



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.297 OF 2011

MAHESHKUMAR CHHOTABHAI PATEL

ILABEN MAHESHKUMAR CHHOTABHAI.....PLAINTIFFS/RESPONDENTS

-VERSUS-

BANK OF INDIA.....1ST DEFENDANT/APPLICANT

SAMUEL A.ANGWENYI.....2ND DEFENDANT/RESPONDENT

ESTHER N.ANGWENYI.....3RD DEFENDANT/RESPONDENT

M/S SESA INVESTMENT LTD.....4TH DEFENDANT/RESPONDENT

RULING

1. This ruling relates to a Notice of Motion Application dated 30th November, 2016 and filed in Court by the 1st Defendant (herein “ the applicant”) on 1st December 2016. It is brought under the provisions of section 1 B (1), 3, 3A, 63 of the Civil Procedure Act, Order 40 Rule 6 and 7, Order 51 Rule 15, Order 17 Rule 2, of the Civil Procedure Rules 2010, Section 98 (1) Land Act, 2012 and Article 159 (2) of the Constitution of Kenya 2010.

2. The Applicant is seeking for orders that:

i. *Spent*

ii. *That the Plaintiffs/ Respondents suit filed through the amended Plaintiff dated 10th April 2012 as well as the injunction emanating there from confirmed on 22nd March 2012 be dismissed with costs and the injunction be discharged/ varied/ set aside because the Plaintiffs/Respondents have failed to make any payments or to service the loan and accrued interest since they filed this suit in the year 2011.*

iii. *That the 2ⁿ,3rd and 4th Defendants/Respondents’ defence be also struck out because they have no locus standi in the suit in view of a ruling of this Court delivered on 9th of June 2012.*

iv. *That this Honorable Court do allow the 1st Defendant/ Applicant to exercise its statutory power of sale in accordance with the charge executed between it and the Plaintiffs on 25th September*

2009.

v. *That this Honorable Court do issue any such other and/ or further orders as Justice of the case herein may demand.*

vi. *That the costs of this Application be in the cause.*

3. The Application is supported by the ground on the face of it and an Affidavit sworn by Allan Ngenya Mburu, the Assistant Manager of the 1st Defendant Bank. He avers that, the Plaintiffs (herein “the 1st Respondents”) approached Applicant on 9th December 2009, for an overdraft facility of Kshs. 15,000,000. Which was granted. The 1st Respondents charged property registered as L.R. NO. 209/8593/44 (hereinafter referred to as “the suit property”) as security thereto.

4. However, the 1st Respondent defaulted in repaying the loan and interest accrued thereto and on demand for repayment of the loan, he filed this suit and an order of injunction was granted on 14th July 2011 stopping the Applicant from exercising its statutory power of sale.

5. In the year 2012, the Respondents approached the Applicant and proposed to settle the accrued loan and interest after sale of the suit property by way of private treaty to the 2nd, 3rd and 4th Defendants (herein “the 2nd, 3rd, and 4th Respondents”). Subsequently, the 1st Respondents purportedly entered into a Sale Agreement with the 2nd, 3rd and 4th Respondents but the sale Agreement was declared “flawed” by the Court vide, a ruling delivered on 9th June 2012.

6. The 1st Respondents then promised to repay the loan and the accrued interest by 29th July 2016, but failed to do so. A further promise to pay Kshs 5,000,000 on or before 18th August 2016, was not honoured and to date the Respondents have not serviced the loan and/or the accrued interest.

7. The Applicant further averred that, the 1st Respondents have deliberately delayed, this matter, leading to the Applicant suffering massive losses and therefore their inequitable conduct disentitles them from enjoying the temporary injunction issued by the Court on 14th July 2011. In that case the Applicant should be allowed to enforce its statutory Power of sale as the 1st Respondent is heavily indebted to the Applicant, and therefore has approached the Court with unclean hands.

8. However the Application was opposed by the 1st Respondents vide grounds of opposition filed in Court on 13th January 2017. He argues that, the Application has no merit, his case raises triable issues that ought to be determined by the Court. That the Applicant having accepted the sum of Kshs. 3,600,000 from the 2nd, 3rd and 4th Respondents and on the strength of the 1st Respondent’s Advocate’s undertaking, the Applicant has acquiesced to the arrangement between the 1st Respondents on the one hand and the 2nd, 3rd and 4th Respondents on the other hand. That the Applicant also misled the 1st Respondent that it would facilitate the transfer of the suit property to 2nd, 3rd and 4th Respondents, upon payment of the outstanding loan by the latter but that was not done.

9. Further, the Applicant did not allowing the 2nd, 3rd and 4th Respondents, to complete their part of the bargain, and kept the 1st Respondents Plaintiffs in the dark, only to ambush them at last. The 1st Respondents further argued that failure to give them mandatory statutory notice before advertising the property for sale in improper.

