



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. E211 OF 2020**

**SAGAL INVESTMENT LIMITED.....1<sup>ST</sup> PLAINTIFF**

**BEYRUHA ACADEMY LIMITED.....2<sup>ND</sup> PLAINTIFF**

**-VERSUS-**

**GULF AFRICAN BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**LEAKEY'S AUCTIONEERS LIMITED .....2<sup>ND</sup> DEFENDANT**

**RULING**

1. Through the application dated 22<sup>nd</sup> June 2020, the plaintiffs/applicants herein seek the following orders; -

**1. Spent**

2. That an order of Temporary Injunction do issue restraining the defendants whether by itself, its employees, servants, auctioneers agents and or Assigns from selling by Public Auction on 25<sup>th</sup> June 2020 or on any other date, from transferring, charging, exercising any statutory power of sale, either by public auction or Private Treaty and/or otherwise interfering, advertising, commencing or proceeding with any realization process in respect of the plaintiff's properties, known as L.R. No. 209/18158 (I.R. No.127286) Diamond Park Estate, South B and L.R. No. 209/12221/333(I.R. No. 81080) Five Star Estate, South C on account of any loan facility guaranteed that form the subject matter of this suit, pending the hearing and determination of this application.

3. That an order of Temporary Injunction do issue restraining the defendants whether by itself, its employees, servants, auctioneers agents and or Assigns from selling by Public Auction on 25<sup>th</sup> June 2020 or on any other date, from transferring, charging, exercising any statutory power of sale, either by public auction or Private Treaty and/or otherwise interfering, advertising, commencing or proceeding with any realization process in respect of the plaintiff's properties, known as L.R. No. 209/18158 (I.R. No.127286) Diamond Park Estate, South B and L.R. No. 209/12221/333(I.R. No. 81080) Five Star Estate, South C on account of any loan facility guaranteed that form the subject matter of this suit, pending the hearing and determination of this suit.

4. That the honourable court may be pleased to make such further or other orders as it deems fit for the end of justice.

5. That cost of this application be provided for.

2. The application is supported by the affidavit of the 2<sup>nd</sup> applicant's director **Mr. Abdi Hassan Abdi** and is based on the following main grounds: -

1. That the 2<sup>nd</sup> plaintiff is the registered owner of the parcel of land known as L.R. No. 209/12221/333(I.R. No. 81080) Five Star Estate, South C, and the 1<sup>st</sup> plaintiff is the registered owner of land known as L.R. No. 209/18158 (I.R. No.127286) Diamond Park Estate, South B.

2. That on or about 9<sup>th</sup> November, 2015 the 2<sup>nd</sup> plaintiff with the 1<sup>st</sup> defendant entered into an Islamic Banking Facility

### **Diminishing Musharaka Property Finance.**

- 3. That the 2<sup>nd</sup> plaintiff was the borrower and SAGAL INVESTMENT LIMITED the 1<sup>st</sup> plaintiff was the corporate guarantor of the debtor.**
- 4. That the Islamic Banking Facility Diminishing Musharaka Property Finance was available for the period of 180 months (15 years) from 9<sup>th</sup> November, 2015.**
- 5. That the facility offered by the 1<sup>st</sup> defendant Kenya Shillings Sixty-Six Million Five Hundred Thousand (Kshs 66,500,000/-).**
- 6. That the 2<sup>nd</sup> plaintiff by October 2019 had substantially paid Kenya Shillings Thirty Million (kshs 30,000,000/-) to set off the debt due herein to the 1<sup>st</sup> defendant.**
- 7. That the 1<sup>st</sup> defendant through the 2<sup>nd</sup> defendant have demanded from the plaintiffs a sum of Kenya Shillings Eighty-Two Million Five Hundred Thirty-Nine Thousand Two Hundred Eighty-Five and Seventeen Cents (Kshs 82,539,285.17) as which is at 20<sup>th</sup> February 2020.**
- 8. That the plaintiffs have carried out a forced valuation report of the suit properties L.R. No. 209/12221/333(I.R. No. 81080) Five Star Estate, South C and as L.R. No. 209/18158 (I.R. No.127286) Diamond Park Estate have been valued at Kenya Shillings one hundred seventy million (kshs 177,000,000/=) cumulatively.**
- 9. That the Principal Borrower and the 1<sup>st</sup> defendant under the Letters of Offer and the Charge Document agreed that the facilities offered were to be Islamic facilities and governed under Sharia and hence Sharia – compliant, that no interest (Riba) was to be charged on the facilities.**
- 10. That the 2<sup>nd</sup> plaintiff runs an educational facility which has remained closed since March, 2020 following the government directives towards curbing Corona Virus, thus the 2<sup>nd</sup> plaintiff is unable to raise any money as no school fees is being paid to the school.**
- 11. That on the 8<sup>th</sup> June, 2020 the 1<sup>st</sup> defendant unlawfully caused advertisement for sale by Public Auction through the 2<sup>nd</sup> defendant of all plaintiff's property, known as L.R. No. 209/18158 (I.R. No.127286) Diamond Park Estate, South B and L.R. No. 209/12221/333(I.R. No. 81080) Five Star Estate, South C on 25<sup>th</sup> June, 2020 at 11.00a.m. to the plaintiff detriment as the property is used as educational facility while the other is a matrimonial property.**
- 12. That the plaintiffs are apprehensive that the defendants will sell by public action on 25<sup>th</sup> June, 2020 and thereafter proceed to transfer the suit property to 3<sup>rd</sup> parties.**

