



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ENVIRONMENT AND LAND COURT NO.69 OF 2013

DORCAS P.M OLUOCH OKEYO.....1ST PLAINTIFF

JOSANA ACADEMY LIMITED.....2ND PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT

RULING

1. This is a ruling on a Notice of Motion dated 21/6/2013 and filed here by the defendant – **CO-OPERATIVE BANK OF KENYA** – on 21/6/2013. The application was filed against the plaintiffs – **DORCAS P.M OLUOCH OKEYO** and **JOSANA ACADEMY LIMITED** – and is brought under Order 40 rule 7, Order 51 Rule 1,3 and 15 of Civil Procedure Rules and Sections 1A, 1B, 3, 3A, and 6 of Civil Procedure Act (Cap 21) Laws of Kenya and all other enabling provisions of law.
2. Prayers 1 and 2 are now spent and what is for consideration at this stage are prayers 3,4, and 5, which are as follows:

Prayer 3. That the honourable court be pleased to set aside interim injunction orders granted Exparte on 16/4/2013.

Prayer 4: that in the alternative to prayer 3, this suit be and is hereby dismissed with costs for being filed in breach of Section 6 of Civil Procedure Act.

Prayer 5: That costs of the application be granted to the defendant.

3. The grounds advanced in support of the application stipulate, inter alia, that the court granted restraining orders ex parte on 16/4/2013 on the basis that the defendant had failed to attend Court and deferred the application for injunction dated 28/3/2013; that failure to attend court was due to an inadvertent mistake on the part of the defendant as it failed to instruct counsel to represent it in these proceedings; that there is still pending between the parties herein **KISUMU HIGH COURT CIVIL CASE NO.74/2000: DORCAS P.M OKEYO VS CO-OPERATIVE MERCHANT BANK & CO-OPERATIVE BANK OF KENYA LIMITED** and upon service of pleadings in this suit, the same were filed in the other suit under the mistaken belief that it was a continuation of the previous suit; that the defendant only came to know about the ex parte proceedings and orders of 16/4/2013 from the debtor after the said orders had already been granted; that the defendant has a good defence and response both to the suit and the application; and that the plaintiff will not suffer prejudice because even if the orders granted on 16/4/2013 are set aside, it will continue enjoying the earlier orders granted on 4/4/2013.
4. The application has a supporting affidavit sworn by one **GEORGE RATEMO MECHEO** who

