



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & ADMIRALTY DIVISION
HCCC NO. 48 OF 2013

PETER ODIWOUR NGOGEPLAINTIFF

VERSUS

JOSEPHINE AKOTH ONYANGO1ST DEFENDANT

KENYA COMMERCIAL BANK LIMITED.....2ND DEFENDANT

WALKER KONTOS ADVOCATES3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

RULING

1. Peter Odiwour Ngoge (hereinafter “the Plaintiff”) is an Advocate of this court. He carries on his trade in the name and style of O.P Ngoge & Associates at Nairobi. He states that he is an Advocate of more than twelve (12) years standing. On 11th February, 2013, he brought this suit claiming that as such Advocate, he had neither drawn and signed a transfer dated 22nd December, 2003 nor signed a Charge dated 4th April, 2005 of LR No.1160/784 between one Sehit Investments ltd and the 1st Defendant. He stated that the said transfer was a subject of another suit **Milimani HCCC NO. 705 of 2009**.
2. The net effect of the Plaintiff’s claim is that since he had not participated in either the drawing of the said transfer or registration thereof or the execution of the subsequent charge over the suit property, the actions of the Defendants had put his career as an Advocate in jeopardy and that he was being exposed to possible criminal prosecution for uttering a false document. He claimed that the Defendants had colluded to show that the said transfer and charge emanated from him and had thereby damaged his reputation. That those actions wrongly attributed to him were meant to deprive the owner of LR No.1160/784 of that property contrary to law. The Plaintiff prayed for an injunctive order, declarative orders and damages.
3. Together with the Plaintiff, the Plaintiff filed an application for an interlocutory order of injunction. In his Affidavit, he reiterated on oath what he had stated in the Plaintiff. When the matter came up for hearing, the 2nd Defendant raised a Preliminary Objection which was supported by the other Defendants. The 1st and 2nd Defendants filed Affidavits denying the Plaintiff’s allegations. The 2nd and 3rd Defendants filed written submissions whilst the Plaintiff responded orally.
4. It was contended by the Defendants that Sehit Investments Ltd had sold to the 1st Defendant the

