



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 77 OF 2017

HENRY MULI MUNGUTI1ST PLAINTIFF

DAVID NDUNDA NYUNGU2ND PLAINTIFF

HENRY MWAKE MBINDYO..... 3RD PLAINTIFF

(Suing as officials of Good Hope Rehabilitation
centre)

- V E R S U S -

MARTIN MISCHRICK 1ST DEFENDANT

JENNIFER OTIN 2ND DEFENDANT

FRANCIS KIETI 3RD DEFENDANT

REGISTRAR OF SOCIETIES 4TH DEFENDANT

KENYA COMMERCIAL BANK LIMITED 5TH DEFENDANT

RULING

1) The subject matter of this ruling is the motion dated 23rd May 2017 taken out by **Good Hope Rehabilitation Centre** through its officials. In the aforesaid motion the plaintiff sought for the following orders:

1. This application be certified as urgent and be heard ex-parte in the first instance.

2. Pending the inter-partes hearing of this application, the 5th respondent be restrained from releasing any money either to the 1st, 2nd and 3rd defendants by themselves their agent and/or any other person acting from savings account No. [Particulars Withheld] and current account no. [Particulars Withheld] both in the name of Goodhope Rehabilitation Centre held at Kenya Commercial Bank, Mtito Andei Branch.

3. Pending the hearing and determination of this suit, the 5th respondent be restrained from releasing any money either to the 1st, 2nd and 3rd defendants by themselves their agents and/or

any other person acting through them to any person from savings account no. [Particulars Withheld] and current account no. [Particulars Withheld] both in the name of Goodhope Rehabilitation Centre held at Kenya Commercial Bank, Mtito Andei Branch.

4. The costs of this application be borne by the 1st, 2nd, 3rd and 4th defendants.

2) The motion is supported by the affidavit of Henry Muli Munguti.

The motion was served upon Martin Mischrick, Jennifer Otin, Francis Kieti, Registrar of Societies and Kenya Commercial Bank Ltd, being the 1st, 2nd, 3rd, 4th and 5th defendants respectively. In response to the motion, the 1st – 3rd defendants filed a combined notice of preliminary objection and grounds of opposition while the 4th defendant filed the replying affidavit of Jacob M. Ikiara to resist the motion. The 5th defendant has never participated in these proceedings.

3) When the motion came up for inter partes hearing, this court directed the parties to file written submissions.

4) I have considered the grounds stated on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have further considered the grounds stated on the notice of preliminary objection plus the rival written submissions. I think it is appropriate to begin by determining the notice of preliminary objection raised and argued by the 1st to 3rd defendants. The following grounds were put forward in the aforesaid notice.

1. THAT the plaintiff(s) lack the requisite locus to approach this honourable court on seeking orders to freeze and or continue to halt the affairs of the savings accounts no. [Particulars Withheld] and current account number [Particulars Withheld] that have been frozen at ex parte stage on the 25.5.17 as they are nether signatories, beneficiaries, and or persons entitled by law and or equity to rightful drawn benefit from the proceedings of the savings accounts no. [Particulars Withheld] and current account number. [Particulars Withheld].

From the foregoing this application and or suit is Non suited owing to the fact that the plaintiffs lack the requisite locus and or standing to entertain, proceed and or prosecute this matter in relation to the savings accounts no. [Particulars Withheld] and current account number [Particulars Withheld].

2. THAT without prejudice to the foregoing the plaintiff(s) lack the requisite locus to approach this honourable court on seeking orders to freeze and or continue to halt the affairs of the savings account no. [Particulars Withheld] that have been frozen at ex parte stage on the 25.5.17 as they are nonexistent bank and they cannot be signatories, beneficiaries and or persons entitled by law and or equity to rightful drawn benefit from the proceedings of NON EXISTANT account(s).

3. THAT the application filed is misconceived, mischievous and or an effort to circumvent the law and or reinvent the wheel with regard to procedure to operating a bank account as the plaintiff (s) are neither signatories, the source of funds and or the beneficiaries and or legitimate holds of any legal rights over the funds in the current account number [Particulars Withheld] and the current effort to freeze the said accounts and or the application and or suit is an effort to gain control over a bank account in mechanisms and or procedures that are unknown to law, logic, reason and or common sense but can only be attributed to advise to bad counsel, an effort of criminality.

That the 1st plaintiff was in fact a vagrant, druggie that was rehabilitated by the beneficiary of the funds in the RTGS herein before mentioned, Dr. Klaus, and who brought him from the ashes, and the 1st plaintiff has done no better than bite the hand that feeds him.

