



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 50 OF 2020

JOHN MWASHIGADI MWAKISHA.....APPELLANT

VERSUS

HOUSING FINANCE COMPANY LIMITED.....RESPONDENT

(An Appeal from the Judgment of Hon. C. M. Ndegwa, Senior Principal Magistrate,

delivered on 8th May, 2020 in Mombasa Chief Magistrate's Court

Civil Case No. 1998 of 2019).

JUDGMENT

1. A brief background giving rise to this appeal is that the appellant filed a suit against the respondent in the lower Court through a plaint dated 14th November, 2019. The plaint discloses that the appellant is the registered owner of the property known as subdivision No. 2874 Sec VI/MN situated at Changamwe in Mombasa. He charged the said property which has a residential house, to secure a loan of Kshs. 3,450,000/=. The appellant claims to have serviced the loan to the tune of Kshs. 2,320,000/=.

2. On 30th September, 2019, the respondent issued a notice through M/s Trevo Auctioneers that the property would be advertised for sale by auction on 10th December, 2019 to recover the sum of Kshs. 8,573,196/90/= allegedly due and owing to the respondent in respect of the loan, plus interest and other accrued charges.

3. The appellant's contention before the lower court was that the attempt which was being made by the respondent to recover the aforesaid sum was contrary to the in diplum rule which is binding to the respondent, as the maximum sum recoverable on a loan of Kshs. 3,450,000/= is Kshs. 6,900,000/=.

4. When respondent sought to sell the property in exercise of its statutory power of sale to recover the loan amount, the appellant filed **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014**. The said plaint was contemporaneously filed with a Notice of Motion under certificate of urgency seeking among other prayers, an order of injunction restraining the respondent herein from advertising for sale, selling and/or disposing of the property known as subdivision No. 2874 Sec VI/MN. An injunction was granted restraining the sale of the said property, pending the hearing and determination of the suit.

5. The suit filed sought to challenge the propriety of the realization process in so far as it related to issuance of the statutory notices preceding the exercise of a chargee's power of sale. The respondent appealed from the said decision in the Mombasa Environment and Land Court in Appeal No. 1 of 2014. In a Judgment delivered on 13th April, 2016, the order for an injunction was upheld and the respondent was ordered to issue valid statutory notices to the appellant in compliance with the provisions of Sections 90 and 96 of the Land Act, 2012.

6. At a later date, the respondent attempted to once again sell the appellant's property. The appellant would hear none of it. It culminated in the filing of **Mombasa Chief Magistrate's Court Civil Case No. 1998 of 2019**. That is the suit that gives rise to the present appeal. In the said case, the appellant's argument was that the previous notices which were the subject of **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014**, which led to the decision in Mombasa Environment and Land Court Appeal No. 1 of 2014 (Mombasa ELC Civil Appeal No. 1 of 2014), barred the sale of the property in issue. The appellant's argument was that contravention of the provisions of Sections 90 and 96 of the Land Act constitutes a fresh cause of action warranting a distinct action. In the new suit filed before the lower court, the appellant sought several orders, among them was a declaration that the intended sale of the suit property without mandatory adherence to the provisions of the Land Act, 2012 was irregular and unlawful, that the recovery of the sum of Kshs. 8 Million was in violation of the in diplum principle and therefore unlawful. The appellant also sought an order for injunction before the said court.

7. In opposing the appellant's application before the lower court, the respondent filed a replying affidavit on 8th January, 2020 sworn by Joyce Wambugu, the respondent's Branch Operations Manager, Mombasa. The respondent also filed a Notice of Preliminary Objection dated 26th November, 2019 where it contended that Section 34 of the Civil Procedure Act does not grant jurisdiction to the lower court to hear **Mombasa Chief Magistrate's Court Civil Case No. 1998 of 2019**, so as to entertain and determine the issue of compliance with the orders and decrees issued in **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014** and Mombasa ELC Civil Appeal No. 1 of 2014. He stated further that Section 6 of the Civil Procedure Act bars the Court from proceeding with a suit where the issues are substantially similar to the issues in another suit. The respondent took the position that the issues of illegal interest and service of statutory notices can all be raised and determined in **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014**, but not by a fresh suit.

