



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS

CIVIL CASE NO.341 OF 2018

PATRICK JAMES MBOGO.....1ST PLAINTIFF

JOSEPHINE MUKAMI MBOGO...2ND PLAINTIFF

VERSUS

BANK OF AFRICA LIMITED.....DEFENDANT

RULING

1. Before this Court the Notice of Motion dated 22nd November 2018 by which **BANK OF AFRICA KENYA LIMITED**, (the Defendant/Applicant) seeks for orders that:-

“1. The Plaintiff’s Complaint dated 24th August 2016 be struck out and the suit be dismissed with costs.

2. In the alternative to prayer 2 above, this suit be stayed pending the hearing and determination of HCC NO.346 OF 2016, PATRICK JAMES MBOGO and JOSEPHINE MUKAMI MBOGO –VS- BANK OF AFRICA.

3. The costs of this Application be awarded to the Defendant.”

2. The Application was premised upon **Sections 1A, 1B, 3A and 6** of the **Civil Procedure Act, Cap 21, laws of Kenya, Order 2 Rule 16** of the **Civil Procedure Rules 2010** and all other enabling provisions of the law. The same was supported by the affidavit of even date sworn by **FELIX MUHATI** a Recoveries Manager with the Defendant Bank.

3. The Plaintiff/Respondent did not file any Reply to the Application. The Application was canvassed by way of written submissions. The Defendant/Applicant filed its written submissions on 2nd April 2019 whilst the Plaintiff/Respondent filed their submissions on 9th May 2019.

BACKGROUND

4. The genesis of the present suit are various loan facilities which the Defendant Bank advanced to the Plaintiffs in or around the year 2016 in the amount of **Kshs.70,000,000/=** vide the letter of Offer dated 22nd December 2011. The said loan facilities were secured by the following securities (hereinafter “**the securities**”)

a. A first legal charge dated 15th June 2011 over Land Reference Number Kajiado/Kitengela 22515, Land Reference Number Kajiado/Kitengela 22516 and Land Reference No.Kajiado/Kitengela 22517 (“**the suit Premises**”) for the amount of **Kshs.45,000,000.00**

b. A deed of rental assignment dated 15th June 2011 over the suit premises and

c. A further legal charge dated 16th April 2012 over the Suit Premises for the amount of **Kshs.25,000,000.00**.

5. The Plaintiff failed to service the loans as required and the Bank commenced the process of realization of its securities.

6. The Plaintiff then filed a Notice of Motion dated **24th August 2016** in **HCC NO.346 OF 2016 PATRICK JAMES MBOGO and Another –VS- BANK OF AFRICA**, seeking to restrain the Defendant Bank from realizing its securities pending the hearing and determination of that suit. In a Ruling delivered on **29th June 2017**, **Hon Justice F. Tuiyott**, dismissed the Notice of Motion dated **24th August 2016**. Being aggrieved by that Ruling the Plaintiffs on **11th July 2019** filed a Notice of Appeal together with an application for stay pending the hearing and determination of the intended Appeal being **Civil Appeal No.344 of 2017 PATRICK JAMES MBOGO and JOSEPHINE MUKAMI MBOGO –VS- BANK OF AFRICA KENYA LIMITED**.

7. Later by a consent entered into between the parties, it was agreed that the status quo relating to the securities be maintained pending the determination of the aforesaid Appeal. That Appeal remains pending before the Court of Appeal.

8. In the meantime the Plaintiffs on **22nd August 2018** filed the present suit being **HCCC No.341 of 2018**. In their Plaint the Plaintiffs sought the following Orders:-

“(a) General Damages

(b) A declaration that the Promissory note issued by the Plaintiff to the Defendant and the subsequent acceptance thereof is valid, proper, legal and binding,

(c) Mandatory injunction directing the Defendant to release and/or discharge the Plaintiff’s securities being lands Reference Numbers Kajiado/ Kitengela 22515-22516-22517.

(d) Interest on (as above) at Court rates.

(e) Any other or further relief which this Honourable Court deems fit and just to grant.”

9. The Defendant Bank then filed this present application seeking to have the Plaint dated **22nd August 2018** struck out on grounds that the matters raised in this suit are directly and substantially the same as those in issue in **HCCC NO.346 OF 2016**, which is still pending before the High Court.

10. As stated earlier the Plaintiffs did not file any reply to the application.

ANALYSIS AND DETERMINATION

11. I have carefully considered the submissions of both parties as well as the relevant law. The key question is whether the current suit ought to be struck out. **Order 2 Rule 15** of the **Civil Procedure Rules 2010** provides as follows:-

“15(1) At any stage of the proceedings the Court may Order to be struck out or amended any pleading on the ground that:-

a. It discloses no reasonable cause of action or defence in law; or

b. It is scandalous, frivolous or vexatious; or

c. It may prejudice embarrass or delay the four trial of the action; or

d. It is otherwise an abuse of the process of the Court.”

