REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 41 of 2003

LAWE INVESTMENTS LIMITED…….....……1ST PLAINTIFF

EMILY OMONDI (suing as the administrator

of the estate of the late Abigael Aremo).....2nd PLAINTIFF

VERSUS

NATIONAL BANK LIMITED .....1ST DEFENDANT

GEORGE MULUAN OKOTH.....2ND DEFENDANT

JOSEPH GIKONYO t/a GARAM INVESTMENTS.....3RD DEFENDANT

STEPHEN KUNGU KAGIRI.....4TH DEFENDANT

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R U L I N G

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1. This is a Ruling on the Preliminary Objection raised by the 1st and 3rd Defendants ("the Defendants") in opposition to the entire suit. The Preliminary objection was specifically pleaded by the 1st Defendant in its Statement of Defence dated 7th February 2003.

2. The preliminary objection was threefold. Firstly, that this suit is res judicata by virtue of the Judgment and Order of this Court in **HCCC No. 867 of 2000 George W. M Omondi & Lawe Investments Ltd – vs- National Bank of Kenya Limited** in which the issues that have been raised in this suit were fully adjudicated upon and determined. That a valid and binding consent was recorded on 11th May 2001 between the 1st Plaintiff and 2nd Defendant with the 1st Defendant. The Defendants contended that that consent judgment put to rest any questions touching on the validity of the charge and the 1st Defendant's power of sale that are now in dispute in these proceedings. It was also the contention of the Defendants that the Plaintiffs are estopped from denying the legal validity of the Charge dated 22nd September, 1997 created over LR. No. 209/2029/2 to secure payment of a sum of Kshs. 15,000,000/= (hereinafter "the

Charge"), as express admissions on the validity of that Charge were made in the pleadings filed by the Plaintiffs and the 2nd Defendant in **Nairobi HCCC No. 867 of 2000 (supra)** and in **Nairobi HCCC No. 958 of 2001 George W. M Omondi & Anor –vs- National Bank of Kenya,** respectively and that such express admissions constitute a bar to the Plaintiffs re-opening the issues touching on the validity and consideration of the Charge.

3. The second issue was that this suit is sub judice by virtue of the fact that the Plaintiffs are ventilating material and substantial issues of law and fact raised in previous existing suits involving the same subject matter and parties, most of which have been abandoned. That these suits include **Nairobi Milimani HCCC No. 867 of 2000** (supra) where a consent judgment was entered, **Nairobi Milimani HCCC No. 893 of 2002 George W. M. Omondi & Lawe Investments Ltd –v-National Bank of Kenya Limited** which has since been withdrawn with costs. The Defendants also pointed out to the court that there was an existing suit known as **Nairobi Milimani HCCC No. 1040 of 2002** between the same parties for similar reliefs as the instant suit. The Defendants contended that the aforementioned suits exist to date even though the Plaintiffs allege that the same were abandoned and unilaterally withdrawn on 4th February 2003 by the Plaintiffs to pave way for this suit. It was the contention of the Defendants that the withdrawal of the latter suit bears no legal effect as the same was not formally adopted as the order of the court. In this regard, the Defendants argued that the existence of the said suit was a bar to the current suit by virtue of Section 6 of the Civil Procedure Act and the instant suit should be struck out as being an abuse of the Court process.

4. The final issue was that the 2nd Plaintiff has no locus standi to bring this suit to ventilate interests touching on the 1st Plaintiff. In arriving at this conclusion, the Defendants contended that the 2nd Plaintiff has no proprietary interest in the suit property and that further the 1st and 2nd Plaintiff are two separate and distinct entities in law even if the 2nd Plaintiff were to be presumed to be one of its directors and shareholders. In conclusion, the Defendants contended that if the 1st Plaintiff was aggrieved by the manner in which the power of sale was exercised by the Defendants, it was the only party permitted to commence legal proceedings to vindicate its violated rights and interests.