10. That, similarly that there are issues to be determined between the Respondents which include inter alia whether there was failure on the part of the 2nd, 3rd and 4th Respondents to complete their part of the contract and therefore breach of the contract between themselves on the one hand and the 1st Respondent and the Applicant on the other, and whether the said Respondents failed to remit the consideration of the suit property within the agreed time (30) days or at all and to register the Transfer of the suit property in

the name of the 4th Respondent in spite of the transfer documents having been executed by the Applicant and already handed over to the 4th Respondent's Advocates and/or whether there was any connivance to have the suit property advertised for sale or by failing to respond to the notices issued by the Applicant's Advocates demanding that they act in accordance with the undertakings and to honour the deadlines.

11. Finally, the 1st Respondent also raised the issue of fraud by the Applicant's agents praying, the suit must run its course.

12. The 2nd, 3rd and 4th Respondents also opposed the Application vides replying Affidavit sworn by the 2nd Respondent Samuel Angwenyi. He deposed that the Application is Res judicata and an abuse of the Court process, as the issues herein are directly and substantially the same issues in previous proceedings canvassed in the Applicant's Notice of Motion Applications dated 12th April 2012 and resultant ruling delivered by the Court dated 5th December 2012, and the Notice of Motion Application dated 23rd September 201. That the issues have been fully determined by the Court. The issues include:- dismissal of the suit for failure to prosecute it and discharge of the varying and/or setting aside of the injunction orders granted by this Court on 22nd March 2012. He argued that the Parties have since gone through the pre-trial procedures by filing and exchanging of pleadings, witness statements, list and copies of documentary evidence to be relied on by each party and more importantly they have taken hearing dates for the main suit, the last such hearing date falling on the date of the instant Application. Therefore the prayer for dismissal of the suit for want of prosecution is not only an abuse of the Court but also self-defeating.

13. The 2nd to 4th Respondents averred that, the Applicant has concealed material facts to the effect that the Court under the ruling delivered on 9th July 2012 stated as follow;-

“as the Application before the Court does not address the consequences of the cancellation of the Agreement dated 7th October, 2010, I will direct that Parties revert to their pre-agreement position, and refund monies which may have changed hands as appropriate. By granting the Plaintiff's application, I am not making any Judgment on any Party's liability on the Sale Agreement dated 7th October, 2010.”

14. The Respondents argued that subsequent to that ruling, the 2nd to 4th Respondents, have since filed their statement of defence and counter claim that raises triable issues. That having been sued jointly with the Applicant, the Applicant can only apply that they be struck out as parties, if it deems them to be improper parties. The Applicant cannot seek to strike out their statements defences for lack of locus standi, as they have a claim against 1st Respondent.

15. The Parties agreed to dispose of the Application by filing submissions. The firm of M/S Mutitu & Co. Advocates filed submissions on behalf of the Applicant on 8th February 2017, basically reiterating the contents of the Affidavit in support of the Application. It was reiterated that, the 1st Respondent has on several occasions promised to repay the outstanding loan and interest thereon, through various proposal in open Court but failed to honour the same. That a proposal was made on 14th July 2016 for payment of kshs.5, 000,000 within 15 days, whereupon the Court indulged the 1st Respondent and adjourned the matter to 29th July 2016. That at no time has the 1st Respondents disputed owing the 1st Applicant Kshs. 15,000,000.

16. The Applicant submitted that the issues the 1st Respondent allege are triable, have already been dealt with by the Honorable Court in the previous rulings delivered herein. Neither has the issue of fraud been raised in the grounds of opposition filed or ever before.

17. The Applicant relied on the cases of ; **Al Jalal Enterprises Ltd Vs. Gulf Africa Bank Ltd (2014) eKLR** and **Bii Vs. Kenya Commercial Bank Ltd (2001) 458.** to argue that “he who come to equity must do equity” That, the 1st Respondent having failed to service the loan, and/or pay what is admitted, is

outside the realm of exercise of the Court's discretion. The cases of; **Harrish Chandra Bhovanbhai Jobanputra & Anor Vs. Paramount University Bank Ltd & 3 others (2014) eKLR** and **Mobil Kitale Service Station Vs. Mobil Oil Kenya Ltd & Anor (2004) eKLR** were also cited to submit that, the Courts have condemned litigants who use orders of injunction to evade their responsibility to repay their loans liability. The Applicant prayed that the Application be allowed as prayed

18. However, the 1st Respondent in response submissions filed through the Firm of Mugo Kamau & Co. Advocates reiterated that a Court can only strike out pleadings where it is perfectly clear that the plea cannot succeed or has little substance. The case of; **Caneland Ltd & others Vs. Delphis Bank Ltd, CA No. 20 of 2000** (unreported) was relied on to argue that the remedy of striking out pleadings is drastic and is only granted in clear cases. Further reference was made to the case of; **Metro Petroleum Ltd Vs. Wameo Petroleum Ltd (2006) eKLR** to argue that a defence that raise even one triable issue, must be allowed to proceed, and maintained that the Plaintiff herein is not a sham, as it raises several triable issues. Therefore the Application is an abuse of the Court process, because had the Applicant fixed the matter for hearing, and not filed this Application, the case would have been heard and finalized, the Parties having agreed on the issues to be determined. The Application should therefore dismissed and the suit be prosecuted.

