REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 10 OF 2015

WAIHENYA CHEMISTS LTD.....1ST PLAINTIFF

PETER MAINA WAIHENYA.....2ND PLAINTIFF

-VERSUS-

INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION..DEFENDANT

RULING

On 11th March, 2015, the plaintiffs filed a suit against the defendant seeking for, among other things, an order for injunction to restrain the defendant, its servants and agents from selling property known as Title No. Karatina Town/Block 11/274 below the current value of the property or until such a time that it had been properly valued. They also sought for a declaration that the amount demanded by the defendant as the loan due to it from the plaintiffs was excessive, usurious and in contravention of the law. Further the plaintiffs asked for accounts to be taken of the loan due.

The plaintiffs' suit arose out of an agreement made on 11th December, 1999 between the 1st plaintiff and the defendant according to which the defendant lent and advanced to the 1st plaintiff an amount of Kshs. 4,000,000/= secured by the Title No. Karatina Town/Block 11/274(hereinafter "the suit property"). The owner of the suit property was the 2nd plaintiff who guaranteed to pay the loan in the event of default. Amongst other terms of the agreement, the interest rate was agreed at 20% per annum.

The plaintiffs admitted that somewhere down the road, the 1st plaintiff defaulted in payment of the loan and for that reason the defendant has, on various occasions, attempted to exercise its statutory power of sale to dispose of the suit property and recover its loan.

The plaintiffs' concern is that the defendant has been attempting to sell the suit property for between Kshs 6 Million and 10 Million yet it is worth more than Kshs. 80 Million. The defendant is also alleged to have been charging excessive interest rates in breach of the loan agreement and also in contravention of the law.

Alongside the suit, the plaintiffs filed a motion dated 3rd day of March, 2015 seeking for an injunction to restrain the defendant from disposing of the suit property, initially pending the hearing and the determination of the motion and subsequently pending the hearing and the determination of the suit itself.

The defendant opposed the motion and filed a replying affidavit to that effect; in addition, it also filed a notice of preliminary objection dated 17th April, 2015 based on the grounds that the motion is res judicata because the issues raised in that motion have been heard and determined in a ruling delivered in Nyeri High Court Civil Case No. 22 of 2013 between the 1st plaintiff and Karatina Market Mall Ltd on the one hand and the defendant and Garam Investments, which I understand to be a firm of auctioneers, on the other hand.

The defendant also pleaded that the motion together with the suit are *sub judice* because the Nyeri Civil Case No. 22 of 2013, the subject matter of which is similar to that in the present suit, is still pending for determination.

It is the defendant's preliminary objection that is the subject of this ruling.

As the case number suggests, the Nyeri High Court Civil Case No. 22 of 2013 was filed in 2013 more particularly on 13th August, 2013. The 2nd plaintiff in the present suit was also one of the two plaintiffs in the 2013 suit; the other plaintiff was Karatina Mall Limited. The defendant in this suit was a defendant in the previous suit; its co-defendant in that suit was an auctioneer trading under the name and style of Garam Investments.

The subject matter in the two suits is common, and just as it is in the present suit the primary prayer which the plaintiffs sought in the 2013 suit was for an injunction to restrain the defendants from disposing of the suit property. The cause of action in both the suits is more or less

similar; that the rate of interest which the defendant levied on the 1st plaintiff's loan was unilateral and contrary to the loan agreement between it and the defendant; that at the time of the defendant recalling its loan the 2nd plaintiff had paid in excess of Kshs. 3,000,000/=, an amount that the defendant has apparently not taken into account; and, that the amount demanded by the defendant is exaggerated.

One additional point to note is that the plaintiffs in the 2013 suit also sought for an interim injunction to restrain the defendant and its agent, the auctioneers from selling the suit property pending the hearing and determination of that suit. That application was dismissed vide a ruling delivered on 27th January, 2015; in dismissing the application, the Court, stated, inter alia, that:

> ***I have considered the application, the rival arguments of the parties and do find that the applicant has not shown a prima facie case with a probability of success at the trial. The defendant is seeking to exercise a statutory power of sale which has arisen as the 1st plaintiff guaranteed Waihenya Chemists Ltd who has defaulted to pay the loan. The 1st plaintiff executed a personal guarantee on the 11.12.2998(sic) to the effect that whenever the principal debtor (Waihenya Chemists Ltd) would default in paying of any instalment on the principal sum, outstanding interest thereon and any other sums due and payable by him to the corporation (1st Defendant) for the space of 14 days, the guarantor (1st Plaintiff) or either of them would within 7 days after demand in writing pay the 1st Defendant the amount of the principal sum for the time being, outstanding interest therein and other monies unpaid. The guarantor executed a charge on land title No. Karatina/Town/Block 1/182 measuring 0.0186 hectares with developments thereon all valued at Kshs. 6,000,000 by Industrial Commercial Development Valuers.***
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> ***I have looked at the loan agreement and established the plaintiff (sic) has properly invoked the clauses in the agreement and has properly exercised the statutory power of sale.***
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> ***The applicant has not demonstrated that any of his legal rights has been threatened by any unlawful action of the defendants to justice (sic), this court granting an order of temporary injunction.***
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> ***This court has no powers to renegotiate the agreement between the parties. The upshot of the above, is that applicant has not established that he has a prima facie case with a likelihood of success.***

It is apparent from this ruling that the substantive issue in the present application and indeed the suit itself, which I understand to be the defendant's right to exercise its statutory power of sale over the suit property, **Title Number Karatina/Town Block1/182** was the issue germane to the above ruling. The plaintiffs have erroneously, so I suppose, described the suit property as 'Title No. Karatina Town/Block 11/274' in prayer (a) of their plaint; I think the description is an error because there is nowhere else in the plaintiffs' pleadings where this particular registration number has been referred to.