12. The power given to Courts to dismiss a suit is one which should be exercised both cautiously and judiciously. In the case of **DT DOBIE & COMPANY (KENYA) LIMITED –VRS JOSEPH MBARIA MUCHINA & ANOTHER [1980]eKLR Hon Justice Madan JA** (as he then was) observed as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously disclose no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of the case before it.”

13. Similarly in **TRANSCEND MEDIA GROUP LIMITED –VS- INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION 2015 eKLR**, it was held as follows:-

“a. The Court should not strike out a suit if there is a cause of action with some chance of success;

b. The power to strike out suit should only be used in plain and obvious cases and with extreme caution;

c. The power should only be used in cases which are clear and beyond all doubt;

d. The Court should not engage in a minute and protracted examination of documents and facts; and

e. if a suit shows a semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward.” [own emphasis]

14. A party’s right to pursue justice ought not be curtailed however implausible or improbable his chances of success may seem. In **YAYA TOWERS LIMITED –VS- TRADE MARK BANK LIMITED** (in liquidation) **Civil Appeal No.2 of 2000** the Court of Appeal held thus:-

“A Plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the Plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial.”[own emphasis]

15. It is submitted for the Defendant/Applicant that the present suit is sub-judice in light of the existence of **HCCC NO. 346 OF 2016** which involves the same parties and the same subject matter. The Plaintiff/Respondent counters that the suit is not sub- judice as they contend that the proceedings in this matter involve determination of legal questions which are separate and distinct from those which are for consideration in **HCCC NO.346 OF 2016**. The Respondents submit further that the prayers sought in the two suits are different.

16. **Section 6 of the Civil Procedure Act, 2010** provides that:-

“No court will proceed with the trial of any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and determined by such court.”

17. In the case of **WILLIAM CHARLES FIRYDA –VS- LANCE P. NADEAU & ANOTHER [2015] eKLR**, the Court reiterated the conditions upon which the sub-judice Rule rests as follows:-

“For the sub-judice rule in Section 6 aforesaid to apply, there must be

- i. An existing suit or proceeding in which the matter in issue in the current suit is directly and substantially in issue in the previous suit or proceeding;**
- ii. The parties in both suits must be the same or be parties under whom they or any of them claim; and**
- iii. They should be litigating under the same title and that suit should be pending in Kenya.”**

18. Are the above conditions applicable in the present matter? Certainly and it is not denied that there exists a suit previously filed in the High court in Kenya being **HCCC NO.346 OF 2016**. The previous suit was filed by the Plaintiff on **25th August 2016** while the very same Plaintiff filed this present suit two (2) years later on **28th August 2018**. The two suits involve exactly the same parties being **PATRICK JAMES MBOGO** and **JOSEPHINE MUKAMI MBOGO** as the Plaintiffs in the two suits while **“Bank of Africa Kenya Limited”** is named as the Defendant in both suits. No other party/parties are involved.

19. Additionally I find that the subject matter of the two suits is exactly the same being the loan facilities granted by the Defendant Bank to the Plaintiffs sometime in the year 2011. The two suits both involve the same properties being the securities offered up by the Plaintiffs for the said loan facilities being title numbers:-

- **Kajiado/Kitengela 22515**
- **Kajiado/Kitengela 22516**
- **Kajiado/Kitengela 22517**

20. Similarly the two suits involve the question of whether or not the Defendant Bank is entitled to exercise its statutory power of sale with respect to the said securities. In **HCCC NO.346 OF 2016**, the prayers sought involve an injunction to prevent the Defendant bank from selling or in any way interfering with the securities whilst in **HCCC NO.341 OF 2018** (the present suit) the Plaintiff/Respondents seek a declaration that the promissory note issued by the Plaintiffs to the Respondent is valid proper, legal and binding. This promissory note is stated to have been offered by the Plaintiffs to discharge the debt owed to the bank.

21. This declaratory prayer does not in my view make the two suits different. Indeed as pointed out in the Applicants submissions it is nothing more than a **“window dressing exercise”** and a thinly veiled attempt to strike a distinction between the two suits. It is pertinent that prayer (2) of the present suit seeks a mandatory injunction in exactly the same terms the injunctive orders sought by prayer (a) in **HCCC NO.346 OF 2016**.

22. The Plaintiffs having consented to the status quo in **HCCC NO.341 OF 2016** pending the determination of the appeal filed by themselves, appear to have grown weary in awaiting the appeal process and decided to file another suit over the same matter. This amounts to an abuse of court process. The Plaintiff need not have filed a fresh suit. All they needed to do was amend the Plaintiff filed in **HCCC NO.341 OF 2016** so as to incorporate the prayer relating to the promissory note. The present suit is mischievous and is a clearly abuse of court process.

23. I therefore find that the present suit is nothing but a thinly veiled attempt by the Plaintiffs to litigate the same cause of action twice in the same court. It is merely a difference without any distinction. As such I find that the present suit is indeed sub-judice. Accordingly I strike out

this present suit and award costs to the Defendant/Applicant.

Dated in Nairobi this 25th day of November, 2019.

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Justice Maureen A. Odera