



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

COMMERCIAL DIVISION

AT MOMBASA

CIVIL CASE NO. 29 OF 2018

SABIR TAHIR SHEIKH SAID 1ST PLAINTIFF

SAID TAHIR SHEIKH SAID2ND PLAINTIFF

JAMAL TAHIR SHEIKH SAID..... 3RD PLAINTIFF

MOHAMED TAHIR SHEIKH SAID.....4TH PLAINTIFF

OMAR TAHIR SHEIKH SAID.....5TH PLAINTIFF

SALIMA TAHIR SHEIKH SAID.....6TH PLAINTIFF

HAMUDA AHMED BA-SIDDIQUE7TH PLAINTIFF

VERSUS

BANK OF AFRICA LIMITED.....DEFENDANT

RULING

1. The defendant, Bank of Africa Limited, filed a Notice of preliminary objection dated 28th April, 2018 against the plaintiffs' Notice of Motion dated 27th April, 2018 on the grounds that:-

i. The plaintiffs contravened Order 4 rule 1(1)(f) by committing perjury when they failed to disclose that there was a pending suit, Mombasa HCCC No. 57 of 2016, Juja Coffee Exporters Limited and Others vs Bank of Africa, where injunctions over the suit properties had been dismissed. Thus, the court should in accordance with Order 4 rule 1(6) strike out the entire plaint as the matter is *sub-judice* and an abuse of the process of the court as the earlier suit filed is still pending;

ii. The plaintiffs lack *locus standi* to seek any injunctive relief as they are not the owners of the charged properties which are owned by limited liability companies save for the property owned by the late Tahir Sheikh Said Ahmed;

iii. The suit by the late Tahir Sheikh Said Ahmed has abated in Mombasa HCCC No. 57 of 2016, Juja Coffee Exporters Ltd and Others vs Bank of Africa and no application has been made to revive the suit. Thus the present suit is an abuse of the court process as no legal representative has been appointed to revive the suit in Mombasa HCCC No. 57 of 2016;

iv. The matter is *res-judicata* as three injunction applications over the suit properties in the present suit have been dealt with in the pending suits and the concluded appeal.

2. In order to understand the context in which the preliminary objection was raised, it is necessary to refer to the Notice of Motion application dated 27th April, 2018, filed by the plaintiffs (respondents). It seeks the following orders:-

i. Spent;

ii. That this honorable court be pleased to grant the applicants leave to institute these proceedings against the defendants/respondents by virtue of being the beneficiaries of the Estate of the late Tahir Sheikh Said, the owner and/or beneficial owner of the suit properties;

iii. That pending the hearing and determination of this application, the Defendants/Respondents by themselves, their officers, servants, agents or otherwise howsoever be restrained from selling, disposing of, alienating, and/or transferring those suit properties known as:-

- i. Plot No. 44 Section XXI Mombasa Island registered in the name of TSS Transporters Limited;
- ii. Plot 147 Section XXI Mombasa Island;
- iii. Plot No. 1654 Section XXI Mombasa Island;
- iv. Plot No. 526 & 527 Section XXI Mombasa Island;
- v. Plot No. 5866 Section XXI Mombasa; and
- vi. Title No. Mombasa/Block XXVI/381; (ii) to (vi) all registered in the name of TSS Investments Limited.

iv. That pending the hearing and determination of this suit, the Defendants/Respondents by themselves, their officers, servants, agents or otherwise howsoever be restrained from selling, disposing of, alienating, transferring the suit property by way of a public auction or private treaty and/or otherwise howsoever interfering with the plaintiffs/applicants' interest in the properties known as:-

- vii. Plot No. 44 Section XXI Mombasa Island registered in the name of TSS Transporters Limited;
- viii. Plot 147 Section XXI Mombasa Island;
- ix. Plot No. 1654 Section XXI Mombasa Island;
- x. Plot No. 526 & 527 Section XXI Mombasa Island;
- xi. Plot No. 5866 Section XXI Mombasa; and
- xii. Title No. Mombasa/Block XXVI/381; (ii) to (vi) all registered in the name of TSS Investments Limited;

v. That this application be heard *inter-partes* on such date and at such time as this Honourable court may direct; and

vi. That the costs of this application be in the cause.

3. The said application is supported by the affidavit of Said Tahir Sheikh Said sworn on 27th April, 2018. The defendant (applicant) filed its written submissions on 8th June, 2018. The same were highlighted by its Learned Counsel Mr. Gichuhi. It was his submission that the only prayer in the plaint was for an injunction of the suit properties but no mention was made of whether the the plaintiffs intend to redeem the properties, thus no cause of action had been raised.