5. The Plaintiffs attacked the Preliminary Objection as being incompetent as the issues raised do not amount to preliminary points of law. Firstly, they contended that the issues of res judicata and estoppel raised by the Defendants can only be determined through the hearing and evidence as the parties in the suits are different and the reliefs sought are all different in all the suits mentioned by the Defendants. That secondly, the Preliminary Objection was against the letter and spirit of Article 159 2(d) of the Constitution which enjoins this court to administer justice without undue regard to technicalities. The Plaintiffs further averred that the matters raised in the preliminary objection require intensive investigation of facts, scrutiny of documents and other evidence. As such the plaintiffs contended that the objections raised to the suit were premature at this stage.

6. It was the Plaintiffs further contention that the issues raised in the objection cannot be determined or decided fairly and substantively in a summary way. It was asserted that the substance of the instant suit was a challenge to the Charge that was fraudulently executed which led to the irregular and fraudulent sale of the property known as LR No. 209/2029/2. That further, the suit referred to by the defendants, **Nairobi HCCC No. 867 of 2000 (supra)** was settled by way of a consent and not through merit. That the consent did not specify the property it related to. With regard to **Nairobi HCCC No. 1040 of 2002 (Supra)** the Plaintiff submitted that the same was settled and/or withdrawn with costs paid pursuant to the Orders made on 25th March 2003. That the 1st Defendant's Advocates filed an application to stay the present proceedings until costs of the previous suits were settled. That upon such payment, the suit herein was reinstated vide a ruling made by **Njagi. J** on **12th November 2010**.

7. With regard to the locus standi of the 2nd Plaintiff in this suit, Mr. Muriuki, learned counsel for the Plaintiff submitted that Emily Omondi was the administrator of the Estate of the Late Abigael Aremo who was the majority shareholder of the 1st Plaintiff Company. That the Administrator has a legal duty to protect the affairs of the deceased person under the Law of Succession Act, which has been violated by

the Defendants. The Plaintiffs also contended that the dismissal or striking out of a suit is a harsh procedure that is applicable where a party's case is incurably hopeless. It was submitted that the Plaint by the Plaintiffs raises triable issues that require the scrutiny of this Court at the trial. The Plaintiffs therefore urged this Court to dismiss the Preliminary Objection.

8. I have considered the written and oral submissions by learned Counsels. I have also considered the material and various authorities placed before me. Before considering the issues raised before this Court, it is important to set out the law with regard to Preliminary Objections. In the celebrated case of **Mukisa Biscuits Manufacturing Company Ltd –vs- West End Distributors (1969) EA 696** the Eastern Court of Appeal held at page 701 that:-

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion." (Emphasis supplied)

At page 700 the court had stated that:-

"..... So far as I am aware a Preliminary Objection consists of a point of law which has been pleaded at which ..... by clear implication out of the pleadings and which if argued as a preliminary point may dispose off the suit." (Emphasis supplied)

With the above in mind, the question that arises is, does the Defendants' objection satisfy the requirements set out in the Mukisa Biscuits case? I have looked at the three points raised by the Defendants' preliminary objection. To my mind, the issues of res judicata, and sub judice are pure questions of law. In deciding the two issues, this court is perfectly entitled to act on the pleadings and other relevant material presented before it. There are no facts that need to be ascertained to be able to determine the issues raised thereof. One only needs to look at the record to be able to determine the same. It is not in dispute that there were various suits instituted by the parties to this suit . It is also not in dispute that all those disputes have either been settled or withdrawn. Those are the undisputed facts. Whether there is a dispute as to the interpretation each party gives to the said set of facts, in my view, does not matter for the purposes of the Preliminary Objection before me. I am therefore not in agreement with the Plaintiffs' Counsel's submissions that the preliminary objection is in breach of the principles set out in the Mukisa Biscuits case.

