



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION, MILIMANI
CIVIL CASE NO. 335 OF 2015

LETSHEGO KENYA LIMITED.....PLAINTIFF

VERSUS

1. ELIZABETH WAMURANG'A ICIKA.....DEFENDANT

2. GODFREY MUHURI MUCHIRI.....DEFENDANT

RULING

This is an application by the Plaintiff (by notice of motion dated 23rd September, 2015) seeking the following main orders:-

“THAT the defendants/respondents, their servants and/or agents or anyone acting through them be restrained from dealing, selling or in any way tampering with motor vehicle registration number KBQ 787X.

THAT an order do issue that the plaintiff is at liberty to realize the security in motor vehicle registration number KBQ 787X in default of the payments of the loan secured through it by the 1st Defendant.

THAT in the alternative.....an order do hereby issue for the immediate preservation of motor vehicle registration number KBQ 787X at a neutral place, that is Ruai Police Station or Leakey's Storage yard pending hearing and determination of this suit.

THAT the OCS Ruai police station to assist in compliance.”

The application is said to be brought under section 1A, 3A of the **Civil Procedure Act, Cap. 21 (the Act)**, and also under **Order 40 of the Civil Procedure Rules (the Rules)**.

The grounds for the application as they appear on the face thereof are:-

“i. THAT the motor vehicle subject matter of this suit is secured in favour of the plaintiff/applicant through a valid and registered chattels mortgage instrument dated 6th August 2014.

ii. THAT the 1st Defendant/Respondent has illegally sold the motor vehicle subject matter of this suit to the 2nd Defendant/respondent and yet the same is secured for a loan obtained by

the 2nd Defendant/respondent from the Plaintiff/applicant.

iii. THAT the Plaintiff/applicant is suspicious of the fact that the 1st Defendant/respondent is colluding with the 2nd Defendant/respondent to defeat the registered interest of the plaintiff/applicant by disposing the security subject matter herein.

iv. THAT unless a restraining order is issued the plaintiff/applicant's interest may be violated as the Defendants/Respondents may dispose of the motor vehicle and hence defeat the security.

v. THAT the 1st Defendant has obtained orders from the Kangundo Law Courts seeking transfer of the aforesaid motor vehicle to himself as against the 2nd Defendant.

vi. THAT in order to secure the Plaintiff/applicant's interest, it would be in the best interest to have the motor vehicle registration number KBQ 787X preserved at a neutral place i.e. Ruai Police Station or Leakey's Storage yard at Industrial Area pending hearing and determination of the issues herein.

vii. THAT unless the orders sought are issued against the Defendants/Respondents herein, then the Plaintiff/Applicant stands to suffer irreparable loss and damage.”

There is a supporting affidavit sworn by one WINNYROSE AKHONYA IMBALI who says she is the legal officer of the Plaintiff as well as an advocate of this court. Various documents are annexed to the supporting affidavit.

The 2nd Defendant has opposed the application. There is a replying affidavit sworn by him and filed on 7th October, 2015. Various documents are annexed thereto. There is also a further affidavit of the Plaintiff, sworn on 27th October, 2015.

The main grounds for opposing the application, as they emerge from the replying affidavit are:-

1. That the Plaintiff has not disclosed material facts to the court; that they are parties in Kangundo Civil Suit No. 83 of 2015 which Court declined to grant ex-parte orders for preservation of the said motor vehicle which prompted the Plaintiff to seek from this court the same orders with the same parties over the same subject matter.
2. That the prayer to stay the proceedings of Kangundo SPMCC No. 83 of 2015 will amount to abuse of court process as the only remedy would have been to appeal against the orders by the lower court.
3. That the plaintiff has no locus in this matter as it did not advance any money to the 1st Defendant as alleged nor is there privity of contract between the Plaintiff and the 2nd Defendant.
4. That the plaintiff has not tendered evidence to show that there was collusion between the two Defendants to defraud it.
5. That the Plaintiff rushed to register the motor vehicle in joint names with the 1st Defendant after the 2nd Defendant had already obtained orders restraining anybody from transferring it.
6. That the Plaintiff has not explained to court why it took it a period of over one year to undertake the registration of the motor vehicle in joint names.
7. That before purchase of the motor vehicle the 2nd Defendant undertook due diligence by conducting a search at the Kenya Revenue Authority which confirmed the 1st Defendant as the sole

owner of the motor vehicle.

8. That on 19th February 2015 the 1st Defendant swore an affidavit about the loss of the motor vehicle's log book and even then, the 2nd Defendant confirmed once more that the motor vehicle was registered in the 2nd Defendant's name only.