4. With regard to non-disclosure of material information, Counsel outlined a series of cases that the Court of Appeal and this court had dealt with in regard to the suit properties, and in particular, Mombasa Court of Appeal, Civil Appeal No. 99 of 2016, Bank of Africa Limited vs Juja Coffee Exporters Ltd and Others, which allowed an appeal filed by the bank (applicant) thereby setting aside a conditional injunction issued by this court in Mombasa HCCC No. 57 of 2016. He also stated that a Notice of Motion application dated 7th March, 2018 seeking injunctive relief filed in the said case was dismissed on 5th April, 2018 for being *res judicata*.

5. It was submitted that the respondents failed to disclose about the existence of HCCC No. 57 of 2016, Juja Coffee Exporters Ltd and Others vs Bank of Africa, which formed the subject of appeal in Mombasa Court of Appeal, Civil Appeal No. 99 of 2016.

6. Mr. Gichuhi stated that the respondents lack *locus standi* as they are not Directors or Shareholders of the companies for which they seek orders of an injunction.

7. The applicant's Counsel relied on the case of **Nairobi Mamba Village vs National Bank of Kenya** [2002] 1EA 197, where the court held that for one to file a suit similar to this one, the plaintiffs have to be chargors, but they are not in the present case. He also relied on the case of **Salmon vs Salmon** [1897] AC 22 which stated that a shareholder has no legal or equitable interest in the property of a company. He further relied on the case of **Macaura vs Northern Assurance Company Ltd** [1925] AC 619 on the same point.

8. It was the applicant's Counsel's argument that the suit herein is *res judicata*. Reference was made to the applicant's written submissions with regard to the provisions of Section 7 of the Civil Procedure Act which bars a court from trying a suit or issue in which the matter directly and substantially in issue, has been issue in a former suit between the same parties, or between parties under whom any of them claim, litigating under the same title in a court of competent jurisdiction and has been heard and finally determined. In so submitting he relied on the case of **Uhuru Highway Development Ltd. vs Central Bank of Kenya and 2 Others**, Civil Appeal No. 36 of 1996.

9. It was also submitted that under the provisions of Order 24 rule 3(1) and (2) of the Civil Procedure Rules, the suit in Mombasa HCCC 57 of 2016, Juja Coffee Exporters Ltd and Others vs Bank of Africa abated on or about 10th January, 2018, after the death of the plaintiff at an earlier date as no legal representative of the deceased plaintiff had been made a party to the suit.

10. In making reference to written submissions filed by the respondent's Counsel, Mr. Gichuhi argued that the respondents cannot lay a claim on redeeming the charged properties for they are not legal or beneficial owners of the said properties, they are also not administrators or legal representatives of the estate of the deceased. The beneficiaries could therefore not make any binding representations on behalf of the estate of the deceased. The applicant's Counsel prayed for the application and suit by the respondents to be dismissed with costs.

11. Mr. Okatch, Learned Counsel for the respondents relied on their submissions filed on 10th May, 2018. He stated that apart from the injunctive orders sought in the plaint, the plaintiffs have prayed for further orders or relief as the court may deem fit and just to grant. He indicated that in the Notice of preliminary objection, the Counsel for the applicant did not raise any issue with the single prayer for injunctive relief contained in the plaint.

12. Counsel submitted that the application dated 27th April, 2018 shows that the plaintiffs filed the suit as beneficiaries of the deceased's estate because their father was a majority shareholder of the companies in issue. It was stated that a succession cause was filed in the Kadhi's court which will deal with the properties in the deceased's estate including the shares therein, which can be bequeathed or inherited. He added that through inheritance, the respondents would make tangible decisions on redeeming the properties in issue. He stated that the chargee herein had however moved to sell the properties before the succession cause was heard and determined. It was stated that by so doing, the applicant was clogging the equity of redemption whereas the beneficiaries should save the estate from auction by the applicant.

13. On the doctrine of *res judicata*, Mr Okatch argued that it was not clear if the applicant was addressing the said doctrine on issues raised or the parties to the suit. Counsel submitted that a matter becomes *res judicata* when there is a conglomeration of the parties and issues, to a suit. He contended that the matter herein is not *res judicata* as the matters in issue were filed at different times, entertained by this court and the Court of Appeal dealt with the issue of the injunction that this court had given. He stated that the properties in which the respondents' father was a shareholder were listed in the earlier case and the properties are the same in this case and in the deceased's estate.