3. The 1<sup>st</sup> respondent/defendant opposed the application through the Notice of Preliminary Objection dated 1<sup>st</sup> July 2020 wherein it listed the following grounds: -

- 1. The application dated 22<sup>nd</sup> June 2020 is fatally defective as the issues raised were determined the 5<sup>th</sup> June 2020 in HCCC No. E228 of 2019 Beyruha Academy Limited & Sagal Investments Limited versus Gulf Africa Bank Limited and Leakey's Auctioneers Limited.**
- 2. It matters not HCCC No. E228 OF 2019 Beyruha Academy Limited & Sagal Investments Limited versus Gulf Africa Bank Limited and Leakey's Auctioneers Limited has alleged been withdrawn since 22<sup>nd</sup> June 2020 as termination of legal process such as a notice of discontinuance, like any other step in the process, could be used by a party to obtain a collateral advantage which would be unjust for him to retain and could therefore be prevented by the court under its inherent jurisdiction to prevent an abuse of the process of the court. (See Beijing Industrial Designing & Researching Institute v Lagoon Development Limited [2015] e KLR.**

4. This ruling is in respect to the 1<sup>st</sup> respondent's Preliminary Objection (P.O.)

5. Parties canvassed the Preliminary Objection by way of written submissions which I have carefully considered. The main issue for determination is whether the Preliminary Objection has merit.

6. The gist of the 1<sup>st</sup> respondent's objection is that the application dated 22<sup>nd</sup> June 2020 is res judicata as the issues raised in the said application has already been determined in the ruling delivered on 5<sup>th</sup> June 2020 in HCCC No. E228 of 2019 between the same parties.

7. On their part, the applicants argued that matters raised by the 1<sup>st</sup> respondent in the Preliminary Objection are not pure points of law and can only be determined after perusal of evidence. The applicants contended that the preliminary Objection was founded on contested facts.

8. The applicant's case was that since HCCC No. E228 of 2019 had been withdrawn through the Notice of Withdrawal dated 22<sup>nd</sup> June 2020 prior to the filing of the instant suit and application, the applicants' right to discontinue the suit cannot be questioned. They maintained that

the present suit is different from the earlier suit in that the applicants have different prayers and new material evidence.

9. In the celebrated case of *Mukhisa Biscuits Manufacturing Company Limited v West End Distributors Ltd* [1969] EA 696, it was held: -

**“So far as I am aware, a Preliminary Objection consists of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration.”**

**In the words of Sir Charles Newbold P at page 701, B: -**

**“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are not correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessary increase costs and, on occasion, confuse the issues, and this improper practice should stop.”**

10. In the present case, it was not disputed that the applicants herein filed the earlier suit together with an application dated 25<sup>th</sup> July 2019 (herein after **“the earlier application”**) wherein they sought the following orders: -

1. Spent

2. Spent

3. That pending the determination of this suit this honourable court be pleased to grant an order of temporary injunction restraining the defendants whether by themselves, their employees, servants, agents or auctioneers from doing any of the following acts, that is to say, from further advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or appointing Receivers exercising any power conferred by Section 90(3) of the Land Act by leasing, letting, charging or otherwise howsoever interfering with the plaintiff's ownership of and title to all that parcels of land known as L.R. No. 209/18158 Diamond Park Estate, South B and L.R No. 209/12221/333(I.R No. 81080) Five Star Estate, South C.

4. That interlocutory mandatory injunctions do issue compelling the 1<sup>st</sup> defendant to render a true, proper and accurate account to the plaintiffs and the court on the actual status of the charge account(s).

