



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 746 OF 2012

NAZIR JINNAH PLAINTIFF

VERSUS

ASMAHAN PETERSON 1ST DEFENDANT

WRIGHT AUCTIONEERS 2ND DEFENDANT

STEPHEN NYAMBU MBIJIWE 3RD DEFENDANT

R U L I N G

1. There are 2 applications before Court for determination. The first is the Plaintiff's Notice of Motion dated 28 November 2012 but filed on 3 December 2012. That application sought Orders as follows:

“1. THAT the application herein be certified as urgent and service thereof be dispensed with in the first instance for reasons of urgency.

2. THAT this Honourable Court do hereby order the transfer of Chief Magistrate Civil Suit No. 5129 of 2010 from the Chief Magistrate's Court to the High Court.

3. THAT further to prayer 2 above, this Honourable Court do hereby order consolidation of this suit with the said Chief Magistrate's Court Civil Suit No. 5129 of 2010.

4. THAT this Honourable Court do direct that any further proceedings or execution or consequential orders in Chief Magistrate Civil Suit No. 5129 of 2010 be stayed until further orders from this Court or until the full hearing and final determination of the High Court Suit.

5. THAT this Honourable court do direct that any further proceedings or execution or consequential orders in Chief Magistrate's Court suit No. 5129 of 2010 be stayed pending the hearing and determination of this application.

6. THAT this Honourable Court be pleased to issue a temporary order by way of an injunction directed at the Respondents either by themselves, their

agents or any other persons acting for or their behalf restraining them from in any dealings, transactions or otherwise effecting the transfer of motor vehicle registration NO. KBE 472Y Volkswagen Beate to any potential buyers, third parties or any person whatsoever pending the hearing and determination of the suit herein.

7. THAT the cost of the application be provided for.”

The Plaintiff's said application came before Mutava J. under Certificate of Urgency on 3 December 2012 and the learned Judge granted a temporary injunction in terms of prayer no. 6 as above.

2. Prior to the Plaintiff's said application being heard *inter partes*, the Defendants laid before court a Notice of Motion dated 7 January 2013 but not filed until 25 January 2013. The Application was brought under **sections 1A, 1B, 8, 11 and 34** of the *Civil Procedure Act* as well as **Order 2 Rule 15** and **Order 51 Rule 1** of the *Civil Procedure Rules, 2010*. It sought the striking out of the Plaintiff's Application dated 28 of November 2012 and the discharge of the *ex-parte* Orders issued by this court on 3 December 2012. The Application was based on the following grounds:

“a. That this suit is an abuse of the process of the Honourable Court.

b. That the purported value of the motor vehicle the subject matter herein as per plaintiff's own plaint was Kshs.2,000,000/= as of the year 2009, but of course it has depreciated, and the value of decree being executed was Kshs.2,382,905/=, therefore, this suit ought to have been filed in the subordinate courts being the courts with the lowest grade competent to try it.

c. That section 34 of the Civil Procedure Act mandatorily prohibits institution of a separate suit in all issues or matters arising out of an execution of a decree and directs that such issues be raised before the court that issued the decree in issue.

d. That the same issues of the execution that the plaintiff has raised in this suit and his application herein dated 28th November 2012 were raised by him in the case where the decree was issued being CMCC 5129 of 2012, MILIMANI NAIROBI particularly in his application dated 19th October 2012 and similar temporary order obtained therein, therefore this suit is an abuse of the process of this court.

e. That there is pending a similar suit in this High Court being HC Misc. Application No. 523 of 2012, Nairobi filed on 17th October, 2012, hence this suit and even that miscellaneous suit are an abusive duplication of the said application in the lower court dated 19th October 2012 which is still pending”.

3. The Defendants' Application was supported by the Affidavit of its advocates on record namely **Alex Gatundu** sworn on 7 January 2013. The deponent maintained that the suit before this court was related to a suit in the lower court being *CMCC No. 5129 of 2010 (Milimani)* which had been finalised and Judgement delivered on the 13th September 2012. A Decree had been issued detailing a decretal amount of Shs. 2,382,905/- together with costs at Shs. 178,265/-. That suit had been as between the first Defendant herein (as Plaintiff) and the Plaintiff herein (as Defendant). Attachment had been ordered and one of the vehicles owned by the Plaintiff herein registration No. KBE 472Y was sold in execution of the said Decree on 6 October 2012. The deponent noted that since the institution of the suit in the lower court, the Plaintiff herein had made more than 12 applications all meant to delay and derail the said suit. In that regard, the Plaintiff herein had made an application to this court being *HC Misc Appl No. 523 of 2012* seeking a stay pending appeal and the release of the said motor vehicle. That application had not been pursued. Thereafter, the

Plaintiff herein on 16 October 2012 filed another application in the lower court, again under certificate of urgency, seeking the review of the summary judgement entered by the lower court in the aforementioned case. A temporary order of stay of execution was issued but the application is still pending for *inter-partes* argument before the lower court. Mr. Gatundu then went on to say that the Plaintiff herein had filed yet another application by way of Notice of Motion in the lower court dated 22 October 2012. That application sought a temporary order by way of injunction to stop any dealings with the said motor vehicle and for the same to be delivered up into the custody of the Plaintiff herein. According to the deponent, that application was still to be heard and decided by the lower court. Mr. Gatundu concluded his Supporting affidavit by detailing that all the issues raised in the suit before this Court were the same issues which had been raised in the suit in the lower court and ruled upon. He pointed out that **section 34** of the *Civil Procedure Act* specifically detailed that all matters in relation to the execution of a Decree ought to be raised before the court issuing that Decree and not via a fresh suit albeit in another court.