- introduced himself as a credit officer working with the defendant.
5. The supporting affidavit repeats generally the grounds in support of the application before delving into other background details surrounding the case.
 6. The plaintiff was still said to be owing to the defendant and is being dishonest by pleading lack of knowledge of the status of the loan account. It is even said that the plaintiff had had a negotiated settlement with the defendant over the amount owed and the defendant, as a concession, had allowed the plaintiff to pay the lesser amount of Kshs.23,800,000/= within a given period; but the agreed period expired without any payment.
 7. The defendant denied the plaintiff's report that failure to pay was due to the fact that the defendant reported the matter to Credit Reference Bureau. The defendant explained that such report was a requirement of the law. According to the plaintiff, it was difficult to raise the money to pay the defendant, having been so reported and depicted as uncreditworthy.
 8. The plaintiff had taken issue that the entity contracted with for the loan was different from the one now demanding payment. To this, the defendant replied that when that entity ceased to exist, due process was followed and its activities were taken over by the defendant.
 9. And the defendant has demanded payment all along with the plaintiff making some proposals for repayment. The allegation therefore that the Limitations of Actions Act may have caught up with it is said to be misplaced as the claim to recover has always been sustained by the defendant.
 10. The suit is also said to run afoul of Section 6 of Civil Procedure Act (Cap 21), having been filed while a suit between the same parties over the same subject matter is already pending; the suit being **KISUMU HIGH COURT CIVIL CASE NO.74 OF 2000**.
 11. The plaintiffs are accused of seeking to change the terms of borrowing as to the repayment period and the amount; they are said to be doing this through the back door and the court is asked not to be party to it as it has no jurisdiction to rewrite the Contract between the parties.
 12. The plaintiffs made a response vide a replying affidavit filed here on 16/9/2013. The affidavit is sworn by the plaintiff's advocate who stated, inter alia, that the defendant was duly served; it accepted service; but failed to make a response to the application.
 13. Counsel averred that the defendant accepts the fact of service. He took issue however with the defendant's attempt at explaining why a response was not forthcoming within the required time. The explanation proffered was said to be contradictory in that the defendant said it didn't instruct counsel to take up the matter but proceeded to assert awhile later that it mistakenly assumed the matter to be the other suit pending between the parties and therefore filed a response there. To counsel, you cannot talk of not having instructed counsel and then proceed to talk of have made a response and filed it in the wrong matter.
 14. Counsel asserted that in order to succeed to set aside the orders already granted, the defendant would need to have a plausible explanation for failure to attend court and also demonstrate that it has a good case that would warrant the application for injunction to be dismissed if heard. According to counsel, the court would still grant the application even if it is heard inter partes. That being the case, it would be proper to let the order granted to continue in force. The court should instead focus on the main case for hearing.
 15. Further, counsel stated that the issues raised by the defendant in the supporting affidavit are not enough to warrant the setting aside of the injunction. The issues, counsel said, merely show the defendant has counter allegations or different interpretations arising from the very same documents the plaintiff is relying on. The interpretations of the defendant are said to run counter to the provisions of law particularly the Land Act No.6 of 2012 at Sections 78,90(1) and (2) and 96 considered together with Section 85(1) and (2). According to counsel, an entirely new form and content of statutory Notice is provided for and any chargee wishing to exercise the statutory power of sale is mandatorily enjoined to comply.
 16. The suit is said not to constitute an abuse of court process. It is based on new issues of fact and new issues of law. It is a new cause of action. The issues to be ventilated are said not to have been in existence when the previous suit was filed.
 17. Both sides filed written submissions in lieu of hearing. The plaintiff's submissions were filed on 3/6/2014. By and large, the submissions restate and amplify what the replying affidavit contains. There is a rebuttal of the application and some decided authorities were availed as a necessary back-up to some of the legal arguments advanced.
 18. According to the plaintiff, the order set to be set aside was a regular one and the decided case of

- MWALA VS KENYA BUREAU OF STANDARDS (2001) 1 EA 148** should provide a guide on how to handle the issue. In short, exercise of court's discretion is called for. And in such exercise, the court must consider the reason for defendant's failure to appear in court on the hearing date; take into account the merits of the case proposed to be set up if the order is set aside; and be persuaded that the application to set aside is not motivated by the desire to obstruct and delay the course of justice.
19. The defendant is said to fall short of these requirements. It gives unsatisfactory explanation for failure to attend court; it purports to have failed to instruct a counsel to handle the matter but in the same vein asserts that it instructed a counsel who filed a response in the wrong case. According to the plaintiffs, the defendant is not candid in its explanation and is misleading the court. By implication therefore, the defendant is said not to be motivated by desire for justice but is instead motivated by the desire to obstruct and delay it. And this should not be allowed for in the case of **SHAH VS MBOGO & ANOTHER (1967) E.A.116**, the exercise of court's discretion is not designed to assist a person who has deliberately sought to obstruct or delay justice.
 20. And for not being candid, the case of **UHURU HIGHWAY DEVELOPMENT LIMITED VS CENTRAL BANK OF KENYA. CA Application No.140/1995** should provide the way forward. The case concerned a party who had concealed relevant material while obtaining a court order. It was held that courts must be prepared to protect themselves from parties who are prepared to deceive, whatever the motive for doing so may be.
 21. As to the alleged violation of Section 6 of the Civil Procedure Act by the plaintiffs, the suit was said to constitute new facts and new cause of action. The plaintiff said there was non-compliance by the defendant with crucial provisions of the Land Act, 2012, and there have been other developments initiated by the defendant coming after the earlier suit was filed. The present suit and the earlier suit are therefore different.
 22. The defendant's submissions were filed on 7/10/2013. The submission contain a background narrative of the goings - on in the case. It then highlights the issues for determination while at the same time arguing the merits of the application.

