



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 519 OF 2011

PETER GICHORA MWAURA.....1ST PLAINTIFF

PAUL KUNGU KAMATA.....2ND PLAINTIFF

V E R S U S

JOSEPH WERU NDUGO1ST DEFENDANT

HOUSIGN FINANCE CO. OF KENYA LIMITED.....2ND DEFENDANT

R U L I N G

1. The application before the court is a **Notice of Motion** dated **16th April 2014** and filed in court by the 2nd Defendant bank under Order 2 Rule 15 of the Civil Procedure Rules and Section 7 and 3A of the Civil Procedure Act. The application seeks with costs an order that the Plaint dated 18th November 201 be struck out and the suit be dismissed against the 2nd Defendant.
2. The application is premised on the grounds set out therein and is supported by affidavit of **Patrick Wainaina** sworn on **16th April 2014** and filed in court on 19th July 2014.
3. The Plaintiff's case from the pleadings and the said supporting affidavit is that the suit was filed on 21st November 2011. The 2nd Defendant was served with the Plaint and Summons to enter appearance on 15th December 2011 and subsequently filed its statement of defence on 8th February 2012. The 2nd Defendant company lawfully exercised its statutory power of sale over the property LR. No. 14225/122 as the 1st Plaintiff had defaulted in servicing his loan. The charged property was sold vide public auction on 13th October 2006. The 1st Defendant was declared the successful bidder at a public auction held on 13th October 2006 undertaken by M/s Nguru Enterprises. The 1st Plaintiff had earlier filed suit Milimani HCCC NO. 163 of 2007 which was determined in favour of the 1st and 2nd Defendants in judgment delivered on 20th December 2011 by Hon. Justice Kimondo. The Applicant now alleges that the Plaintiff's claim in this suit as concerns the exercise of statutory power of sale, pleaded in paragraphs 5, 6, 10, and 12 of the Plaint is therefore *res-judicata* and an abuse of the court process as the Plaintiff could have included the claim for compensation in the previous suit. In any event, the Applicant's case is that the instant suit is premised on an alleged tort of trespass which is statute barred under the provisions of Section 4 of the Limitation of Actions Act, Chapter 27 Laws of Kenya which should have been filed within three (3) years from October 2006 when the cause of action arose. The Plaint therefore does not disclose any reasonable cause of action in law against the 2nd Defendant and should be struck out with costs, it was submitted.
4. The application is opposed by the Plaintiff's who deny that the principle of *res-judicata* applies in

- this matter.
5. Parties filed written submission which I have considered. In my view, the only issue for determination is whether or not the suit against the 2nd Defendant is *res-judicata*. I have no intention of writing a long Ruling in this matter. Neither will I go into legal details of what constitutes *res-judicata* as the principle is well understood by the parties in this matter. what this court may point out are the following:-
 - i. The issue as to the exercise of the 2nd Defendant's power of sale was fully determined in HCCC NO. 163 of 2007 and cannot again be subject matter of this suit. That issue can only be appealed in the Court of Appeal in the same cause.
 - ii. There are no direct or indeed indirect claim or prayers against the 2nd Defendant and paragraphs 5, 6, 10 and 12 of this suit to the extent that they refer to the 2nd Defendants are matter already dispensed with in the said HCCC No. 163 of 2007.
 - iii. The Plaintiff's claim appears to be based on a tort of trespass by the 1st Defendant deriving authority from the 2nd Defendant. This act of trespass was committed on 21st November 2008. This suit was filed in court on 21st November 2008. That means that the suit was filed within the three (3) year period limitation for the filing of a tort of trespass. Therefore, submission by the 2nd Defendant/Applicant that the claim is time barred is not correct.
 6. The Plaintiffs in their claim against the 1st Defendant appear to have dragged the 2nd Defendant into this suit. Whether they will sustain the case against the 2nd Defendant is a matter to be decided in a full hearing. In any event, and to avoid any doubts whatsoever, Justice Havelock, in his Ruling on the Notice of Motion dated 27th June 2012 by the 1st Defendant who sought the dismissal of this suit on account of duplicity stated as follows at paragraph 12 therefore:-

“ . . . Accordingly, I believe that the Plaintiffs have every good reason to continue to prosecute this case as against the Defendants . . . ”
 7. It is instructive that the Judge uses the word 'Defendants' and not the 1st Defendant. That was a finding by the Judge that there were triable issues. It was a finding which, unless successfully appealed, remains the position in this matter, and the Judge made if after carefully considering the 1st and 2nd Defendant's defences as regards allegations of malice, loss and damage claimed in the Plaintiff.
 8. For the going reasons the 2nd Defendant's Notice of Motion herein dated 16th April 2014 is dismissed with costs to the Plaintiff/Respondent.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 12TH DAY OF JUNE 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Mr. Kamete for the Plaintiffs

Mr. Muriithi holding brief for Issa for the Defendant

Teresia – Court Clerk