



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**CIVIL SUIT NO. E 023 OF 2019**

**FERNANDO WANGECHI MURIUKI.....PLAINTIFF/APPLICANT**

**- VERSUS -**

**FAMILY BANK LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**REGISTRAR OF LANDS KIAMBU.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

1. **Family Bank Limited**, hereinafter the Bank, has raised a preliminary objection to this suit filed by **Fernando Wangeci Muriuki**, the plaintiff. The Preliminary Objection is dated 20th May 2019. The main thrust of that objection is that the plaintiff is in breach of the *sub judice* rule, in that there is in existence another suit filed by the plaintiff against the Bank, being **HCC Misc NO 257 of 2018**(hereinafter referred to as the other suit). The Bank has termed this suit to be an abuse of the court process and that it is an attempt by the plaintiff to forum shop because the other suit is still pending determination by this court.

**ANALYSIS**

2. The only issue for determination is whether the Rule of *sub judice* has been breached by the plaintiff in filing this case. In the other suit the plaintiff commenced her action by way of Originating Summons. In that Originating Motion the plaintiff sought determination of some 11 questions but all those questions are related to the Bank's action of exercising its power of sale over the plaintiff's charged properties.

3. In this suit the plaintiff, while acknowledging her indebtedness to the Bank, alleged, as in the other suit, that the Bank had failed to serve her with the statutory Notices before Scheduling sale of the charged properties.

4. In the other suit, when the matter was before the judge, on 29th May 2018 an order was made as follows:

**(a) today's sale is stayed on condition that the plaintiff deposits half of the amount in arrayed within 45 days from today's date and auctioneers fee within 7days from today's date;**

**(b) mention on 30th July 2018 for further directions.**

5. On 30th July 2018, when the matter came before the judge, on it been stated that the plaintiff had failed to make payment as ordered the court vacated the injunctive orders initially issued.

6. It is thereafter when the Bank scheduled yet another sale of the charged property that the plaintiff filed this present suit. The plaintiff obtained at *ex parte* stage injunction restraining the Bank from selling by auction the charged properties.

7. What the plaintiff did, after her injunctive orders were vacate in that other suit, was to simply file another case, that is this suit, and in so filing the plaintiff made no mention at all of the other suit. That failure was in breach of Order 4 Rule 1(1) (f) of the Civil Procedure Rules which requires a plaintiff to disclose the existence of a previous suit, when filing another suit.

8. There is no doubt in my mind that the plaintiff has gone against the *sub judice* rule and has therefore abused the process of the court. In the case **Kivanga Estates Limited v National Bank of Kenya [2014] eKLR** the court was called upon to decide, as I am requested to do here, whether the applicant was abusing the process of the court in filing a fresh suit, and this is what the court state:

“.....from the Judgment of my learned brother **Majanja J.** in the **Fleur Investment** case (*supra*) at paragraph 35 of his Judgment:

**“35. In my view, this petition is another suit filed to litigate the same matter between the same parties seeking similar relief. It is an abuse of the court process to file a multiplicity of suits seeking similar relief in respect of the same subject matter.”**

Further, **Angote J.** came to a similar conclusion in the **Chairman District Alcoholic Drinks Regulation Committee** case (also supra) when he detailed at paragraphs 38 and 39 thereof:

**“38. A party who wishes to file a suit which is similar to an existing suit must withdraw the first suit first. This court cannot allow parties to be filing a multiplicity of suits on the basis that they have found that the previous suit(s) wanting either in content or form. The court must and should invoke its inherent jurisdiction to stop such abuse of the court process.**

**39. Abuse of court process includes a situation where a party improperly uses judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the administration of justice.”**

9. In this case the plaintiff did not withdraw the other suit. Despite the existence of the other suit the plaintiff proceeded and filed this suit. That is, as I have stated before, an abuse of the court process contrary to Order 2 Rule 15 (d) of the **Civil Procedure Rules**. Having found that the plaintiff has abused the court’s process in filing this case there is but one order that I should issue. This suit will be struck out with costs to the Bank.

**CONCLUSION**

10. The **ORDER** of the Court is:

- **This suit is hereby struck out for being an abuse of the Court process with costs to the 1st Defendant.**

**DATED, SIGNED and DELIVERED at NAIROBI this 17th day of DECEMBER, 2019.**

**MARY KASANGO**

**JUDGE**

**Ruling read in open court in the presence of**

Court Assistant.....Sophie

.....for the Plaintiff

.....for the 1<sup>st</sup> Defendant

.....for the 2<sup>nd</sup> Defendant