In this respect, the overriding objective of the court to do justice as stated in Section 1A of Civil Procedure Act was reiterated while the power of the Court to set aside the order as spelt out in Order 40 rule 7 of Civil Procedure Rules was emphasized.

23. The defendant then proceeded to cite the decided case of **LAZARUS CHOMBA VS ZAKAYO GITONGA KABUTHA & ANO: HCC NO.1622/1998** to show what the court should consider in order to set aside the order. The principles cited are entirely similar to those highlighted in the of **MWARIA V KENYA BUREAU OF STANDARDS** (Supra) cited by the plaintiffs. Having mentioned the principles earlier in this ruling, a repeat is superfluous and unnecessary.
24. The defendant submitted that the court's concern is to do justice. The defendant was said to have a good defence that raises triable issues. The defendant is also said to have met the threshold necessary to set aside the order given. The plaintiff is said not to be diligent in loan repayment and contrary to what the plaintiffs would have the court believe, the sums borrowed, repayment amount and applicable interests are all well known to the plaintiffs. The plaintiffs are said to have been making proposals on how to pay and they would not make such proposals without the requisite knowledge.
25. And the allegation of bad faith by the defendant against the plaintiffs concerning a re-negotiated sum for payment is contested. The allegation is made because the plaintiff intended to borrow elsewhere in order to make such payment but hit a dead end in its efforts because the defendant had allegedly given information concerning the plaintiff's uncredit worthiness to the anticipated lenders of the money. The defendant explained that it did so because of a legal requirement that was not of its own making and it cannot therefore be blamed for complying with the law.
26. The defendant reiterated that its power and time to exercise statutory power of sale was due and the initiated action to exercise it was proper+ and in compliance with the law. And such effort is not caught up by Limitation of Actions Act since the admission of debt due by the defendant and subsequent proposals as to repayment continued to sustain the defendants rights to recover the debt.

27. And the allegation that the application is meant to delay or obstruct justice was denied by the defendant. It was pointed out that the defendant acted with due diligence and there is entry of appearance, filing of defence and filing of the present application and all are meant to expedite the matter. The defendant submitted it was keen to be heard on the merits of the case.
28. As regards violation of Section 6 of Civil Procedure Act by the plaintiff, the defendant submitted that the other case pending between the parties raises issues that are similar to the issues in this case. The two suits raise issues of there being no charge over the suit property in favour of the defendant; no valid statutory notice issued to the plaintiffs; and both asked for a permanent injunction against the defendant. According to defendant, what the plaintiff raises in this suit could have been put in the other suit by way of amendments or other applications.
29. Two decided cases were availed to point the way forward. **MEHESHKUMAR MANIVAI PATEL VS RIFTVALLEY AGRICULTURAL CONTRACTORS LIMITED & BENSON THIRU KARAJA: HCC NO.20/2005, NAKURU**, dealt with a similar problem and the latter case was struck out. **BENARD BAYA MWARO VS ORNAJO ORAZIO & MAINGI MWARO NGOKA (20005) eKLR** also handled a similar problem and the latter case was dismissed. The defendant wants this suit dismissed. The plaintiffs are said to be trying to taking unfair advantage of the defendant by filing this suit while the other one is still pending.
30. I have endeavoured to highlight the salient aspects of the material placed before me by both sides without, I hope, paying undue homage to brevity. Primarily, the application herein is about setting aside an order of injunction granted in an earlier application. But an alternative is also asked for which, according to the defendant, requires the dismissal of the suit. I perceive that this alternative prayer is more pivotal since if granted, the prayer for setting aside the injunctive relief may not require to be considered. For how would you dismiss a suit and still consider an interlocutory order in it?
31. The alternative prayer is about violation of Section 6 of Civil Procedure Act (Cap 21) by the plaintiffs. This allegation is made because there is a suit – **KISUMU HIGH COURT CIVIL CASE NO.74/2000** – between the same parties over the same subject matter. I have already stated elsewhere in this ruling the arguments for and against this prayer by both sides. A repeat would look like an unnecessary regurgitation.
32. The plaint in the earlier suit was availed by the defendant. I have looked at this suit itself. There are prayers in the two suits which are essentially similar. I will set out the relevant prayers in the two suit for ease of comparison.