- suit property for a sum of Kshs.17million vide a sale agreement dated 24th December 2004. That pursuant thereto, the said Sehat Investments Ltd executed a transfer which was registered against the suit property, that the 1st Defendant obtained two loans on 04/04/05 and 06/04/2009 for Kshs.85million and Kshs.10million, respectively. That since then, the said Sehat Investment Ltd had commenced Milimani HCCC NO. 705 of 2009 seeking to nullify the said sale, that the Plaintiff had sworn an Affidavit in those proceedings wherein he made similar averments as in this suit. That an application in the said suit for injunction by the said Sehat Investments Ltd had been dismissed on 19th February, 2013. On the foregoing, the 2nd Defendant contended that the Plaintiff lacked locus standi to bring this suit and/or the application, that the suit was res judicata, time barred and that no prima facie case had been established capable of success in the suit.
5. The 3rd Defendant also filed written submissions in support of the Preliminary Objection. It was submitted on behalf of the 3rd Defendant that this suit was caught up by the provisions of Section 6 of the Civil Procedure Act and that the Plaintiff herein has been participating in the aforesaid HCCC No.705 of 2009. The case of **Barclays Bank of Kenya Ltd –vs- Elizabeth Agiza (HCCC206/2012)** was relied on for the submission that the suit being subjudice should be struck out. It was contended that the matter in issue in this suit is directly in issue in the aforesaid 705 of 2009, that the Plaintiff had failed to disclose that a ruling was pending in a matter he had participated in. The cases of **Shirika Lakusaidia Watoto Wa Kenya Faidi Kenya –vs- Rhoda Shop & others NKR HCCC No.201 of 2005 and Abdi Duale –vs- NBK & 2 others NKR HCCC No.239 of 2004 (UR)** were relied on in support of those submissions. Mr. Gichuhi for the 3rd Defendant further submitted that the Plaintiff was guilty of Material nondisclosure that the 3rd Defendant was joined in the suit on the ground of alleged non-attestation of the charge dated 4th April, 2005 and that the suit was res judicata and should therefore be struck out. The cases of **Andrew Ouko –vs- KCB HCCC No.558 of 2004 (UR) and Lakhand Fulchand Shah & anor –vs- I & M Bank Ltd (2000) eKLR** were relied on in support of the said submissions. Counsel urged that both the application and suit be struck out.
 6. Mr. Ngoge appearing for himself submitted that res-judicata did not apply as HCCC No.705 of 2009 had not been concluded yet, that the ruling of 19th February, 2013 had been stayed, that he was neither a party nor had he participated in HCCC NO. 705 of 2009, that he had not been served with any pleadings in the said suit and that the current suit was totally different from HCCC 705 of 2009. On the issue of Locus Standi Mr. Ngoge submitted that he had brought the suit to clear his professional name from spurious allegations made against him regarding the transfer of the suit property. He stressed that he had brought the current suit to clear the use of his name fraudulently and not on behalf of Sehat Investments. He denied being guilty of material non-disclosure and stressed that the suit was meant to clear his name and that it had not been brought on behalf of Sehat Investments Ltd as claimed by the Defendants.
 7. In rejoinder, the Defendants submitted that fraud under the Limitation Act, Cap 22 Laws of Kenya is a tort whose term is three (3) years, that since Mr. Ngoge had participated in HCCC No.705 of 2009 he was aware of the matters therein and his current suit was therefore caught up with limitation. That this suit was as a result of the dismissal of the other case (HCCC NO.705/2009) and that the law bars piecemeal prosecution of cases. Finally that the Defendant's approach by way of a preliminary Objection was proper and there was no need of an application under Order 7 of the Civil Procedure Rules.
 8. I have carefully considered the Affidavits on record, written and oral submissions as well as the authorities relied on. The Defendants contention is that both the application and the suit are subjudice and res judicata **HCCC No.705 of 2009 Sehat Investments Ltd –vs- Josephine Akoth Onyango & 3 others**, that the Plaintiff had no locus standi to bring the current suit, that this suit is time barred by the Limitation of Actions Act, Cap 22, Laws of Kenya. The Defendants also raised the issue for suppression of material facts and material non-disclosure by the Plaintiff. Of course the Plaintiff denied all these both in his Affidavits in Reply and submissions.
 9. In order for the court to resolve the issues raised in the Preliminary Objection, it is imperative to appreciate the issues involved and the manner the parties have raised them.
 - a. At paragraph 4 of the Replying Affidavit, Josephine Akoth Onyango swore:-

“4. (ii) I was taken to the Plaintiff by Angela Mulwa a director of Sehit Investments Ltd, who had earlier introduced me to the Plaintiff as her friend and former school mate, for purposes of witnessing my signature on the charge document. The Plaintiff drew the Agreement for sale and I was informed by the same Angela Mulwa that he also drew the transfer.

(iii)

(iv) Sehit Investments Limited is the Plaintiff in HCCC No.705 of 2009 with myself the 2nd Defendant and two others as other Defendants. In that case, the Plaintiff swore an Affidavit (see page 20-81 of the application) in support of Sehit Investments Limited alleging that he did not draw the Transfer and neither did he witness any payment I made to the Plaintiff for the purchase of the property.....

(v) The court has already delivered a ruling on HCCC No.705 of 2009 after considering the evidence of the Plaintiff’s incredulous allegations and ruled that the suit property is legally owned by myself.

9. That the Plaintiff was an active participant in HCCC No.705 of 2009 by filing an Affidavit in support of Sehit Investments Limited way back in November, 2009 to which I responded and if he had a separate claim against any of the Defendants in that case, he would have filed suit.....”

b. In his Replying Affidavit sworn on 25th February, 2013 James Odwako swore:-

“14. THAT without prejudice to the foregoing, the Plaintiff has not explained to the Honourable Court the inordinate delay in commencing this suit since the year 2009 when he filed an Affidavit in HCCC NO.705 of 2009 and as such I verily believe that this suit is not urgent as the Plaintiff wants the court to believe but is merely being used by the Plaintiff as a smokescreen to unlawfully obtain injunction orders on behalf of Sehit Investment Limited which similar orders were denied by the Honourable court in the Ruling delivered on 19/02/2013.

