



**Wanjohi v Njuguna & 3 others (Civil Case E087 of 2018)
[2022] KEHC 12748 (KLR) (Commercial and Tax) (30 August 2022) (Ruling)**

Neutral citation: [2022] KEHC 12748 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E087 OF 2018
DAS MAJANJA, J
AUGUST 30, 2022**

BETWEEN

MICHAEL MWANGI WANJOHI PLAINTIFF

AND

PATRICK KANGETHE NJUGUNA 1ST DEFENDANT

EDWARD NJUGUNA KANGETHE 2ND DEFENDANT

GEORGE JAMES KANGETHE 3RD DEFENDANT

CO-OPERATIVE BANK OF KENYA LIMITED 4TH DEFENDANT

RULING

1. The 4th defendant (“the bank”) has filed the notice of motion dated March 25, 2022 under section 1A, 1B, 3, 3A and 6 of the *Civil Procedure Act* (chapter 21 of the laws of Kenya) and order 5 rule 1 of the *Civil Procedure Rules* (“the Rules”) where it seeks an order that the plaintiff’s suit be declared as having abated for lack of summons to enter appearance (“the summons”) or in the alternative the plaintiff’s suit be struck out for being *sub judice* Nairobi HC COMM No 292 of 2017; Wardpa Holdings Limited v Cooperative Bank of Kenya Limited (“HC COMM No 292 of 2017”).
2. The application is supported by the affidavit sworn on March 25, 2022 by the 4th defendant’s Head of Legal, Lawrence Karanja and it is opposed by the plaintiff through his replying affidavit sworn on April 20, 2022.
3. The background facts of this suit are that the plaintiff together with the 1st, 2nd and 3rd defendants are shareholders and directors of Wardpa Holdings Limited (“the company”) where each of them holds one share. The company is the registered owner of the property known as LR No 209/2489/22 (“the suit property”) which is currently charged to the bank. On September 26, 2018, the plaintiff filed suit



complaining that he was not aware that the suit property had been charged to the bank until it was advertised for sale by public auction in the Daily Nation newspaper on January 5, 2018. The plaintiff averred that he is a stranger to the transactions that led to the suit property being charged to the bank for a facility granted to the 1st and 3rd defendants. He assailed the 1st, 2nd and 3rd defendants' conduct on the ground that they failed to act *bona fide* and in the interest of the company, failed to act for the proper purposes of the company in relation to its affairs and also failed to protect the company's property including the suit property. The plaintiff also alleged that the said defendants caused or procured the charge of the suit property to secure private loans for the directors without a company resolution.

4. Together with the plaint, the plaintiff filed an application dated September 26, 2018 seeking permission to continue the claim as a derivative claim on behalf of the company and restrain the bank from exercising its statutory power of sale over the suit property. By a ruling dated March 1, 2019, the court allowed the plaintiff to continue this matter as a derivative claim but declined to issue an injunction. The ruling is subject of an appeal by the plaintiff.
5. The bank then filed an application dated April 17, 2020 seeking to dismiss the suit for want of prosecution or in the alternative strike the bank from the suit. It claimed that the plaintiff had not taken any steps to prosecute the suit since the ruling dated March 1, 2019 was delivered. The court dismissed the application by the ruling dated July 29, 2021 and directed the plaintiff to apply for stay of proceedings pending appeal within 21 days. On November 11, 2021, the court dismissed the plaintiff's application for stay pending appeal and directed the parties to go for case management.

Issues For Determination

6. Turning to the application before the court, the main issues for determination are whether the suit has abated for lack of summons and/or whether the suit is *res sub judice* HC COMM No 292 of 2017.

Abatement of the suit

7. The bank contends that even though the plaintiff took out summons on November 24, 2021, the suit had already abated either on October 27, 2018 or on April 1, 2019 as the same was were taken out in contravention of order 5 of the *Rules*. On his part, the plaintiff states that initially, his advocates served summons issued on November 24, 2021 upon the defendants' advocates on record and that he served fresh summons issued on January 30, 2022 upon all parties through their respective advocates.
8. The bank's assault on the suit is premised under order 5 rule 1 of the rules which provides as follows:

Issue of summons [order 5 rule 1]

1. When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.
2. Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.
3. Every summons shall be accompanied by a copy of the plaint.
4. The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear: Provided that the time for appearance shall not be less than ten days.
5. Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub rule (2) of this rule.



6. Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue, failing which the suit shall abate.
9. Considering the aforesaid provisions, the summons were not issued, sealed and served within 30 days of filing the suit. However, the summons issued on November 24, 2021 and January 30, 2022 were served on the bank. Although the summons were not extracted, sealed and served within the statutory timelines, it is not lost to the court that the bank has been aware and has actively participated in these proceedings for the last four years and has only raised the issue of the validity of the summons at this stage.
10. In *Equatorial Commercial Bank Limited v Mobansons (K) Limited* MLND CA Civil Appeal No 236 of 2006 [2012] eKLR the Court of Appeal had this to say about the purpose of summons and a party who does not challenge its validity in time:

"We definitely appreciate and agree that the object and scope of summons is to make the defendant aware of the suit filed against him and to afford him time to appear and follow the process of law. It was re-emphasized by Mr Odera that the purpose in this case was adequately and sufficiently achieved and the defect or the irregularity, if any, was waived. The case of Nanjibhai Prabhudas & Co Ltd v Standard Bank Ltd [1968] EA (K) 670 was relied upon wherein the Court of Appeal held that:-

- (i) Even if the service of the summons was defective, the defect constituted an irregularity capable of being waived and did not render the service a nullity.
- (ii) Any irregularity in the service had been waived by the defendant by entering an appearance and by delay in bringing the application to hearing;

Sir Charles Newbold at page 681 and 683 of Nanjibhai's case (*supra*) observed as under:-

"The defendant entered an appearance in the High Court and took out the motion which is the subject of this appeal in the High Court; and it was not until a very late stage that it was noticed that the seal was an incorrect seal. This shows how technical is the objection and it also shows that this incorrect act in no way prejudiced the defendant."

