



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT VOILAW COURTS
COMMERCIAL CASE NO 7 OF 2017

FREDRICK A. MAKUMBI.....PLAINTIFF

VERSUS

KCB BANK KENYA LTD.....DEFENDANT

RULING

INTRODUCTION

1. The Defendant's Notice of Motion dated 10th October 2017 and filed on 11th October 2017 was filed pursuant to the provisions of Section 1A, 1 B, 3A & 6 of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 2 Rule 15(d) of the Civil Procedure Rules, and all other enabling provisions of the Law). Prayer No (1) was spent. It sought the following remaining orders:-

1. Spent.

2. THAT the Plaintiff's suit dated 27th September 2017 and filed in court on 28th September 2017 be struck out for being an abuse of the court process.

3. THAT in alternative to (2) above, the Plaintiff's suit dated 27th September 2017 and filed in Court on 28th September 2017 and all proceedings under it be stayed for being *sub-judice* in view of Msa HC Case No. 31 of 2013; Fredrick A. Makumbi vs Kenya Commercial Bank Limited.

THE DEFENDANT'S CASE

2. The Defendant's application was supported by the Affidavit of Austine Omondi that was sworn on 10th October 2017. Its Written Submissions were dated 15th December 2017 and filed on 18th January 2018.

3. Its case was that the Plaintiff had previously filed **HCCC No 31 of 213 Fredrick A Makumbi vs Kenya Commercial Bank Limited** at High Court of Kenya Mombasa in respect to L.R. No 1956/888,889 and 890 Voi (hereinafter referred to as "the subject properties") which were charged to the Plaintiff to secure a loan facility of Kshs 35,000,000/=.

4. In the said suit, the Plaintiff had sought intervention of the court as he had argued that it (the Defendant) had not issued him with the mandatory statutory notices before it instructed auctioneers to sell the said subject properties in a public auction. On 18th September 2014, the court directed that it re-issue the said notices which it did.

5. It stated that the said suit was still pending hearing and determination at Mombasa and as a result, the suit that the Plaintiff filed at High Court of Kenya Voi on 28th September 2017 was an abuse of the court process and offended the principle of the law as set out in Section 6 of the Civil Procedure Act.

6. It therefore urged this court to strike out and/or stay the same pending the hearing and determination of the suit that was filed at High Court of Kenya, Mombasa.

THE PLAINTIFF'S CASE

7. In opposition to the said application, the Plaintiff swore a Replying Affidavit on 13th November 2017. His Written Submissions were dated 14th November and filed on 15th November 2017.

8. His case was that it was inappropriate for the Defendant's application to have been supported by an affidavit that was sworn by its counsel.

9. He added that despite the suit filed at High Court of Kenya at Mombasa and at High Court of Kenya Voi relating to the same subject matter, the two (2) courts were being asked to interpret two (2) sets of notices in the context of the pleaded laws. It was his contention that the re-issuance of the fresh notices rendered the suit at High Court of Kenya at Mombasa spent and that the only pending issue therein was that of costs.

10. He averred that the suit at High Court of Kenya Voi constituted a distinct cause of action based on the validity or propriety of the present realisation process and that neither Section 6 nor Section 7 of the Civil Procedure Act had been infringed upon.

11. He therefore urged this court to dismiss the application with costs to him.

LEGAL ANALYSIS

12. The first preliminary issue for determination was whether or not the Affidavit in support of the Defendant's application was defective for having been sworn by its counsel.

13. The Defendant referred this court to the case of **Regina Waitira Mwangi Gitau vs Boniface Nthenge [2015] eKLR** where it was held that an affidavit where an advocate raises issues of law and fact which were within his knowledge, having been an advocate, does not render such an affidavit defective.

14. The Plaintiff did not submit on the issue of competence of the Supporting Affidavit of Austine Omondi. It was therefore not clear to this court if he had abandoned his argument relating to the same.

15. Be that as it may, this court perused the said Supporting Affidavit and noted that the same was sworn by the Defendant's counsel. He deponed on issues of fact that were well within his knowledge as an advocate.

16. He did not need to rely on another source to contend that the Plaintiff had filed a suit at High Court of Kenya Mombasa and that an order had been issued by the said court directing the Defendant to re-issue fresh statutory notices to the Plaintiff herein before it could realise its securities.

17. The fact that both suits related to the same subject matter was well within his knowledge. In fact, this fact was not in contention as the Plaintiff had admitted that the subject matter was the same but that the two (2) suits related to different causes of action.

18. In the circumstances foregoing, this court found the Plaintiff's assertions regarding the defectiveness of the Defendant's Supporting Affidavit not to have had any merit.

19. Turning to the substantive issue of duplicity of suits, the Plaintiff submitted that the suit that was filed at High Court of Kenya Voi was not *res judicata* as the challenge related to fresh statutory notices and thus constituted of fresh cause of action.

20. On the other hand, the Defendant submitted that issuance of fresh notices did not constitute a fresh cause of action because the incompetence of the fresh statutory notices could have been raised in the suit at Mombasa.

21. Considering that the Plaintiff was complaining about the competence of the fresh notices that were ordered to be re-issued by the High Court of Kenya Voi, this court was persuaded by the Defendant's submissions that issues relating to the fresh statutory notices that it re-issued ought to have been raised in the suit that had been filed at Mombasa for two (2) reasons.

22. The first reason was that the fresh Statutory Notices were re-issued pursuant to an order that was issued by the High Court of Kenya, Mombasa. Secondly, as the Defendant's argued, there was a possibility of two (2) different courts with equal and concurrent jurisdiction's issuing totally different orders in respect of the same subject matter. This could embarrass both courts.

23. Whereas as the Plaintiff correctly argued that the two (2) sets of statutory notices constituted separate causes of action, **"No court should 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 other court having jurisdiction in Kenya to grant the relief claimed"** as is stipulated in Section 6 of the Civil Procedure Act.

24. Accordingly, having considered the Affidavit evidence, Written Submissions and case law that was relied upon by the respective parties, this court came to the firm conclusion that the Plaintiff could not keep one foot in the High Court of Kenya Mombasa and another in the High Court of Kenya Voi and oscillate between the two (2) courts in an attempt to get orders that would be favourable to him. Doing so can be deemed to be forum shopping.

25. As stated hereinabove, not only would such a scenario have the potential of embarrassing two (2) courts when they give conflicting orders but this can also amount to an abuse of court process that would see the Defendant running like a headless chicken between the two (2) courts with equal and concurrent jurisdiction.

26. In view of the fact that there is an express provision of the law giving guidance on what to do when there are two (2) suits that are pending in courts having jurisdiction to grant reliefs sought by a plaintiff, this court was not persuaded that it should strike out the Plaintiff's case because he still had the option of electing in which court he would want to prosecute his case against the Defendant, herein. Of course, he must proceed in the most prudent manner to avoid one (1) suit being struck out for want of prosecution.

DISPOSITION

27. For the foregoing reasons, the upshot of this court's Ruling was that the Defendant's Notice of Motion application dated 10th October 2017 and filed on 11th October 2017 was merited and the same is allowed. In that the Plaintiff's suit that was dated 27th September 2017 and filed on 28th September 2017 and all proceedings under it be and are hereby stayed pending the determination of **HCCC No 31 of 2013 Fredrick A Makumbi vs Kenya Commercial Bank Limited Mombasa.**

28. Costs shall be in the cause.

29. It is so ordered.

DATED at NAIROBI this 25th day of May 2018

**J.
JUDGE**

KAMAU

READ, DELIVERED and SIGNED at VOI this 30th day of May 2018

**F.
JUDGE**

AMIN