14. On non-disclosure of material information, it was argued that the cause of action was the advertisement of the properties for sale and that the succession cause would like to bring in legal representatives with a view of having order in the management of the properties. Counsel for the respondents contended that shareholders have interest in the property as the value of a share is determinable by the asset worth of a company and that the companies in issue are worth a lot of money.

15. Counsel prayed for the orders issued on 11th June, 2018 not to be vacated as the subject of the suit would be lost. He also sought to have the application and suit heard on merit. Counsel relied on the authorities referred to in their written submissions.

16. Mr. Gichuhi in response to the foregoing stated that a prayer in the plaint for any other relief that the court may deem appropriate to issue, is negligence in legal drafting. He also contended that this court was being asked to sit on appeal on its own ruling of 5th April, 2018 and the Court of Appeal decision in Mombasa Court of Appeal decision in Civil Appeal No. 99 of 2016.

17. He argued that there was no clog in the equity of redemption as the respondents had no legal interests as no Judgment or order had been issued in the succession cause.

ANALYSIS AND DETERMINATION

18. The issues for determination are:-

- i. If the suit herein is *res judicata*;
- ii. If the suit is *sub judice*;
- iii. If the respondents failed to disclose material information to the court; and
- iv. If the respondents have *locus standi* to institute the current suit and the application dated 27th April, 2018.

19. On the issue of *res judicata*, the plaintiffs in the Mombasa HCCC No. 57 of 2016 are Juja Coffee Exporters, TSS Transporters Limited, TSS Investments Limited and Tahir Sheikh Said Ahmed. The defendants are the Bank of Africa Limited and KAAB Investments Limited. The cause of action relates to loans advanced to the 1st plaintiff which were secured by charges executed against several properties owned by the 2nd and 3rd plaintiffs therein. The 1st defendant averred in its defence that 1st plaintiff therein failed to pay the sums advanced to it hence it was at liberty to exercise its power of sale of the properties offered as collateral to the loans.

20. The Court of Appeal stated as follows with regard to the doctrine of *res judicata*, in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR:-**

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered

a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

21. The present suit was filed by persons who claim to be the beneficiaries of Tahir Sheikh Said (now deceased). Their intention as deposed to in the affidavit of Said Tahir Sheikh sworn on 27th April, 2018 is to protect the estate of the deceased from alienation and wastage. They perceive the sale of the assets of the companies where their deceased father was a majority shareholder as being tantamount to intermeddling with his estate. I therefore do agree with Mr. Okatch that the suit herein cannot be said to be *res judicata* under the provisions of Section 7 of the Civil Procedure Act. The issues that were put forth and determined in the application seeking injunctive orders in Mombasa HCCC No. 57 of 2016 are not similar to the issues that are deposed to in the said supporting affidavit. The averments in the plaint are also different.

22. On the issue of the present suit being *sub judice*, Section 6 of the Civil Procedure Act provides that:

“No court shall proceed with the trial of any suit or proceedings 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 proceedings in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

23. For the doctrine of *sub judice* to apply the following principles need to be present:

i. There must exist two or more suits filed consecutively;

ii. The matter in issue in the suits or proceedings must be directly and substantially the same;

iii. The parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title; and

iv. The suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

24. In this instance, I am of the considered view that although the properties the subject of the two suits are the same and the prayers sought are for interim injunction pending the hearing of the suits, the causes of action are different. This court can therefore not hold that there are two parallel causes of action that have been filed. The present suit is therefore not *sub judice*.

25. With regard to non-disclosure of material information and perjury, the plaintiffs in paragraph 11 of the plaint aver that there is no pending suit or previous proceedings in any other court in the Republic of Kenya **against the defendant filed by the plaintiffs in respect to the subject matter of this suit.** This court has already stated that in Mombasa HCCC No. 57 of 2016 the plaintiffs were three companies and the deceased Tahir Sheikh Said was the 4th defendant. As at the time the said suit was filed, he was alive. The cause of action then, was different from the one in the present suit. The respondents herein were not parties to the earlier suit. Their main interest in the properties owned by the deceased is their claim of being entitled to inherit the shares the deceased owned in the said properties. The averment contained in paragraph 11 therefore holds true in that Mombasa HCCC No. 57 of 2016 was filed by different plaintiffs. Points of convergence are that the 1st defendant therein is the defendant in this case and the description of the properties in issue are similar. I therefore find that the verifying affidavit sworn on 27th April, 2018 by Said Tahir Sheikh Said does not amount to perjury.