4. The Application was opposed by the Plaintiff who, as above, had obtained *ex parte* orders on 3 December 2012, in relation to its Notice of Motion dated 28 of November 2012 firstly, seeking to have the lower court case transferred to this court and secondly, an injunction to prevent the disposal of the said motor vehicle. The Defendants had responded to that application by the Plaintiff by the filing of a Notice of Preliminary Objection filed herein on 31 January 2013. The grounds of the preliminary objection were as follows:

“a. That this suit is an abuse of the process of the Honourable Court.

b. That the purported value of the motor vehicle the subject matter herein as per the Plaintiff’s own plaint was Kshs.2,000,000/= as of the year 2009, but of course it has depreciated and the value of decree being executed was Kshs.2,382,905/=, therefore, this suit ought to have been filed in the subordinate courts being the courts with the lowest grade competent to try it.

c. That section 34 of the Civil Procedure Act mandatorily prohibits institution of a separate suit in all issues or matters arising out of an execution of a decree and directs that such issues be raised before the court that issued the decree in issue.

d. That the same issues of execution that the Plaintiff has raised in this suit and his application herein dated 28th November, 2012 were raised by him in the case where the decree was issued being CMCC 5129 of 2012, MILIMANI NAIROBI particularly in his application dated 19th October, 2012 and similar temporary order obtained therein, therefore this suit is an abuse of the process of this court.

e. That there is pending a similar suit in this High Court being HC Misc. Application No. 523 of 2012, Nairobi filed on 17th October, 2012, hence this suit and even that miscellaneous suit are an abusive duplication of the said application in the lower court dated 19th October 2012 which is still pending”.

These grounds were very similar to those of the Defendants’ Application dated 7 January 2013.

5. Although there are the 2 applications pending for determination, it seemed to the Court that if a Ruling was delivered in connection with the Defendants’ Application dated 7 January 2013 in their favour, such would dispose of the Plaintiff’s application of 28 November 2012. As can be seen above, the Defendants’ said application sought for the Plaintiff’s application dated 28 November 2012, as well as the whole suit, to be struck out. That application was supported by the Affidavit dated 7 January 2013, of the advocate on record for the first and second Defendant, **Alex Gatundu** who basically repeated the Grounds in support of the application as above.
6. In this regard, the Replying Affidavit of the Plaintiff sworn on 13 February 2013 is pertinent. The Plaintiff, in his said Affidavit, admitted that the first Defendant had obtained a warrant of

attachment before judgement *ex-parte* 20 August 2010 in the lower Court suit being *CMCC No. 5129 of 2010*. That suit was as between the first Defendant and the Plaintiff. The Plaintiff had filed an application for stay pending appeal on 18 September 2012. However it became obvious that both that application and the intended appeal were a waste of time as the first Defendant had sold the subject matter vehicle to the third Defendant on 6 October 2012. Consequently, the Plaintiff had been advised by his advocates on record to make an application that all further proceedings, execution or consequential orders in *CMCC No. 5129 of 2010* be stayed pending the hearing and determination of new issues as against all the parties involved being the first, second and third Defendants herein. Hence, included in his said application dated 28 November 2012, was a prayer for the subordinate court suit to be transferred to the High Court and consolidated with the same. Thereafter, and rather strangely, the Plaintiff referred to **section 34** of the *Civil Procedure Act* in his said affidavit. It was his opinion (presumably on the advice of his advocates on record) that they are now new issues arising as against the second and third Defendants and consequently the provisions of **section 34** of the *Civil Procedure Act* did not apply. The Plaintiff also commented that he failed to understand how the VW Beetle vehicle registration number KBE 472Y had been sold for what he termed a “paltry Shs. 430,000/-” when its original value, two years earlier, was Shs. 2 million. He also noted that there had been no valuation produced in respect of the said vehicle.

