



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 1043 of 2012

ESTHER NJERI KOMUPLAINTIFF/APPLICANT

VERSUS

CONSOLIDATED BANK LTD.....1ST DEFENDANT/RESPONDENT

LEAKEYS AUCTIONEERS.....2ND DEFENDANT/RESPONDENT

RULING

The Respondents filed a Preliminary Objection dated 23/1/2013 to the Applicant's application dated 21/12/2012, and that the suit be determined in *limine* on grounds that:

1. The application and the suit be is in contravention of the provisions of Order 4 Rule 1(1)(f) and/or Legal Notice 36/2000
2. The suit seeks orders that have also been sought and declined in HCCC 281/2012 and HCCC 899/2010
3. The application and suit is frivolous, vexatious and an otherwise abuse of Court Process as defined under Order 2 rule 15.

The Applicant sought orders of injunction from this Honorable Court to restrain the Respondents from disposing by way of public auction, private sale or in any other way properties known as Kiambaa/Kanunga/T.215 Kiambu and Ngong/Ngong/23478 registered in the names of Francis Komu Gitau (the Applicant's husband). She also sought to be granted leave to take over the repayment of the money due to the 1st Respondent under the legal charge created on the aforementioned properties.

The gist of the application is that Applicant is the chargor's wife and that she substantively contributed to the acquisition of the suit properties charged to the 1st Respondent. That being the spouse of the chargor, the Applicant has a right to redeem the charge amount if given reasonable time to do so.

Parties made submissions in respect of the Preliminary Objection in Court. Counsel for the Respondents reiterated the contents of the PO. It was his submission that the provisions of Order 4 Rule 1(f) was couched in mandatory terms that a party ought to disclose the existence of previous suits between parties over the same subject matter. He submitted that the Applicant in paragraph 15 of the Plaint and paragraph 3 of the Verifying Affidavit stated that there are no previous suits over the subject matter.

Counsel submitted further that although at paragraph 8 of the Applicant's Supporting Affidavit, the Applicant alluded to the existence of previous suits, the fact that she did not disclose in the Plaintiff and Verifying Affidavit shows dishonesty on her part. It was his submission that the Applicant and her husband have been precluded to file multiple suits whenever they are not satisfied with a decision.

Counsel for the Respondent relied on the decision in the case of **Abdi Hashi Duale v National Bank of Kenya Ltd & 2 others (2005) eKLR**. He also annexed rulings in HCCC No. 899/2010 and HCCC No. 281/2012 stating that the same gave the history of the present application and suit. The Respondents urged the Court to dismiss the application and the suit.

In response, counsel for the Applicant submitted that the Plaintiff herein is different from the Plaintiff in HCCC No. 899/2010 and HCCC No. 281/2012. Further that the rulings therein were inapplicable to the present suit. He submitted that the Plaintiff herein has recourse in law and hence the reason of her coming to Court. It was his submission that the Applicant had come to Court with clean hands.

The Court of Appeal for East Africa in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** laid down the basis for determining preliminary objections as thus:

Per Law J.A

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which, if argued, as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving use to the suit to refer the dispute to arbitration.”

The issue raised by the Respondents herein is in respect of Order 4 Rule 1(f) of the Civil Procedure Rules. The provision gives in mandatory terms the particulars of a Plaintiff. Being a pleading, I find that the objection raised by the Respondents fits the requirement as held by the Court in the aforementioned case.

In determining whether the suit is in contravention to Rule 1(f) of the Civil Procedure Rules, it is proper to reproduce the provision for scrutiny. It reads;

1. (1) *The plaintiff shall contain the following particulars—*

*(f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court **between the plaintiff and the defendant** over the same subject matter and that the cause of action relates to the plaintiff named in the plaintiff. (Emphasis added)*

(2) The plaintiff shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.

It is not in doubt that the suit herein is in respect to a properties known as Kiambaa/Kanunga/T.215 Kiambu and Ngong/Ngong/23478 registered in the name of Francis Komu and charged to the 1st Respondent. It is also the case that the prayers sought are to stop the 1st Respondent from exercising its statutory power of sale in respect of the said properties. The Respondents have pointed out that there have been other cases, namely: HCCC 281/2012 and HCCC 899/2010 wherein such orders have been sought but declined. I note from the rulings availed by the Respondents that indeed the issues therein are similar to the suit herein. However, the difference between HCCC 281/2012 and HCCC 899/2010 and the present suit is the Plaintiff.

It is my view that the wordings of Rule 1(f) specifically state provide for the existence of a pending suit between the same parties, both Plaintiff(s) and Defendant(s). Thus, the subject matter could be the same, but the parties, or one of the parties different, hence such party cannot be locked out of doors of justice.

As to whether the suit is frivolous, vexatious, and an abuse of the court process, I shall refer to Bullen &

Leake's, Precedence of Pleadings 12th (ed.) for purposes of definition: *A pleading or an action is frivolous where it is without substance or groundless or fanciful and it is vexatious where it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. A pleading tending to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matter and so raises irrelevant issues which may involve expenses, trouble and delay and that will prejudice the fair trial of the action and so is the pleading which contains unnecessary or irrelevant allegations. Abuse of the Court process means misuse of the Court machinery or process.*"

It is my view that the suit herein raises triable issues that are worth giving judicial time. It is the Plaintiff's claim that the suit properties are matrimonial properties having contributed in acquiring the same. As to whether this aspect will impact on the agreement between the Plaintiff's husband and the 1st Respondent, will be determined at trial. The Court is further guided by the decision of the Court of Appeal in the case of **Kisii Farmers' Co-operative Union Limited v Sanjay Natwarlal Chaunhan t/a Oriental Motors (2006) eKLR**. In allowing an appeal where a Plaint had been struck out at the superior court for being frivolous and vexatious, the Court of Appeal observed,

"It is now well settled law, that the power to strike out a pleading or any part of a pleading is a power that courts must exercise with a lot of restraint. Normally it is better to allow a weak case to go to trial than to invoke the guillotine process."

From the foregoing, I find that the preliminary objection lacks merit and consequently dismiss the same. Costs of this application shall be in the cause.

Dated, signed and delivered this 15th day of April 2013

L.N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiff

.....For the Defendant

.....Court Clerk