5. That a declaration be issued, that the Statutory Notice issued to the plaintiff/applicant by the defendant/respondent was a nullity for being defective, for failure to detail the amount that the plaintiff/applicant must pay to rectify the default as required by Section 90(2) (b) of the Land Act No. 6 of 2012.

6. That a declaration be issued, that the issued 45 days Auctioneers Notice to sell upon the plaintiff/applicant was a nullity, as the defendant/respondent had not served upon the plaintiff/applicant a 40 days' notice to sell as required by Section 96(2) of the Land Act No. 6 of 2012.

7. That Land Title L.R NO. 209/18158(I.R No. 127286) Diamond Park Estate, South B and L.R No. 209/12221/333 (I.R No.81080) Five Star Estate, South C be valued by an independent valuer to ascertain its current market value to ascertain the extent of the security attached in exercise of statutory power of sale carried out by the 2<sup>nd</sup> defendant/respondent on the instructions of the 1<sup>st</sup> defendant/respondent.

8. That an injunction be and is hereby granted restraining the 1<sup>st</sup> and 2<sup>nd</sup> defendants from further advertising for sale, selling whether by public auction or private treaty, disposing of or otherwise howsoever completing by conveyance or appointing Receivers or exercising any power conferred by Section 90(3) of the Land Act by leasing, letting, charging or otherwise however interfering with the plaintiff's ownership of and title to all that parcels of land known as L.R. No. 209/18158 Diamond Park Estate, South B and L.R No. 209/12221/333(I.R No. 81080) Five Star Estate, South C.

9. That costs of this application and suit be provided for.

11. It was further not disputed that upon hearing the parties in the earlier application, this court in a Ruling delivered on 5<sup>th</sup> June 2020 dismissed the application. The applicants herein filed a notice of withdrawal of the earlier suit on 23<sup>rd</sup> June 2020 and filed the instant suit and application filed the instant suit and application on the same date.

12. The question which then arises is whether the instant suit and application are res judicata.

13. My finding is that Order 25 Rule 1 and 2 of the Civil Procedure Rules allows parties to withdraw suits at any time before the suit is set down for hearing. The said order stipulates as follows: -

**“1. At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.**

2. (1) Where a suit has been set down for hearing it may be discontinued, or any part of the claim withdrawn, upon the filing of a written consent signed by all the parties.

(2) Where a suit has been set down for hearing the court may grant the plaintiff leave to discontinue his suit or to withdraw any part of his claim upon such terms as to costs, the filing of any other suit, and otherwise, as are just.”

14. The right of a party to discontinue as suit was discussed in *Beijing Industrial Designing & Researching Institute v Lagoon Development Limited* [2015] eKLR as follows: -

“As a general proposition, the right of a party to discontinue a suit or withdraw his claim cannot be questioned. There are many circumstances when a plaintiff may legitimately wish to discontinue his suit or withdraw his claim. The Supreme Court of Nigeria in *ABAYOMI BABATUNDE V PAN ATLANTIC SHIPPING & TRASPORT AGENCIES LTD & OTHERS*, SC 154/2002 identified those circumstances to include where: -

- i. A plaintiff realizes the weakness of his claim in the light of the defence put up by the defendant,
- ii. A plaintiff’s vital witnesses are not available at the material time and will not be so at any certain future date,
- iii. Where by abandoning the prosecution of the case, the plaintiff could substantially reduce the high costs that would have otherwise followed after a full- scale but unsuccessful litigation, or
- iv. A plaintiff may possibly retain the right to re-litigate the claim at a more auspicious time if necessary.

15. My finding is that the present suit cannot be said to be res judicata as upon the withdrawal of the earlier suit, the applicants were still within their rights to file a fresh suit.

16. How about the present application? Is it res judicata? I have considered the prayers sought in the instant application alongside the prayers sought in the earlier application and I note that they are identical if not exact replica of each other.

17. I find that this court, having pronounced itself fully in the earlier application, cannot be invited to entertain the new application merely because the earlier suit was withdrawn. My finding is that the instant application amounts to gross abuse of the process of court and a cheeky attempt by the unsuccessful parties in the earlier application to have a second bite at the cherry by purporting to withdraw the earlier suit so as to engage the court in potentially embarrassing journey of deliberating over the same application a second time.

18. For the above reasons, I find that the Preliminary Objection dated 1<sup>st</sup> July 2020 is merited. I find that the application dated 22<sup>nd</sup> June 2020 is fatally defective and I therefore strike it out with costs to the 1<sup>st</sup> respondent.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 17<sup>th</sup> day of December 2020 in view of the declaration of measures restricting court operations due to Covid - 19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Ogunde for the Defendant.

No appearance for the Plaintiff.

Court Assistant: Sylvia