7. The Plaintiff filed his submissions on 28th of February 2013. He detailed the prayers of its suit as filed in this Court on 28 November 2012. He noted that the Defendants had unlawfully executed the Judgement debt which, as a result, had ended up with the sale of the motor vehicle KBE 472Y on 6 October 2012. Consequently the prayer as regards the declaration for the auction to be declared illegal, irregular and void, together with the order for the return of the said motor vehicle, had now been overcome by events. The Plaintiff then set out the grounds of the first and second Defendants’ Notice of Motion dated 7 January 2013 (as above). In response to those grounds, the Plaintiff agreed that it was true that there had been an application to stay pending appeal filed on 18 September 2012 in this Court as regards *CMCC No. 5129 of 2012*. There was another application filed in the lower court for stay of execution. The Plaintiff maintained that it became apparent that prosecuting the Application for stay pending appeal as well as the intended appeal to this Court, was considered a waste of time as the judgement in the lower Court had issued. Further, the applications had abated by virtue of being overtaken by events, since the second Defendant herein had already sold the subject of motor vehicle. The Plaintiff then set out the full provisions of **section 34** of the *Civil Procedure Act* but, of course, this related to the lower Court as being the forum in which the Decree was passed. He submitted that the section had been enacted for the purposes of halting needless litigation and with a view to enabling parties to obtain adjudication of questions relating to execution without unnecessary expense or delay, which a fresh trial might entail. He went on to say that the rule of *res judicata* dealt with the finality of a decision of a court on matters actually more constructively in issue before it and such bars a fresh trial in relation to such questions in subsequent proceedings between the parties. It was the Plaintiff’s contention that this suit, a new High Court matter, raises new issues together with new parties and the complaint does not lie as under **section 34** of the *Civil Procedure Act*.
8. The Plaintiff then referred the court (without attaching a copy) to the volume on **The Code of Civil Procedure (V of 1908)** authored by **V.V. Chitaley & E. N. Annaji Rao**. He maintained that **section 34** applied to “**parties to the suit**”. He pointed to the third Defendant herein as support to the proposition that the High Court suit did not lie within the ambit of **section 34**. He also maintained that the executing Court could not raise any question as to the validity of the Decree nor as regards the quantum of damage for acts done under cover of execution. He also pointed out that where a Decree has been obtained by fraud or collusion, which in itself would amount to a substantial question as to its validity, then such could only be raised in a separate suit. In this connection, the Plaintiff relied upon the case of **Muiruri v Dobie Mugo Ltd (1981) KLR 243**. I did not see the relevance of that authority as it amounted to an appeal to the Court of Appeal against the Judge’s (at first instance) refusal to award damages for wrongful seizure. In the conclusion to his submissions, the Plaintiff referred to the sum received for the suit motor vehicle at auction amounting to Shs. 430,000/- which he maintained was unreasonable and smelt “fishy”.
9. Unfortunately for the Defendants, their advocates did not file any submissions with regard to their said application dated 7 January 2013. However what I can understand from the grounds in

support of the application, the Defendants pointed out that the purported value of the suit motor vehicle as per the Plaintiff's Complaint was Shs. 2 million in the year 2009 and that it had obviously depreciated since then. However, bearing in mind the monetary value of the vehicle, this suit was wrongly filed in this Court and should have been brought in the lower court. The Defendants also maintained that **section 34** of the *Civil Procedure Act* mandatorily prohibits the filing of another suit in relation to all the issues or matters arising out of an execution of a Decree. Finally on the question of the matter being *res judicata*, the Defendants had maintained that all these matters in relation to the execution process were before the Magistrate in *CMCC No. 5129 of 2012* and, further, there is pending before this Court *HC Misc Appl No. 523 of 2012* which remains undetermined. In the opinion of the Defendants, this amounted to an abusive duplication particularly as regards the pending application in the lower court, dated 19 October 2012.

10. I have considered the provisions of **section 34 (1)** of the *Civil Procedure Act* which are very clear. It reads:

“All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

To my mind therefore, any questions as to the value of the suit motor vehicle, the legality of the auction sale or the execution process should be addressed to the court executing the decree. In this instance, it is the Chief Magistrate's Court at Milimani. As I read **section 34 (1)** this Court has no jurisdiction in relation to such matters and on that ground alone, I would dismiss the Plaintiff's application dated 28 November 2012 and order that the suit herein be struck out. However there is also the matter raised by the Defendants of *res judicata*. I have perused the annexures to the Affidavit in support of the Defendant's said application dated 7 January 2013. So far as the Plaintiff's Notice of Motion dated 18 September 2012 brought under *HC Misc. Application 523 of 2012* is concerned, the same applies for a stay of execution of the Judgement/Decree of the lower Court pending appeal. That Application arises out of the same set of facts and circumstances as detailed by the Plaintiff in this suit. I have also examined the Notice of Motion filed by the Plaintiff herein and dated 16 October 2012 in *CMCC No. 5129 of 2010*. That contains prayers for the Judgement and Decree of the lower Court to be reviewed, discharged or set-aside. It also seeks a stay of execution of the Decree, summary Judgement and warrants of attachment. Further, it seeks an order that the first Defendant herein be restrained from disposing of, selling et cetera the suit motor vehicle. Here again, these are all matters canvassed before this Court in the Plaintiff's Notice of Motion dated 28th of November 2012. I have absolutely no doubt that the Plaintiff's suit herein, as well as its said Notice of Motion, is *res judicata* as per **section 7** of the *Civil Procedure Act*.

11. The upshot of the above is that I find that the Plaintiff's suit herein, as well as its Application dated 28th of November 2012, offends **section 34 (1)** of the *Civil Procedure Act* and is also *res judicata*. In the circumstances, I strike out the Plaintiff's suit herein as well as the said Application with costs to the Defendants.

DATED and delivered at Nairobi this 28th day of May, 2013.

J. B. HAVELOCK

JUDGE