9. However, with regard to the locus standi of the 2nd Plaintiff, I am of the view that the legal issue raised is a little bit intricate. The Defendants insist that the 2nd Plaintiff is not a necessary party to this suit as she has no right to canvass or address issues that substantially affect the rights and interests of the 1st Plaintiff. It is contended that the 1st and 2nd Plaintiff are two separate and distinct entities in law. The property of the company is distinct from that of its shareholders and shareholders have no proprietary rights to the Company's property apart from the shares that they own. While that may be the position I am of the view that the most efficacious manner of determining these issues is not through a preliminary objection, but through substantive proceedings. Order 1 of the Civil Procedure Rules is clear as to the legal position of a suit on the joinder and non-joinder of parties. A suit cannot be defeated solely because of joinder or non-joinder of parties. For this reason I decline to strike out the 2nd Plaintiff as a party to this suit.

10. This now brings me to the other issues raised in the Preliminary Objection. I have already set out above the contents of that objection. On the first point, the Defendants are empathic that this suit is res judicata by virtue of the Judgment and Order of this Court in **HCCC No. 867 of 2000 George W. M Omondi & Lawe Investments Ltd –vs- National Bank of Kenya Limited.** In the aforementioned suit, the 1st Plaintiff and the 2nd Defendant challenged the Defendant's power of sale and the legal validity of the Charge dated 22nd September, 1997, created over LR No. 209/2029/2 in favour of the 1st Defendant Bank. The chief complaint was the alleged lack of statutory notice, the sale being premature as primary securities had not been sold and the alleged want of consideration. A Consent Order was recorded on 11th

May, 2001 between the parties in the following terms:-

"1) That the Plaintiffs be at liberty to sell the charged property by private treaty within ninety days from 11th May, 2011, at a price acceptable to the Defendant.

2) That if the Plaintiff does not succeed in finding a buyer within 90 days from today, 11th May, 2001, the Defendant will be at liberty to put up the property for sale, either by public auction or private treaty.

3) That the Defendant is to serve upon the Plaintiffs fresh statutory notices to run concurrently with the period given to the Plaintiff by this Order.

4) That there will be no order as to costs."

11. The above Consent order has not been varied or set aside. The question therefore is, did the 1st Plaintiff abandon its claim on the efficacy of the charge when it elected to settle the matter by way of that consent? My view is that, there can be no other conclusion than that by agreeing that the Defendant Bank could exercise its statutory power of sale after 90 days if it failed to find a buyer, the 1st Plaintiff was in essence admitting that the Charge was valid and that is why it consented to the 1st Defendant having to exercise its statutory power of sale under that Charge.

12. The second question is whether the suit is res judicata in light of the said consent. Res judicata can be classified into two distinct forms namely, cause of action estoppel and issue estoppel. Cause of action estoppel prevents re-litigation of the same cause of action. Issue estoppel on the other hand prevents re-litigation of issues that are decided in different causes of action. To my mind, the issue at hand falls within issue estoppel as the 1st Defendant objected to the issue touching on the validity of the Charge document.

13. The question that arises therefore is, was the issue of the validity or otherwise of charges decided in **HCCC No. 867 of 2000?** The Plaintiffs contend that Res judicata does not apply since the matter was not determined on merit but was settled by mutual consent of the parties. I have looked at the Plaint dated 17th May, 2000. It is true that the issue of the validity or otherwise of the Charge was not raised and cannot therefore be said to have been litigated. However, the Consent order recorded between the parties indicates that there was a meeting of minds between the parties. It is settled law that a consent judgment or order can only be set aside on the same grounds as would justify the setting aside of a contract for example, fraud, mistake or misrepresentation. The Plaintiffs have neither indicated to this court that the consent was obtained through fraudulent means nor are they challenging the same. As such, that consent still stands and the parties must be held to their bargain. The 1st Plaintiff freely agreed that the 1st Defendant could exercise its statutory power of sale under the Charge if the Plaintiff failed to secure a buyer for the charged property. In my view, in so doing, the Plaintiff duly acknowledged the validity of the charge. This is so because, the power of sale can only be proffered by a valid Charge document.