26. On the issue of *locus standi*, the respondents' Counsel's assertion was that the respondents have a legal right in the suit properties which consist of their inheritance that stands to be bequeathed to them after the hearing and determination of the succession cause. The case of **Nairobi Mamba Village vs National Bank of Kenya** (supra) was cited to emphasize the proposition put forth by Mr. Okatch.

27. Mr. Gichuhi took the opposite view by stating that the respondents lack *locus standi* to sustain the present proceedings as the properties the subject of the suit are legally and beneficially owned by a third party. He also relied on the case of **Nairobi Mamba Village vs National Bank of Kenya** (supra) to buttress his argument.

28. In the case of **Rajesh Pranjivan Chundasama vs Sailesh Pranjivan Chudasama** [2014] eKLR, the Court of Appeal had the following to say on the issue of *locus standi* in a case that deals with issues of inheritance of a deceased person's estate:-

“ In our view the position in law as regards locus standi in succession matters is well settled. A litigant is clothed with locus standi upon obtaining a limited or full grant of letters of administration in cases of intestate succession. In Otieno vs Ugo & Another [1986-1989] EALR 468, this court differently constituted rendered itself thus:-

“ An administrator is not entitled to bring any action as administrator before he has taken out letters of administration. If he does, the action is incompetent as of the date of inception.” (emphasis added).

29. On the same issue, the Court of Appeal in the case of **Trovick Union International vs Mrs Jane Mbevu**, Civil Appeal No. 145 of 1990, held that:-

“where a party seeks to file a suit on behalf of the estate of a deceased person, he must of necessity obtain letters of administration”.

30. This court when dealing with a similar issue in the case of **Priyat Shah and Mona Shah vs Myendra Devchand Meghji Shah**,

Mombasa HCCC No. 104 of 2016 held that irrespective of the respondents therein being the only heirs to the deceased's estate and the fact that they had moved to court to safeguard the interest of the deceased's estate, however noble their intention was, their actions should have been within the confines of the law.

31. In paragraph 3 of the affidavit filed by Said Tahir Sheikh Said in support of the Notice of Motion dated 27th April, 2018, he states that some of the deceased's children purport to have been appointed as Executors of a will, which is subject to a dispute in Mombasa HCC Misc. Application No. 17 of 2017. I hasten to add that in instances where a deceased person dies testate, the law confers powers on the Executor of the will to file suit to protect the estate of the deceased. In the case of **Kothari vs Qureshi & Another** (1967) EA 564, the court stated as follows:-

"Where a person dies leaving a will appointing an Executor, the person so appointed as Executor represents the estate of the deceased testator as from the date of death of the testator.....an Executor may commence suit before grant of probate and he can carry on the proceedings without grant as far as possible until he has to prove his title.....and if the will is ultimately proved no one can question the validity of such acts."

32. The respondents herein are not Executors of the deceased's will which would confer the necessary powers on them to institute a suit against the applicant to safeguard the properties outlined in the plaint and in the application dated 27th April, 2018.

33. As was argued by Mr. Gichuhi, as of now, it has not been ascertained that the respondents are the legal and beneficial owners of the charged properties. They are neither the administrators nor legal representatives of the deceased's estate. They are also not Executors of the deceased's will. Consequently, the actions that are being undertaken by the applicant herein, have the backing of the law pursuant to the Court of Appeal Judgment in Mombasa Civil Appeal No. 99 of 2016 which set aside a conditional injunction that had been granted by this court in Mombasa HCCC No. 57 of 2016. With regard to the said suit having abated, I do agree that it did so on the death of the deceased. More than one year later, no person has applied to revive the suit as a legal representative of the deceased.

34. It is the finding of this court therefore that the respondents lack the locus standi to institute the case against the applicant and to file the application dated 27th April, 2018. I hold that the suit herein is incompetent, null and void from the start. I therefore strike out the suit filed on 27th April, 2018 and the Notice of Motion dated 27th April, 2018. The defendant (applicant) is awarded costs of the preliminary objection dated 28th April, 2018.

DELIVERED, DATED and SIGNED at MOMBASA on this 21st day of September, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the plaintiffs/respondents

Mr. Gichuhi for the defendant/applicant

Mr. Oliver Musundi - Court Assistant