PLAINT in the earlier but still pending suit – KISUMU HCC NO.74/2000.

Prayer (a): a declaration that there is no valid charge over **KISUMU MUNICIPALITY/BLOCK 4/622** in favour of either of the defendants.

Prayer (d): A permanent injunction restraining the defendants by themselves, their agents, their employees, or anybody claiming under them from selling, offering to sell or otherwise howsoever from interfering with Kisumu Municipality/Block4/622.

Prayer (e): An order that the intended sale by public Auction is invalid and unlawful.

Prayer (f): Costs of the suit.

Prayer (g): Any other or further relief as the court may deem just and fit to grant.

PLAINT in the present suit – E & L NO.69/2013

Prayer (b): A declaration that there is no charge over **KISUMU MUNICIPALITY/BLOCK 4/622**

Prayer (e): A permanent injunction restraining the defendant by themselves, their agents, their employees or anybody claim under them from selling, offering to sell or otherwise howsoever from interfering with **KISUMU MUNICIPALITY/BLOCK 4/622**.

Prayer (f): An order that the intended sale by public Auction is invalid or unlawful.

Prayer(g): Costs of this suit.

Prayer (h): Any other or further relief as the court may deem just or fit to grant.

33. From all this, it can be seen that prayer (a) in the earlier suit and prayer (b) in the present suit are the same; so also are prayer (d) in the earlier suit and prayer (e) in the present suit. Other similar prayers are (e) in the earlier suit and (f) in the present suit; (f) in the earlier suit and (g) in the present suit; and, finally, (g) in the earlier suit and (h) in the present suit. It should be noted that the two suits relate to the same subject matter – sale of **KISUMU MUNICIPALITY/BLOCK 4/622-** and the same loan. The present suit has eight 8 prayers. Out of these, only three (3) are different from the prayers in the earlier suit. The other five (5) prayers are similar in context, purport, tenor, and even wording, as those in the previous suit.
34. The plaintiff's main argument is that the present suit constitutes a new cause of action different from the previous suit. The basis for this must be the later developments in the applicable law and later actions attributed to the defendant. But the plaintiff has to justify whether these later developments would justify filing of a second suit. It seems to me that the plaintiff would answer this in the affirmative.
35. But the defendant has a different view. According to the defendant, the plaintiffs only needed to incorporate the new issues in the earlier suit by way of amendment or other means.
36. Who, then, is right? I think the defendant is right and here is why:

Consider this:

(a) Why would the plaintiffs want two permanent injunctions in respect of the same subject matter and concerning the same loan? How would the two orders operate? Wouldn't the second order to be issued be a vain order? Can a Court of law countenance issuing of orders in vain? Obviously, the plaintiffs would be labouring under a serious misdirection to think that the court would accept this. Yet this would be the end result if the two suits happen to be successful.

(b) Successful prosecution and conclusion of the two suits in favour of the plaintiffs would lead to unnecessary duplication of orders where the prayers sought are similar. This would disadvantage the defendant and this is more so particularly regarding the issue of costs. It's easy to see that the defendant would pay costs at least twice over. This consideration is particularly important because justice should not be made unnecessarily expensive for litigants.

(c) The plaintiffs position that a new cause of action would justify filing of a separate suit is without basis in law particularly where the parties, subject matter and issues are substantially similar. This is what **Order 3 Rule 5(1) of Civil Procedure Rules, 2010**, provides:

Order 3 (5)(1) "Save as otherwise provided, a plaintiff may unite in the same suit several cause of action against the same defendant or the same defendants jointly: and any plaintiffs having of action in which they are jointly interested against the same defendant or defendants jointly may unite such causes of action in the same suit.