14. Conversely, the 1st Plaintiff had every opportunity to insist upon its full rights including challenging the validity of the Charge itself and to come to a settlement or compromise with the 1st Defendant Bank on that footing. Unfortunately this was not done. The 1st Plaintiff elected to settle the matter in terms of the aforementioned consent, and by that election, it is bound by it. It cannot be sufficient to allege and prove that, if the action had been fought out, the Plaintiff would have obtained different results. It is clear under explanation 4 of Section 7 of the Civil Procedure Act, that if an issue would have been raised in a previous proceeding and was not, such issue is still barred from being raised in subsequent proceedings under that Section. I therefore agree with the Defendants' contention that the Plaintiff is estopped from re-opening the issues touching on the validity or otherwise and or the consideration of the Charge. Not even the inclusion of the 2nd Plaintiff as a party to this suit can defeat that fact. Further, the fact of the reliefs in both suits being different does not matter. I therefore hold that the issues touching on the validity of the Charge are res judicata and cannot be subject of another

litigation between the parties

15. I have carefully considered the Plaint dated 24th January, 2002 (sic). The Plaintiffs' claims are twofold. They challenge the validity of the charge over LR No.209/2029/2 and the claim of irregular sale of that property on 25th June, 2003. In my view, these are two separate causes of action. The claim as regards the irregular sale of the property did not exist as at the time the consent order of 11th May, 2001 was entered. The fact that there was a consent to sell the property that did not authorize an alleged irregular sale. Further, that consent could not cover the sale of 15th May, 2002. The latter action could not be covered in the claim in **HCCC No.867 of 2000**. Accordingly, to that extent, that cause of action is not caught up by the doctrine of res-judicata.

16. I now turn to the issue of sub-judice raised by the Defendants on account of the **HCCC No. 867 of 2000, HCCC NO. 893 of 2002** and **Nairobi HCCC No. 1040 of 2002 (Supra).** The doctrine of sub-judice is captured in section 6 of the Civil Procedure Act which 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".

The above provision expressly bars a Court from entertaining a matter in circumstances mentioned therein. In this regard, where a Court finds that a suit in question falls within the four corners of Section 6 aforesaid, the Court has no discretion in the matter but has to stay the subsequent suit or suits. In view of this, the question is, are there proceedings on the same issue and between the same parties that were previously instituted that are yet to be determined? The Defendants admit that HCCC No. 893 of 2002 was withdrawn. They however argue that the **Nairobi HCCC No. 1040 of 2002 (Supra)** is pending for the reason that its unilateral withdrawal by the Plaintiff had no legal effect as the same was not formally adopted by this court as an Order. That argument seems attractive. If the court did not adopt the withdrawal and had the same recorded as such, the same was ineffective. However, that seems not to be the case. Both the court and the Defendants acted on that notice of withdrawal. Costs were awarded on the withdrawn suit. At the Defendants own instance, this suit seems to have been stayed or remained unprosecuted for a long time for non-payment of costs of that withdrawn suit. There is on record, a ruling by **Njagi J** dated **12th November 2010** that reinstated this suit after it had been dismissed for want of prosecution and that such dismissal had been occasioned by delay caused by the unpaid costs of that suit by the Plaintiffs to the Defendants. That payment of such costs effectively removed the barrier between the Plaintiffs and further proceedings in this suit. In my view, the payment of such costs to the Defendants marked the end of those proceedings. I therefore find the Defendants' argument on sub judice to be without merit and dismiss the same.

17. The upshot of the foregoing is that I partially uphold the Preliminary Objection. I therefore strike out those parts of the Plaint dated 24th January, 2003 that challenge the validity of the Charge over LR No.2029/2 for being res-judicata. However, the claim relating to the alleged irregular sale of the property is sustained. The Plaint shall be amended accordingly. Since the 1st Defendant was only partially successful, I will not make any orders as to costs.

DATED and **DELIVERED** at Nairobi this **19th** day of **April,** 2013

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A. MABEYA

JUDGE