4. THAT the application filed therein is misconceived, mischievous, and an impediment to the just expeditious, proportionate resolution of a case and this matter is now res judicata hence barred and does not apply in law by virtue of Section 7 of the Civil Procedure Act Cap 21.

A plaint, HCC 140 of 2013 with exact similar issues, as this matter was struck out and or dismissed and the present case is a mere attempt to reintroduce the case albeit with a streak of cosmetic uplift.

5. THAT the application filed therein is misconceived, mischievous, and an impediment to the just expeditious, proportionate resolution of the suit which is now res judicata hence barred and does not apply in law by virtue of Section 1A (1), 2, 3, 1B (a) (b) (c) (d) and also Article 50 (e) of the constitution.

6. THAT this honourable court lacks the requisite jurisdiction to entertain hear and or determine the plaintiffs application as it is functus officio and or the matter is res judicate.

(Annexed hereto and marked MK1 is the court of appeal authority civil case 60 of 2013 on the subject that quoted the Supreme Court of Kenya case of Hon. Raila Odinga with approval that delved on the subject)

7. THAT this honourable lacks the requisite jurisdiction to entertain hear and or determine the plaintiffs application in so far as concerns the alteration, substitution of the rightful legal and proper signatories to a bank account.

8. THAT the plaintiff's application is misconceived, mischievous and an impediment to the just expeditious, proportionate resolution of a suit and or an attempt to deny the 1st – 3rd defendants from enjoying the fruits of a judgment.

The plaintiff's advocates mischievously sought and got orders from Hoh. Njuguna on an issue that is substantially in dispute and or set for determination before Hon. Sergon at and got herd without participation of the defendants advocates who had in fact filed a response to ventilate issues.

(Annexed hereto and marked MK1 is a detailed correspondence to the D.R of the Civil division articulating the plaintiff's advocates mischief.)

9. THAT the plaintiff applicant is on a frolic mission of reinventing the wheel, wasting judicial time short circuiting justice process and this honourable court must deal firmly and decisively label him and or them as surreptitious litigant with noting that it has gone on record in HCCC 140 of 2013 that they flagrantly disobey this honourable court's orders.

The plaintiffs have additionally demonstrated and or continue to demonstrate that they are vexatious litigants.

5) Though the 1st, 2nd and 3rd defendants put forward a total of 9 grounds, those grounds revolve around two main issues vizly:

First is whether or not this matter is resjudicata

Secondly, whether or not the plaintiffs have locus standi to take out these proceedings.

6) On the first issue, it is the submission of the 1st – 3rd defendants that the plaintiffs having filed Nairobi H.C.C.C no. 140 of 2013 which suit having been determined on merits rendered this suit resjudicata. This court was urged to order for the suit to be struck out by dint of Section 7 of the Civil Procedure Act.

7) On the second issue the 1st-3rd defendants are of the submission that the plaintiffs lack the requisite locus standi to file these proceedings since they are neither the signatories, beneficiaries and or persons entitled by law and or in equity to rightfully drawn benefit from the proceedings of the savings account no. [particulars withheld] and current account no. [particulars withheld]. On its part the 4th defendant was of the submission that the plaintiffs possess the requisite locus standi to institute this suit in their capacities as the representatives of **Goodhope Rehabilitation Centre** pursuant to the provisions of Section 41(1) of the Societies Act Cap 108 Laws of Kenya. The 4th defendant submitted that the plaintiffs were initially registered as **Hopebell Education Centre** but subsequently the society ammended its name to **Good Hope Rehabilitation Centre** on the 20th day of March 2008 and that the current registered officials as per the notification of change of officials filed and received by the 4th defendant are the names of the plaintiffs. The 4th defendant refrained from submitting on the question touching on resjudicata.

8) The plaintiffs are of the submission that they have the requisite locus standi to institute this suit on behalf of the society since they are the registered officials of the society. Having considered the rival submissions over the question as to whether or not the plaintiffs have the requisite locus standi to sue, it is apparent from the document attached to the affidavit of Henry Muli Munguti that the plaintiffs are recognised officials of Good Hope Rehabilitation Centre. Under Section 41(2) of the Societies Act, they are mandated by law to sue and defend an action by and against the society. I am therefore convinced that the plaintiffs possess the requisite locus standi to bring these proceedings. The preliminary objection on locus standi is therefore found to be without merit.