8. The Trial Magistrate delivered a ruling on the respondent's Notice of Preliminary Objection where he held that **Mombasa Chief Magistrate's Court Civil Case No. 1998 of 2019** was an abuse of the Court process and that the application dated 14th November, 2019 ought to have been filed in **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014**. He therefore struck out the suit and the application with costs to the respondent.

9. The appellant herein was dissatisfied by the decision of the Trial Magistrate and on 15th May, 2020, he filed a memorandum of appeal raising the following grounds of appeal:

(i) That the learned Magistrate erred in law in striking out wholly the appellant's action on the basis that there was a pre-existing suit and or that the suit before him was an abuse of the court process;

(iii) That the learned Magistrate exercised his discretion wrongly in striking out the appellant's suit without taking into cognizance fully the special circumstances underpinning his suit and especially that the primary complaint in the instant suit related to the validity of the statutory notices issued by the respondent in exercise of its power of sale whilst the previous suit had turned on validity of statutory notices which had since been nullified on appeal thus paving the way for issuance of the fresh notices the subject of the instant suit;

(iii) That the learned Magistrate erred in law and fact in failing to appreciate that the subsequent and/or re-issued notices and any infractions therein constituted a fresh and distinct cause of action. In the circumstances, the learned Magistrate erred in striking out the entire suit notwithstanding that the elements thereof as related to the validity of the notices were distinct and severable from the matters relating to the quantum of monies recoverable from the appellant on which issue there may have been an arguable point on the principles of *subjudice*;

(iv) That the learned Magistrate acted perversely in striking out rather than staying the suit in so far as the instant suit was not *res judicata*;

(v) That the Trial Magistrate exercised his jurisdiction wrongly in not considering that in the totality of the circumstances of the case and in the event that his sole object in striking out was to obviate a multiplicity of suits, the proper and judicious cause to follow would be a consolidation of the suits and amendment of the pre-existing plaint and not striking out;

(vi) That the Magistrate erred in law in striking out the appellant's suit thereby effectively denying the appellant a forum in which to challenge the validity of the realization process and in the process obtaining such relief as would preserve the status quo especially given that any relief for an injunctive order pending suit would lie only where there is a valid plaint disclosing a cause of action. In the absence of such plaint there would be no platform upon which to base an application for relief pending suit, unless the pre-existing suit was suitably amended, which amendment would have required leave of the Court;

(vii) That the learned Magistrate failed to consider that an application for relief to safeguard the suit property would not lie in an application to amend and/or prior to the facts and/or cause of action giving rise to the plaintiff's claim having been introduced via appropriate amendment.

10. The appellant's prayer is for this Court to set aside the ruling delivered by the Senior Principal Magistrate striking out the suit. He also prays for the suit and the application dated 14th November, 2019 to be reinstated for hearing. His other prayers are for the application dated 14th November, 2019 to be allowed as prayed and for this appeal to be allowed with costs.

11. This Appeal was canvassed by way of written submissions. On 29th October, 2020, the law firm of Moses Mwakisha & Co. Advocates filed written submissions on behalf of the appellant. The respondent's written submissions were filed on 10th December, 2020 by the law firm of Muriu Mungai & Co. Advocates, LLP.

12. The appellant's Counsel, Mr. Mwakisha, submitted that the Trial Court exercised its discretion wrongly. It was stated that as a result thereof, there was injustice in that the validity of the fresh notices issued by the respondent following the annulment of its earlier notices which had been the basis of the earlier suit in **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014** can no longer be questioned since the suit within which the cause of action had been mounted was struck out. He further submitted that what the lower court had in mind when striking out the suit, was that the issues therein ought to have been framed within the pre-existing suit.

13. Mr. Mwakisha was of the view that it would have been impractical in that the validity of the notices in that suit lapsed when the appellate Court (ELC) rendered Judgment in Appeal No. 1 of 2014 at Mombasa. He expressed the view that the **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014** would have required a wholesome amendment to the pleadings to accommodate the fresh grievances, thus leave would have been a prerequisite in order to plead the new cause of action.