19. I have considered the arguments by the respective parties, I find that the issue to determine is whether the Applicant has adduced adequate evidence to warrant the grant of the orders sought. The first prayer is that the suit, filed vide the amended Plaintiff dated 10th April 2012 be dismissed and the injunction order granted herein vacated or discharged.

20. The law on striking out of pleadings is now settled. In addition to the authorities cited by the learned counsel representing the 1st Respondents, it is now settled that, a Court will not strike out a pleading unless the statement of defence is hopeless and does not raise any triable issue. Thus a defence that has even one triable issue must be allowed to unconditionally be prosecuted. As stated in the case of; **Co-operative Bank of Kenya Ltd vs. Kisii Petroleum Produces Ltd NBI HCCC NO.1665 of 1999**. The striking of pleadings is a draconian act.

21. I have gone through the amended Plaintiff filed herein and find that it raises several issues that will require to be heard and determined on merit. These issues include a determination as to whether there is a valid contract of sale of the suit property between the Plaintiffs and the 2nd to 4th Defendants. Whether the sum of Kshs. 3,600,000 which is part of the sale proceeds allegedly made in favour of the Applicant, binds the Applicant to the sale, and therefore estoppes the Applicant from exercising the power of sale, and whether any of the Parties herein have breached the alleged "sale" of the suit property.

22. As already stated, a pleading that raises, even one triable issue should be allowed to proceed to a full hearing. As held in the case of **D.T. Dobie & Company (K) Ltd Vs. Muchina Civil Appeal No. 37 of 1978**,

"a court should aim at sustaining instead of terminating a suit and that the power to strike out should only be exercised after the Court has considered all the facts".

23. If anything, this matter has been certified as ready for hearing and the best the parties can do is to proceed expeditiously and prosecute the main suit. I also note that there have been several applications filed in this matter in relation to the dismissal of the suit and setting aside of the injunction orders issued herein. These applications are taking too much time. I direct that, the Parties herein should now settle on the main issues that will deal with the matter once and for all. I therefore decline to strike out the Amended Plaintiff dated 10th April 2012.

24. The Applicants further seek that the injunction order herein be vacated. If indeed the 1st Respondents are not servicing the loan facility and the sale of the suit property has not materialized, it is only equitable that, the 1st Respondent in the meantime service the loan facility. The issue relating to the aborted sale of the suit property by private Treaty does not prohibit them from servicing the loan. I have noted from the

ruling delivered by the Court dated 9th July 2012, the Plaintiffs/Respondents were cleared to sell the suit property. They cannot fail to pay the loan and hang on the injunction issued, as far as 22nd March, 2012 to wade off the the Applicant.

25. I therefore direct that if the injunction order issued herein which dates as far back as 22nd March, 2012 has to remain in force, the Plaintiffs/Respondents must commence repayment of the sum owing within 30 days of this order. The installments payable should be guided by the monthly installments agreed upon by the Parties. If the Parties are not able to agree on the same, then the Court will intervene for directions. In the meantime, as repayment resumes the Applicant should refund the sum paid to it.

26. In the meantime, the Parties should fix the matter for hearing on priority basis. If anything, the alleged injunction has exceeded the 12 months of a life of an order of injunction.

27. Finally, in relation to the striking out of the defence filed by the 2nd to 4th Defendants/Respondents, I find that, the 2nd to 4th Respondents were sued by the Plaintiffs/Respondents. They are thus defending a claim instituted by the Plaintiffs/Respondents, not the Applicant. The Applicants therefore, have no locus standi to seek out the joint Defendants defence. The presence of the 2nd to 4th Defendants/Respondents has not prohibited the Applicant in any way from exercising its statutory power of sale. I therefore disallow that prayer. Even then, having ordered the Plaintiffs/Respondents to pay the loan arrears or the sale takes place, I find no prejudice that the Applicant will suffer.

28. All in all, I find no merit in and dismiss it the Application save for the order on the injunction order.

29. Those then are the orders of the Court.

Dated, delivered and signed in an open Court on this 21st day of September 2017 at Nairobi

G.L. NZIOKA

JUDGE

In the presence of :-

Mr. Mutito for the 1st Defendant/Applicant

Mr. Mugo for the Plaintiffs/Respondents

Mr. Isingomo for Nyandieka for 2nd to 4th Defendants/Respondents

Teresia – Court Assistant