As noted earlier, the primary objective which the plaintiffs sought to achieve in the 2013 suit is the same objective that the plaintiffs seek in the current suit; that is, an injunction against the defendant from exercising its statutory power of sale and dispose of the suit property.

Against this background, the immediate questions that emerge are these; is the present suit sub judice and is the motion accompanying it res judicata? The two concepts of sub judice and res judicata are covered by sections 6 and 7 of the Civil Procedure Act, cap. 21 and therefore one does not need look any further for the appropriate answers to these questions. Due to their centrality to the issue at hand, it is necessary that I reproduce them here; they state as follows:

> ***6. Stay of suit***
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> ***No court shall 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 any other court having jurisdiction in Kenya to grant the relief claimed.***
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> ***7. Res judicata***
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> ***No court shall try any suit or issue in which the matter directly and substantially in issue has been 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 finally decided by such court.***

The two provisions are in one way or the other related; the fundamental difference between them is whether 'the matter directly and substantially in issue' is pending for determination before a court of competent jurisdiction or it has been determined by such a court. section 6 covers the *lis pendens* aspect while section 7 deals with the finality of the determination.

Although the parties in the 2013 suit are not exactly the same as those in the present suit, the subject matter in the present suit is, in my humble view, 'directly and substantially in issue' in the 2013 suit; the subject matter in both suits is **Title Number Karatina/Town Block1/182** and the common question in the two suits is whether the defendant is entitled to exercise its statutory power of sale and dispose of this property in order to recover its loan.

I appreciate that the principal debtor, Waihenya Chemists Limited was not party to the 2013 suit but its indebtness to the defendant, which was sued in its present capacity, and whether the latter could enforce the loan agreement between the two of them is the central question in that suit. The ruling delivered on the motion in the 2013 suit part of which I have quoted above demonstrates explicitly that this is the position.

I am therefore inclined to agree with the respondent that the present suit is sub judice to the extent that the matter in question is directly and substantially in issue in High Court Civil Suit No. 22 of 2013.

As much as Waihenya Chemists Limited does not participate in the 2013 suit, it is clear from that ruling that its case against the defendant has been adequately ventilated in that suit. Of course, whether it will succeed or not is a different question altogether but it is obvious that if the plaintiffs in that suit were to succeed in obtaining a permanent injunction against the defendant, the applicants would benefit from such an injunction and would not have had any reason for seeking a similar relief in a different suit.

Going by their own admission in their plaint, the first suit which the plaintiffs filed against the defendant in respect of the same matter was Nyeri Chief Magistrate Civil Case No. 512 of 2005; that suit was, according to their own pleadings, dismissed for want of prosecution. Subsequently they filed High Court Civil Case No. 22 of 2013 before they filed the present suit. In all these suits, the plaintiffs have consistently sought to restrain the defendants from liquidating its security and recover its loan. Considering the number of suits filed against the defendant over the same subject matter I am left with the feeling that the plaintiffs have been on a mission of filing a multiplicity of suits against the defendant every time it has sought to exercise its statutory power of sale or whenever their application for interim orders of injunction have failed. The alteration of parties named as plaintiffs in each of these suits is merely a vain attempt to pre-empt the defendant's pleading the doctrines of sub-judice and res judicata.

The 2013 suit has not been concluded and therefore I would be reluctant to conclude that the suit itself is res judicata. I say so because section 7 explains 'a former suit' to mean a suit which has been decided prior to the suit in question regardless of when it was filed; there has to be some element of finality in the former suit. However, the question whether a suit with a probability of success has been made out against the defendant or whether the plaintiffs are generally entitled to an injunction against the defendant is a question which, in my humble view, has been disposed and cannot be regurgitated either in that suit or in a separate suit. Perhaps to that extent, it can be said that the question, and not the suit itself, is res judicata.

I would add that even if the present suit is not res judicata in the strict sense of the word, it is, at the very least, an abuse of the process of the court and for this reason, I would still invoke the rule in Henderson v Henderson and dismiss their application. That rule states where a case does not fall within the rules relating to res judicata, the court may still exercise its discretion under its general inherent jurisdiction to prevent litigation that amounts to abuse of process so as to stop a party from raising an issue which was or could have been determined in earlier proceedings. ***(See Henderson v Henderson (1843) 3 Hare 100).*** The rule in Henderson v Henderson has been described as being essentially part of the court's wider jurisdiction for striking claims out as an abuse of process, and as a form of issue estoppel. Although the rule as now understood is separate and distinct from cause of action estoppel and issue estoppel, it has much in common with them and the underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. (see Halsbury's Laws of England, 5th Edition Volume 12(2009) at paragraph 1167).

In the ultimate I uphold the respondent's preliminary objection dated 17th April, 2015 and strike out the applicant's motion dated 3rd March, 2015. The respondent shall have costs. It is so ordered.

Signed, dated and delivered in open court this 30th November, 2018

Ngaah Jairus

JUDGE