



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MISC. CIVIL APPL. NO. 8 OF 2014

FIDELITY BANK LIMITED APPLICANT

V E R S U S

JOHN JOEL KANYALI RESPONDENT

RULING

1. The Applicant instituted this action by filing Notice of Motion dated 22nd January 2014. The action is not based on a Complaint, Petition or Originating Summons.
2. By that Notice of Motion the Applicant seeks from this Court the following prayer-

“THAT this Honourable Court be pleased to issue orders compelling the Defendant, his tenants, agents and assignees to deposit rents collected from Plot Number KWALE/DIANI BEACH/BLOCK/603 to the Plaintiff’s/Receiver’s escrow account pending the hearing and determination of this application.”

3. At the hearing of that Notice of Motion the Respondent raised Preliminary Objection in the following terms-

“1. There is pending before the High Court in Nairobi HCCC 709/2009

(Commercial and Admiralty Division) a suit between the Respondent (as Plaintiff) and the Applicant (as Defendant) in respect of the same subject matter and the same dispute and this Court cannot proceed with these proceedings by virtue of Section 6 of the Civil Procedure Act – Cap 21 Laws of Kenya.

2. There is also pending before the Court of Appeal C.A. 325 of 2012 between the Respondent (as Appellant) and the Applicant herein (as Respondent) in relation to the decision by the Hon. Justice Kimondo given on 17/11/2011 in HCCC 709/09 in which the Court of Appeal on 28/03/2012 granted an injunction in (Civil Appl. No. Nai. 264/2011 – UR 174/2011) restraining the Applicant (as Respondent) from in any way realizing the suit property or exercising its Statutory Powers under the Securities herein which includes the Charge, Further Charge and Second Further Charge pending the hearing of the Appeal and the Proceedings in the High Court (HCCC 709/09) and therefore these proceedings are an attempt to circumvent the said Orders of the Court of Appeal and constitute a Gross Abuse of the Court Process. The Court of Appeal even directed the proceedings in the High Court to proceed and the same came up for Pre-Trial Conference before Lady Justice Kamau on

- 25/11/2013 and Certified ready for Trial now only awaiting a hearing date.
3. **The Motion dated 22/04/2014 seeks Orders of Mandatory Injunction under Order 40, Rules 2, 3, 4, 5 and 10 when there is no suit upon which the Application is hinged on and the Orders sought cannot be granted as there will be nothing left pending the said Orders. The Application is therefore a nullity, incompetent, frivolous, vexatious, scandalous and an affront to Justice and the same should be struck out for having no basis in law.**
 4. **The Application should be struck out/dismissed in Limine and in the interest of Justice (ex debito justitiae) as it is brought in Gross Violation of all known Principles of Law.”**
 4. In submissions in support of objections No. 1 and 2 above learned Counsel for the Respondent stated that the parties in this action are the same parties in Milimani HCCC No. 709 of 2009 (Milimani Case). That the issues now before this Court is the same issue before the Milimani Court, that is the loans advanced by the Applicant to the Respondent. Further that the Respondent had filed an appeal to the Court of Appeal being Civil Application Nai 264 of 2011 (Court of Appeal Case). That the Court of Appeal had granted the Respondent an injunction stopping the Applicant from exercising its power under the charge. It was therefore submitted by the Respondent that his case in view of Section 6 of the Civil Procedure Act cannot proceed to hearing and that it ought to be stayed.
 5. In support of objection No. 3, the learned Counsel for Respondent Mr. Kopere simply stated **“there is no suit before the Court.”** On that basis he sought that this action be struck out.
 6. The Applicant opposed the Preliminary Objection on the ground that the same failed to meet the threshold set by the case of MUKISA BISCUIT MANUFACTURING CO. LTD V WEST END DISTRIBUTORS [969] E.A. 696. That the objection failed to raise a pure point of law and that it was not based on facts that were not correct. That the charge over the Respondent’s immovable property allowed the Applicant to derive interest in that property. For that reason this action should be allowed to proceed for hearing.
 7. I have considered the parties submissions. It is worth noting that the learned Counsel for the Applicant Miss Muthee did concede that there is a case in Milimani Court involving the same parties as in this action. Learned Counsel conceded that an injunction was issued by the Court of Appeal which injunction restrained the Applicant herein from dealing with the suit property. But she distinguished this case by saying that the present action was seeking that the rental income of the Respondent’s immovable property be held in an account as per the prayer reproduced above.
 8. The Ruling delivered by the Court of Appeal on 28th March 2012 in the appeal filed by the Respondent was made available to me. I reproduce some of it here-

“In articulating the Applicant’s case on the first requirement of a rule 5(2)(b) application, namely whether the applicant’s intended appeal is arguable, Mr. K’Opere in the main submitted that as at the time the statutory notice was issued in June 2009, the applicant was no in default or in arrears because the term loans were being serviced by the overdraft of Kshs. 2 million and that the applicable law provides for the realization process to commence after a period of three months upon default which the Respondent failed to honour and consequently the statutory notice was illegal and secondly, the Respondent had failed to forward an account showing how the overdraft facility of Kshs. 2 million could have arisen to the whooping figure of 12 million within a period of two years. He submitted that whereas the repayment period for the term loans was 60 months (5 years), the applicant had paid a total of Kshs. 5,948,869 within 35 months as at 30th September 2011, against a borrowing of 12 million out of which Kshs. 2 million was an overdraft meant to service the loan of Kshs. 10 million. Mr. K’Opere further submitted that, unlike in many other cases where the issues are disputed accounts, the applicant herein was not a defaulter in that he had continued to pay the Respondent Kshs. 243,182 every month and the repayments amounted to Kshs. 6,435,233 In view of the above, our inclination is to exercise our power in the special

circumstances of this case in a proportionate manner as required of us by Section 3A of the Appellate Jurisdiction Act. As regards this requirement, since it is common ground that the applicant is servicing the loans and this has not been controverted by affidavit evidence, the scales of justice tilt heavily in favour of granting an injunction.”