The question then is, did that incorrect action result in the service being a nullity? The courts should not treat any incorrect act as a nullity, with the consequence that everything founded thereon is itself a nullity, unless an incorrect act is of a most fundamental nature. Matters of procedure are not normally of a fundamental nature."

11. I accept the position enunciated in the above case as it resonates with the provisions of article 159(2) (d) of the *Constitution* that justice is to be dispensed without undue regard to technicalities and the overriding objective in sections 1A and 1B of the *Civil Procedure Act* which requires the court to deal with cases justly and fairly. I hold that it would be unequitable and unjust for this suit to be terminated on the basis of abatement when the Bank was at all times aware of the case against it, having been an active participant in this proceedings for the past four years and having been served with Summons in any event. I decline to hold that the suit has abated.



Res Sub Judice

12. The bank further attacks the suit on the ground that it is *res sub judice* HC COMM No 292 of 2017. The *sub judice* principle is grounded on section 6 of the [Civil Procedure Act](#) states as follows:

"6. Stay of suit

No court shall proceed with the trial of any suit or proceeding 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 or any other court having jurisdiction in Kenya to grant the relief claimed."

13. The Supreme Court of Kenya in [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#) SCK Adv Ref No 1 of 2017 [2020] eKLR expounded on the principle as follows:

(67) The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the court or judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of *res sub-judice* must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

14. In HC COMM No 292 of 2017, the company challenges the charge over the suit property on the ground that it was not executed in line with the company's articles of association and is therefore invalid. It also complains that the charge has never been registered as required. The company seeks an injunction restraining the Bank from exercising its statutory power of sale and a declaration that the charge and documents leading upto its creation are also invalid.
15. In the present case, and as stated in the introductory part, the thrust of the plaintiff's complaint is that by charging the suit property to the bank, the other defendants, as directors, did not act *bona fide* in the interests of the company and for the proper purposes and that they failed to protect the company's property. The plaintiff, on behalf of the company, therefore seeks a permanent injunction restraining the bank from exercising its statutory power of sale, a declaration that the 1st and 2nd defendants abused their duties towards the company, an order that they indemnify the plaintiff and company against any liability incurred in protecting the company's assets and an order that the defendants disclose and account for all details relating to the loan facility and any other facilities and payment of all sums due to the company on taking accounts.
16. Having studied the pleadings in Nairobi HCC No 292 of 2017 and those in this case, I find and hold that this suit fits within the four corners of the *res sub judice* principle. While parties in the two suits



appear to be different in so far as the Plaintiff is concerned, the reality is that in this suit the plaintiff has been granted leave to continue this suit as a derivative suit. This means that he is only a nominal plaintiff and the company is the substantive plaintiff on whose behalf and for whose benefit this suit is being agitated. Thus, the company is the plaintiff in both cases and the reliefs it seeks are primarily against the bank in respect of the suit property. While the directors in this case are 1st, 2nd and 3rd defendant, in HC COMM No 292 of 2017, the 2nd and 3rd defendants are interested parties.

17. Further, the cause of action or substance of the cause of action in both cases is the suit property. In the present case, the plaintiff complains that the directors violated their duties to the company in respect of the suit property and that is why it seeks a permanent injunction restraining the bank from exercising its statutory power of sale. In HC COMM No 292 of 2017, the company seeks to nullify the charge. Though the prayers are couched differently, the result is the same in both cases.
18. The purpose of the *res sub judice* principle to avoid a situation where the court deals with the same subject matter and results in conflicting decisions. In both cases, the company mainly seeks relief in respect of the charge. If both cases are successful, the ultimate result is that the charge will be nullified or that the bank will be permanently restrained from exercising its statutory power of sale. In the event the earlier suit, HC COMM No 292 of 2017 is determined in the company's favour and the charge nullified, there will be no need for this suit as the company's property would have been saved and it would not suffer any loss or damage which is the thrust of the present suit.
19. For the reasons I have set out, I find and hold that this suit is *res sub judice* HC COMM No 292 of 2017.

Disposition

20. I allow the 4th defendant's application dated March 25, 2022 and order as follows:
 - a. This suit be and is hereby stayed pending the hearing and determination of NRB HC COMM No 292 of 2017, Wardpa Holdings Limited v Co-operative Bank of Kenya Ltd.
 - b. For avoidance of doubt, the stay shall not affect any pending appeal in the Court of Appeal.
 - c. Costs of the application shall be in the cause.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST 2022.

D MAJANJA

JUDGE

Court of Assistant: Mr M Onyango

Mr Omondi instructed by Gachie, Mwanza and Company Advocates for the plaintiff.

Mr Kongere instructed by Muriu, Mungai and Company Advocates for the 4th defendant.