9. That the order for preservation of the motor vehicle should not be granted as it will deprive him of a car he bought for value which he uses to drop his children to school and wife to place of work while the Plaintiff's interest is in recovering a loan alleged to have been advanced to the 1st Defendant.

In the further affidavit filed on 28th October 2015, the Plaintiff reiterated the contents of its supporting affidavit, denied the contents of the replying affidavit, while also adding –

i. That the court is seized with jurisdiction to handle the matter as it enjoys global jurisdiction; the cause of action between the plaintiff and 1st Defendant occurred within the jurisdiction of the court; it has supervisory jurisdiction over subordinate courts;

ii. That registration of a chattels instrument under the Chattels Transfer Act, Cap 28 acts as notice to all persons of the instrument and its contents.

iii. That the 2nd Defendant's alleged claim over the motor vehicle is unsustainable as against the registered interests of the plaintiff.

iv. That as the chattels instrument was registered and was meant to act as notice to all and sundry of the interest created thereon, the plaintiff was not mandated or legally bound to take any other action to safeguard their interest.

v. That the transaction between the Defendants was based on falsehoods and could never have been legally binding on the Plaintiff.

vi. That the 1st Defendant did not have capacity to dispose of the motor vehicle in view of the chattels mortgage in place thus her attempt to sell it is a nullity and she did not have good title over the motor vehicle to pass on to the 2nd Defendant.

vii. That the 2nd Defendant is a person vested with many vehicles and other means of transportation thus will not be prejudiced if the plaintiff were allowed to proceed with realizing its security.

viii. That the alleged agreement between the defendants is a fraud as it talks about sale of a plot even without evidence on how money changed hands if at all.

Parties filed written submissions. I have considered them, including the cases cited. I have also read the pleadings herein, including the affidavits sworn in support of and in opposition to the application. I will first deal with the issue of jurisdiction raised. That is, whether this suit is caught by the doctrine of *res sub judice*. The doctrine is captured in section 6 of the Civil Procedure Act which provides -

“6. 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”.

This provision expressly bars a Court from entertaining a matter in circumstances mentioned therein. Therefore, where the Court finds that there are two suits in question which fall on all fours of section 6

aforesaid, it has no discretion in the matter but to stay the subsequent suit or suits.

Moreover, the Court is clothed with inherent jurisdiction to strike out proceedings which are deemed to be an abuse of the process of the Court. Therefore where a party decides to file suit after suit between same parties with the same cause of action with either an intention of vexing or annoying his opponent, and without pursuing the first suit in the production line to its logical conclusion, that action may be construed to amount to an abuse of the process of the Court. In the case of **Nairobi HCCC No. 363 of 2009 Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 Others** Kimaru, J dealing with the issue of abuse of the process of the Court stated -

“This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man’s rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it”.

Consequently, to prevent abuse of the court of process where parallel proceedings are had before two different courts with concurrent jurisdiction or before the same court at different times, section 6 of the Civil Procedure Act requires that the latter suit be stayed to allow the hearing and determination of the earlier proceedings. The filing of a suit before this court while a similar suit between the same parties is pending hearing and determination before a lower court of competent jurisdiction is, clearly, an abuse of court process. In addition, this court has no jurisdiction to interfere with the exercise of discretion by that court except where the court is clearly wrong or has misdirected itself resulting in a miscarriage of justice. From the material before the court, it is not possible to determine that the trial court has exercised its discretion wrongly as the suit has not been fully heard and determined on its merits.

I agree with the 2nd Defendant’s contention that the Plaintiff should have preferred an appeal to the orders of the lower court rather than file a fresh suit in this court before determination of the lower court suit.

The Court cannot be said to be apportioning appropriate share of its resources while allotting resources to a matter which properly speaking should be dealt with as one cause but is unnecessarily fragmented into several pieces. This monopolizes the Court’s limited resources. In order to deal with cases expeditiously, this practice should be discouraged. Under section 1A of the Act, a party to civil proceedings or his advocate is under a duty to assist the Court to further the overriding objective and to that effect, participate in the processes of the Court. Such assistance cannot come in form of duplication of causes of action.

I agree with the 2nd Defendant that this suit is caught up by section 6 of the Act. Accordingly, in the exercise of the powers conferred by the said section, I direct that this suit be stayed pending the hearing and determination of Kangundo SPMCC No. 83 of 2015. Costs in the cause.

Dated, signed and delivered at Nairobi this 23rd day of March, 2016.

A. MBOGHOLI MSAGHA

JUDGE