9. The affidavit in support of the Notice of Motion dated 22nd January 2014 herein shows in my view that the loans the subject of this action are the same loans as those that were before Milimani Court case and Court of Appeal case. To emphasize that, I will reproduce some paragraphs of that affidavit as follows-

“3. THAT I am informed that on or about November 2007, the Respondent applied for a loan facility of Kenya Shillings Seven Million (Kshs. 7,000,000/-) having offered the charged property as security for the said facility being KWALE/DIANI BEACH BLOCK/603.

4.THAT I am informed that by a letter of offer dated 23/11/2007 the Applicant offered to grant the Respondent a term loan of Kenya Shillings Seven Million (Kshs. 7,000,000/-) as sought over a repayment period of six (6) months from the date of commencement of disbursements.

5.THAT I am informed that on or about the 26th day of March 2008 the Respondent entered into an initial Charge with the Applicant for a facility of Kenya Shillings Seven Million (Kshs. 7,000,000/-) which charge was duly registered on 2nd April 2008.

6. THAT I am informed that on or about the 11th day of July 2008 the Respondent entered into a Further Charge with the Applicant for a facility of Kenya Shillings Three Million (Kshs. 3,000,000/-) which charge was duly registered on 18th July 2008.

7. THAT the Applicant agreed upon request by the Respondent to extend the time for repayment of the amounts due under the charge and further charge and to grant to the Respondent a second term loan to the maximum sum of an additional amount of Kenya Shillings Two Million (Kshs. 2,000,000/-) making the total due under the charge in the sum of Kenya Shillings Twelve Million (Kshs. 12,000,000/-) together with further charges and interest provided for in the charge and further charge.

8. THAT I am informed that on or about the 24th day of November 2008 the Respondent entered into a Second Further Charge with the Applicant for a facility of Kenya Shillings Two Million (Kshs. 2,000,000/-) which charge was duly registered on 5th December 2008.

9. THAT I am informed that the Respondent agreed to secure to the Applicant the Additional further loan facility against the charged property in the matter contained in the said Second Further Charge.”

- 10.The Milimani case was filed prior to this action. The Respondent in that case on failing to obtain an interlocutory injunction to restrain the Applicant from realizing its security filed an appeal. The Court of Appeal rendered itself in its Ruling as set out herein above. The loan facility which is the subject of the Milimani and Court of Appeal cases are the same as the ones which are the subject of this action.

- 11.In my view this action cannot proceed to hearing in view of the provisions of Section 6 of the Civil Procedure Rules. That Section provides as follows-

“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 Court in my view is forbidden by that Section from proceeding with this action whilst the Milimani case whose matters are in issue in this case is not concluded. The order that this Court ought to rightly grant is one staying this suit until the Milimani Case is concluded. In the book ‘**A Practical Approach to Civil Procedure**’ by Stuart Sime on staying a suit the learned author stated-

“There is a general public interest in avoiding a multiplicity of claims. Sometimes, it is simply an abuse of process to bring duplicate set of proceedings with the result that the later proceedings will be struck out.”

12. On the second limb of the objection raised by the Respondent I find that the same has merit. The Respondent in raising that objection submitted that there is no suit before Court upon which the Notice of Motion is premised and that accordingly this action should be struck out.

13. Section 2 of the Cap 21 defines a suit as-

“... all Civil proceedings commenced in any manner prescribed.”

Pleading in that same Section is defined as-

“includes a Petition or Summons and the statements in writing of the claim or demand of any Plaintiff and of the defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of the defendant.”

Order 3 Rule 1(1) of the Civil Procedure Rules provides-

“Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.”

14. It is clear from the above that a Civil action can only be

commenced by filing a Petition, Summons and Plaint. This was made clear by the Court of Appeal in the case **BOARD OF GOVERNORS, NAIROBI SCHOOL V JACKSON IRERI GETA (1999)KLR**. The Court stated in that as follows-

“2. Pleading is defined in Section 2 of the Civil Procedure Act to

include a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant; this definition, is couched in such a way as to accord with Order IV rule 1 (now Order 3 Rule 1) which prescribes the manner of commencing suits, which rule provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.

3. The use of the term “summons” in the definition of the term “pleading” must be read to mean “originating summons” as that is a manner prescribed for instituting suits.

4. **Chamber Summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used the Civil Procedure Act and Rules and made thereunder.”**

Similarly as stated by the Court of Appeal, I say Notice of Motion is not a manner prescribed for instituting a suit. It cannot be a pleading as defined in Cap 21 and its Rules. Accordingly there is no suit before Court which suit can sustain the Notice of Motion. I do therefore uphold the objection raised by the Respondent.

15. The orders of this Court therefore are-

- a. **This action is hereby struck out with costs to the Respondent.**
- b. **The Respondent is also awarded costs of the Preliminary Objection dated 17th February, 2014.**

DATED and DELIVERED at MOMBASA this 3RD day of APRIL, 2014.

MARY KASANGO

JUDGE