From this, it is clear that the plaintiffs could clearly incorporate their perceived new cause of action in the earlier suit and this would have served not only the convenience of the defendant but that of the plaintiffs as well.

37. Consider also the need to comply with provisions of Sections 1A and 1B of Civil procedure Act (Cap 21) which enjoin just determination of proceedings; efficient conduct of court business; efficient use of judicial and administrative resources; and timely disposal of proceedings. It becomes easy then to see the injustice of handling two cases separately where they should ideally be handled as one.
38. This is an Environment and Land Court and is governed by Environment and Land Court Act

No.19 of 2011, Section 3 of which provides, inter alia, that it should facilitate the just, expeditious and proportionate resolution of disputes, while the parties, or their authorized representatives, are enjoined to assist the court in furthering these objectives. I consider that handling the suits separately when it is clearly manifest that they can be handled as one is a derogation from these principles. And the plaintiffs, by filing the two suits separately, have failed in their duty to assist the court in furthering the objectives.

39. Quite clearly, it can be seen that I am in agreement with the defendant concerning violation of Section 6 of Civil Procedure Act (Cap 21). I realize however that the defendant is asking for dismissal of the suit. In this respect, the defendant has availed two cases. In **MAHESHKUMAR MANIVHAI PATEL'S** case (Supra) **KIMARU J** struck out the suit and in **BENARD BAYA MWARU'S** case (Supra) **OUKO J** dismissed the case. I must point out however that my appreciation the law is different regarding the action to take. I must venture to assert that I am entitled to take the necessary action under S.3A of Civil procedure Act (Cap 21) which enjoins me to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court". This would also be in accord with Section 19(1) of Environment and Land Court Act No.19/2011 which enjoins the court to act expeditiously, without undue regard to technicality of procedure.

40. Section 6 of the Civil procedure Act (Cap 21) provides:

Stay of Suit: Section 6" No court shall proceed with the trial of any suit 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".

Now it can be seen that at the place right where the provision begins, there is a small note styled. "Stay of suit". That note, in my view, is a pointer to the action the court should take. In other words, the court should not strike out the suit as Kimaru J did in **MAHESHKUMAR MANIVHAI PATEL'S** case nor dismiss it as Ouko J did in Benard Baya Mwaro's case. The court should simply stay the case.

41. I am fortified in my view by the observations of Steve Ouma in his book "A Commentary on Civil procedure Act Cap 21 (2ND EDITION) at page 37. Noting that Section 6 is essentially a rendition of **RES SUB JUDICE** rule, Ouma observes thus:

" The purpose of res sub judice is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suit in respect of the same subject matter in issue".

Ouma continues **" That a previous suit is pending is no ground for dismissing a subsequent suit as incompetent, but the trial must not proceed".**

The situation where two suits which should ideally be one are filed separately in the same court, which is the case here, is also covered by Section 6. the way forward is to stay the suit and this is what I should do here.

42. The action to be taken requires that I do not address the issue of setting aside the injunctive order herein. I say so because when the suit is stayed, anything in or about it is also stayed. It follows therefore that the injunctive order against the defendant and/or any other order issued is stayed and is of no effect against the defendant during the period of stay.

43. Accordingly, the suit herein is found to run counter to provisions of Section 6 of Civil Procedure Act (Cap 21) and it, and any order emanating from it, are hereby stayed.

Costs to defendant.

A.K. KANIARU – JUDGE

29/1/2015

29/1/2015

Before A.K. Kaniaru – Judge

Dianga G – Court Clerk

No party present

Interpretation – English/Kiswahili

Lakewa for Applicant

M/s Onyango for Respondent

COURT: Ruling on application dated 26/1/2013 read and delivered in open **COURT.**

Right of Appeal – 30 days

A.K. KANIARU – JUDGE

29/1/2015