14. The appellant's Counsel submitted that an injunction under Order 40 Rule 6 of the Civil Procedure Rules would not have been available

on an application to amend a plaint, but on a substantive, properly pleaded claim, which was only possible in the context of a fresh cause of action. In his view, any remedy by way of an interlocutory injunction would be lost while such a suitor pursues the process of amendment of the existing pleadings. He also submitted that the fact that computation of the amounts lawfully recoverable appeared to be present in both suits was not sufficient to throw the entire suit out. He contended that the issues were not so intertwined as to be incapable of being disposed of separately and the worst the lower court ought to have done, was to strike out those portions of the claim it felt were replicated in both suits.

15. It was submitted for the appellant that the matter of propriety of the notices was not a replicated issue in the two suits. That the notices re-issued following the decision by Judge A. Omollo was an issue for determination, thus it was imperative for the appellant to be accorded a forum for ventilation by way of the suit being reinstated. It was stated that there was an arguable point on the propriety of the service of the fresh notices. Reliance was placed on the Court of Appeal decision in **Trust Bank Limited v Eros Chemicals Ltd** [2002] 2 EA 550, decided under the old land law regime which held that the statutory notices required under Section 69B of the Indian Transfer of Property Act, 1882 (and by extension Section 74 of the Registered Land Act, Cap 300) (both statutes now repealed) was mandatory and that non-compliance therewith negated the sale process.

16. The respondent's Counsel, Mr. Kongere, submitted that the appellant admitted that the dispute on the amount due remains an issue for consideration in **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014**. He stated that the appellant's claim is pegged on the fresh statutory notices issued which he contends give rise to a fresh cause of action that can only be agitated in a fresh suit. He submitted that when an interlocutory injunction is granted subject to issuance of a fresh notice, the issue of whether a fresh notice was validly issued or not cannot be the subject of a fresh suit but parties would go back to the same court to decide whether the order was complied with. The respondent's Counsel placed reliance on the case of **Kwale Cement Factory Limited & Another v Bank of Africa Kenya Limited** [2019] eKLR and **Anwar Mohamed Bayusuf Limited v Diamond Trust Bank (k) Limited** [2020] eKLR, to bolster the above line of argument.

17. Mr. Kongere contended that the fresh cause of action was not to be agitated in a new case when a former one is alive. He gave the analogy that if person A filed suit against bank B, got an injunction and when bank B issues another notice, and then person A files a second suit, the cycle would go on *ad infinitum*, hence there would be need to repeal Sections 1A, 1B, 3 and 6 of Cap 21. He further submitted that courts have always upheld the dignity of the judicial process by rebuffing any attempts to inundate the Courts with replica proceedings. He supported the said submission with the decision in **Republic v Registrar of Societies-Kenya & 2 others ex-parte Moses Kirima & 2 others** [2017] eKLR.

18. The respondent's Counsel did not agree with the appellant's contention that **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014** would have required amendment and that given time constraints, it created an exception to the general rule. He submitted that urgency would not operate as an exception to the doctrine of *res judicata* and *sub judice*. Reliance was placed on the case of **Co-operative Bank of Kenya Limited v Cosmas Mrombo Moka & Legacy Auctioneering Services** [2019] eKLR.

19. The respondent's Counsel opined that the decision of the Trial Court to strike out the suit was not a capricious one and relied on the case of **Tahir Sheikh Said Investment Limited v Administrator-TSS Grain Millers Ltd & 2 Others** [2018] eKLR. He also submitted that he did not doubt that filing a multiplicity of suits is an abuse of the court process. He relied on the decision in **Republic v Registrar of Societies-Kenya & 2 others ex-parte Moses Kirima & 2 others** (supra), where it was held that every court has the powers to strike out a suit which is an abuse of the court process.