9) The question as to whether or not this suit is resjudicata was substantively addressed by the 1st to 3rd defendants and answered by the plaintiffs. It is the submission of the plaintiffs that H.C.C.C. 140 of 2013 was ordered struck out for want of summons to enter appearance therefore the suit was not heard on its merits hence the current suit is not resjudicata. Having considered the material placed before this court, it is not in dispute that Nairobi H.C.C.C no. 140 of 2013 was dismissed and or struck out for want of prosecution. This court is required at this stage to determine the question as to whether or not this suit is resjudicata via a notice of preliminary objection. In order for a matter to be regarded as resjudicata the following elements must present themselves.

- i. There must be an earlier decision over the dispute or issue.
- ii. There is a final judgement on the merits.
- iii. There is involvement of the same parties.

10) The 1st – 3rd defendants have submitted that this suit is resjudicata. In my humble understanding, an argument on the question as to whether or not an action is resjudicata requires a substantive application in which parties are required to put forward evidence establishing the existence of the elements necessary to prove resjudicata. In the matter before this court it is just alleged that the suit is rejudicata. The defendants have failed to present to this court the pleadings and the decision itself to enable this court scrutinise the same and determine whether or not the doctrine of resjudicata exists. With respect I agree with the submissions of the plaintiffs that the doctrine of resjudicata cannot be proved via a notice of preliminary objection.

11) The plaintiffs have also stated that H.C.C.C. no 140 of 2013 was not determined on its merits hence it cannot be said to be resjudicata. This submission was not controverted by the 1st, 2nd and 3rd defendants and this court has no reason to doubt the veracity of the submission.

12) In the end, I find no merit in the notice of preliminary objection.

Having disposed of the notice of preliminary objection I now turn my attention to the substance of the plaintiffs motion dated 23rd May 2017. The sort of orders sought to be granted have been outlined hereinabove. The main prayer sought by the plaintiffs is an order to restrain Kenya Commercial Bank,

the 5th defendant from releasing any money to 1st – 3rd defendants or any other person from accounts no. [particulars withheld] and no. [particulars withheld] in the name of Good Hope Rehabilitation Centre held at Kenya Commercial Bank Branch, Mutito Andei. The plaintiffs have argued that the aforesaid society is registered under the Societies Act and the plaintiffs are its registered officials and pursuant to its activities the society opened the aforesaid bank accounts. The plaintiffs further argued that sometimes in the year 2010, the officials of the society invited the 1st, 2nd and 3rd defendants to serve as members of the project committee. It is also alleged that the 3rd defendant was granted a limited mandate by the plaintiffs as a signatory to the society’s bank accounts. However, in the year 2013, the plaintiffs aver that they resolved to cancel the bank accounts mandate given earlier to the project committee members and decided that bank accounts should revert to the registered officials of the society. It is the submission of the plaintiff that when they sought to operate the bank accounts with the 5th defendant they were barred and were told that there exists another society bearing the same name as that of the plaintiff society for which the 1st, 2nd and 3rd defendants were the registered officials.

13) The plaintiffs further aver that on 20th May 2017 they were notified by the 5th defendant’s teller that the 3rd defendant attempted to withdraw money from the plaintiffs’ accounts. This information prompted the plaintiffs to move to this court. The arguments of the plaintiffs are contained in the averments in the affidavit of Henry Muli Munguti. The 1st, 2nd and 3rd defendants opted to file a notice of preliminary objection and grounds of opposition instead. Therefore the averments made by the deponent remain uncontroverted. In my humble understanding, I am convinced that the plaintiffs have shown that they have a prima facie case with a probability of success thus entitling them the order for injunction.

14) On the principle as to whether or not the plaintiffs would suffer irreparable loss, there is affidavit evidence which is not denied that the 1st, 2nd and 3rd defendants had instructions on RTGS issued on 19.5.2017 to transfer funds from the aforesaid accounts belonging to the society to third parties but courtesy of the exparte orders of this court, the transaction was stopped. With respect, I agree with the submissions of the plaintiffs that unless the order for injunction is given there is a likelihood that the society’s finances and operations would have been interfered with and the society’s image amongst the donor community would have damaged.

15) When applying the principle of a balance of convenience to this case, I think the same tilts in favour of granting the injunction.

16) In the end, I am satisfied that the plaintiff’s motion has merit. It is allowed as prayed save that costs shall abide the outcome of this suit.

Dated, Signed and Delivered in open court this 17th day of November, 2017.

J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant