation is not a game of chess where players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where the parties place on the table of justice their different position clearly, plainly and without tricks. Pursuing two processes at the same time constitutes and amounts to abuse of Court/legal process... Thus, the multiplicity of actions on the same matter between the same parties even where there exists a right to bring the action is regarded as an abuse. The abuse lies in the multiplicity and manner of the exercise of the right rather than exercise of right per se. The abuse consists in the intention, purpose and aim of person exercising the right, to harass, irritate, and annoy the adversary and interface with the administration of justice...”

- 22. Having considered the plaint in Mombasa HCC No. 9 of 2016, Mombasa HCC 107 of 2018 and the present suit, the common thread is a loan advanced to Juja Coffee Exporters Limited and TSS Grain Millers Limited and the resulting guarantee. The parties are the same or litigating under the same title. As held in Republic v Paul Kihara Kariuki (supra), this amounts to abuse of court process. When the court arrives at such conclusion, what reliefs does it issue?
- 23. The Court of Appeal in Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR settled this question. Having found that the Appellant was simply trying to vex the Respondent once again upheld the High Court’s decision to strike out a suit for being an abuse of process. Therefore, I have no hesitation to strike out the present suit for not only being sub judice but also being an abuse of court process.
- 24. Having come to the above conclusion, I have no doubt in my mind that the Plaintiff is not left without a remedy. It can still pursue the debt owed in Mombasa HCC No. 9 of 2016 as it is currently pursuing or file a counter-claim in Mombasa HCC No. 107 of 2018.
- 25. On the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party. This was well enunciated by the Supreme Court in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2013] eKLR. Having arrived at the conclusion that the current suit is sub judice and an abuse of court process, the only order that lends itself on costs is that the guilty party, that is the Plaintiff, shall bear the costs of this application.



26. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. The Notice of Motion application dated 27th April, 2022 is merited and it is hereby allowed;
 - b. Consequent to (a) above, the plaint dated 30th August, 2021 and filed on 9th September, 2021 is hereby struck out;
 - c. Costs to the Defendants.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF JULY, 2023.

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F. WANGARI

JUDGE

In the presence of;

Mburu Advocate for the Plaintiff

Gikandi Advocate for the Defendants

Abdullahi, Court Assistant