20. On whether the orders for an injunction should be granted, Mr. Kongere submitted that while the appellant would want to have the said order, he failed to demonstrate in what respect the Trial Court erred since his grounds of appeal deal with the decision by the said Court to strike out the suit. He stated that the Trial Court never exercised its discretion to either grant or refuse the injunction, thus the appellate Court could not exercise that discretion in the first instance.

21. It was posited by the respondent's Counsel that the Trial Magistrate in striking out **Mombasa Chief Magistrate's Court Civil Case No. 1998 of 2019**, exercised a discretion that can only be reversed if it is shown that the said Magistrate misdirected himself in some matter and as a result arrived at a wrong decision or unless it was manifest from the case as a whole, that he had been clearly wrong.

ANALYSIS AND DETERMINATION.

22. This being a first appeal, I am guided by the principles that were set out in **Peters v Sunday Post Ltd** [1958] EA 424, where the Court held that-

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide”.

23. This court has carefully considered the written submissions filed by both Counsel on record alongside the grounds of appeal contained in the memorandum of appeal and the ruling by the lower court, which forms the subject of this appeal. The legal precedents cited by each Counsel have also been borne in mind in the writing of this Judgment.

24. The issues for determination in this appeal are-

(i) Whether the fresh notices issued by the respondent gave rise to a fresh cause of action that warranted the filing of a fresh suit; and

(ii) Whether the Trial Magistrate erred in law by striking out Mombasa Chief Magistrate's Court Civil Case No. 1998 of

2019 and the application dated 14th November, 2019.

(iii) Whether the fresh notices issued by the respondent gave rise to a fresh cause of action that warranted the filing of a fresh suit.

25. The appellant herein is convinced that **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014** would require a holistic amendment to the pleadings to accommodate the fresh grievances he has brought forth and that at that stage, leave of the court would be required to plead the new cause of action. The foregoing is an admission that indeed the issues raised in **Mombasa Chief Magistrate's Court Civil Case No. 1998 of 2019** can be handled by the Court in **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014**, after proper amendments have been made on the pleadings therein.

26. There is no dearth of decided cases where parties have gone back to the same Court which issued the order for compliance under Sections 90 and 96 of the Land Act to confirm whether parties had complied with orders of the said Court. The case cited by the respondent's Counsel in **Kwale Cement Factory Limited & another v Bank of Africa Kenya Limited** (supra), is right on point on the said issue.

27. The appellant is of the view that any remedy by way of an interlocutory injunction will be lost if he was to pursue the process of amendment of the existing pleadings. In this court's view, that is a misguided notion. Litigants make applications to amend their pleadings time and again. The appellant is mistaken in making the assumption that **Mombasa Chief Magistrate's Court Civil Case No. 1998 of 2019** would be exempted from the operation of the provisions of Section 6 of the Civil Procedure Act. It is this court's finding that the issues raised in the said case can be comprehensively heard and determined in **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014**, thus the former suit is an abuse of the court process and meant to clog the wheels of justice.

Whether the Trial Magistrate erred in law by striking out Mombasa Chief Magistrate's Court Civil Case No. 1998 of 2019 and the application dated 14th November, 2019.

28. The Trial Magistrate struck out **Mombasa Chief Magistrate's Court Civil Case No. 1998 of 2019** and the application dated 14th November, 2019 on grounds that they were an abuse of the Court process and that the application ought to have been filed in **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014**.

29. Section 6 of the Civil Procedure Act provides as follows-

"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." (emphasis added).

30. For the doctrine of *subjudice* to apply, it is mandatory for the party who submits that an application offends the above doctrine to illustrate that certain conditions precedent exist. These are that the matter in issue in the subsequent suit is also directly and substantially in issue in a previously instituted suit; that proceedings are between the same parties, or between parties under whom they or any of them claim, that the parties are litigating under the same title; and such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya.

31. The High Court in **Kampala Civil Suit No. 450 of 1993 - Nyanza Garage vs. Attorney General** stated thus on the issue of multiplicity of suits-

"In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits."

32. In **Barclays Bank of Kenya Ltd vs. Elizabeth Agidza & 2 Others** [2012] eKLR, the court held as follows-

"... if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the Civil Procedure Act, Section 6 will still apply. This is so because the overriding objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties. My view is that the circumstances obtaining in 1953 when the Jadna Karsan -vs- Harnam Singh Bhogal was decided are completely different from the circumstances obtaining now. The circumstances obtaining at the time of the enactment of Sections 1A and 1B of the Civil Procedure Act were that there is constraint in judicial time and therefore a lot of pressure on the courts to expedite resolution of civil disputes. My view therefore is, if a substantial part of the matters in issue of controversy in the subsequent suit is covered by the previous suit, Section 6 should be invoked to save the precious judicial resources."

33. This appeal is heavily pegged on the assumption that by virtue of the respondent issuing a fresh notice it raises a new cause of action which ordinarily would not have been brought to the Court's attention in **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014**, thus Section 6 of the Civil Procedure Act does not apply to **Mombasa Chief Magistrate's Court Civil Case No. 1998 of 2019**.

34. In the former suit, it is evident from the plaint that the appellant herein challenged the validity of the notices that had been issued by the respondent. In the Judgment by Judge A. Omollo, delivered on 13th April, 2016 arising from an appeal in the said case, she granted the

appellant a temporary injunction subject to the respondent issuing valid statutory notices in compliance with Sections 90 and 96 of the Land Act. The said Judge also directed that the lower court file be returned to the civil registry for parties to deal with that suit as appropriate.

35. In **Mombasa Chief Magistrate's Court Civil Case No. 1998 of 2019**, the appellant still challenges the validity of the fresh notices issued by the respondent after the Judgement which was delivered by Judge A. Omollo. It is not in dispute that in both suits the appellant's objective is to stop the sale of the property known as subdivision No. 2874 Sec VI/MN situated in Changamwe, Mombasa and the developments thereon. The parties are similar in both suits and **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014** is still pending hearing and determination before a Court of competent jurisdiction in Kenya. In the said circumstances, the respondent has ably demonstrated that all the conditions precedent for the application of the provisions of Section 6 of the Civil Procedure Act exist. Consolidation of the two suits as was suggested by the Counsel for the appellant would serve no useful purpose but would only muddle the waters.

36. In the case of **Abdulkadir A. Khalif v Principal Secretary, Ministry of Lands and Physical Planning & 6 others** [2018] eKLR, the Court held the following on the doctrine of *sub judice*:-

“The basic purpose and the underlying object of Section 6 of the Code (sic) is to prevent 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 to prevent multiplicity of proceedings.”

37. Having found that the issues in **Mombasa Chief Magistrate's Court Civil Case No. 1998 of 2019** are substantially in issue in **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014**, I uphold the decision by Hon. Ndegwa, Senior Principal Magistrate, to the effect that the determination in **Mombasa Chief Magistrate's Court Civil Case No. 34 of 2014** will substantially bring to an end the issue in **Mombasa Chief Magistrate's Court Civil Case No. 1998 of 2019**. It is my finding that the Trial Magistrate exercised his discretion judiciously by striking out the latter suit and the application dated 14th November, 2019 for being an abuse of the court process.

38. This court cannot go into the merits of the application for injunction dated 14th November, 2019 since it has upheld the decision by the Trial Court in striking out the said application and the suit in **Mombasa Chief Magistrate's Court Civil Case No. 1998 of 2019**. There is therefore no valid application before me for consideration. Secondly, even if the application was still subsisting, the Trial Magistrate was yet to exercise his discretion in dealing with the matter. If I was to deal with the application before the lower court has considered and determined it, I would deny the parties herein their right to appeal to the High Court and thereby run afoul of the provisions of Article 50(1) of the Constitution of Kenya, 2010, on the right to a fair hearing.

39. In light of the foregoing, I find that the appeal herein is devoid of merit and I hereby dismiss it with costs to the respondent. It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 19th day of March, 2021. Judgment delivered through Microsoft Teams online platform due to the outbreak of the covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of -

Mr. Mwakisha for the appellant

Mr. Kongere for the respondent

Mr. Oliver Musundi - Court Assistant.