15. THAT with regard to the prayers sought in the Plaint, I am advised by my advocates on record M/s Robson Harris & Company Advocates that the same are either res judicata by virtue of the ruling in HCCC No.705 of 2009 and/or statute barred by virtue of Section 4(2) of the Laws of Limitations Act Chapter 22 Laws of Kenya and as such the Plaintiff has failed to establish a prima facie case with any chances of success and the same ought to be dismissed with costs.

**16. THAT I further aver that the Plaintiff has come to court with unclean hands through willful concealment and fraudulent non-disclosure of material facts and has also committed indolent, inordinate and inexcusable delay and as such cannot be granted the equitable reliefs it purports to seek in both the application and in the Plaint dated 11/22/2013 and the same ought to be dismissed by the Honourable Court.”
(Underlining supplied)**

c. In her first Supplementary Affidavit sworn on 13th March, 2013, Rose Mbithe Mulwa stated that she was one of the directors of Sehit Investments Limited and swore that:-

“7. THAT I wish to state that Josephine Akoth Onyango neither gave Mr. Ngoge instructions to draw and Register the fraudulent Transfer instrument dated 22nd December, 2003 nor paid stamp duty or legal fees to Mr. Ngoge to draw and register the said fraudulent Transfer instrument conveying Land

Reference No.1160/784 to Josephine Akoth Onyango.

8. THAT having not drawn or applied for Registration of the said fraudulent Transfer instrument I verily believe that Mr. Ngoge did not execute the charge dated 4th April, 2005 over LR No.1160/784 Nairobi.”

d. In her 2nd Supplementary Affidavit sworn on 13th March, 2013 Angela Mulwa admitted that she was a director of the said Sehat Investments Ltd and swore that:-

“5. THAT Mr. Ngoge who is the Plaintiff in this matter did not draw or Register the Transfer instrument dated 22nd December, 2003 conveying land Reference Number 1160/784 to Josephine Akoth Onyango.

6. THAT having not drawn or applied for Registration of the Transfer instrument dated 22nd December, 2003, Mr. Ngoge did not execute the charge document dated 4th April, 2005 or issue the Bank with the mandatory certificate under Section 69 of the Transfer of Property Act 1882 in respect of the charge dated 4th April, 2005 over LR Number 1160/784.

9. THAT I wish to clarify that retainer relationship did not exist between Sehat Investments Company Limited and Mr. Ngoge as far as the fraudulent Transfer instruments dated 22nd December, 2003 is concerned.”

10. On his part, the Plaintiff swore what he termed as a 3rd Supplementary Affidavit in answer to the Defendant’s assertions in their respective Affidavits. In it, he denied ever being a party in HCCC No.705 of 2009 and was therefore not bound by the pleadings therein, that the ruling of 19th February, 2013 in the said HCCC No.705 of 2009 had been stayed for being incompetent and asserted that he had brought this suit to clear his own name from fraudulent allegations by the Defendants. He also denied that the suit had been caught up by the provisions of the Limitations of Actions Act. The Plaintiff produced a copy of a Ruling of the Hon. Njagi J in the said HCCC No. 705 of 2009 together with documents showing that the same was under investigations.

11. I have set out in detail the parties respective arguments and counter arguments which show that the issue of res judicata as raised by the Defendants is strenuously disputed, the issue that the Plaintiff was a party or participated in HCCC No.705 of 2009 is not only disputed but also denied, that the issue of limitation of the Plaintiff’s suit is not only disputed but also denied. Most of the facts relied on by the Defendants are seriously disputed.

12. In the celebrated case of **Mukisa Biscuits Manufacturing Company –vs- West End Distributors Ltd (1969) EA 696** at 701 Sir Charles Newbold president of the East African Court of Appeal observed:-

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of Preliminary objection. 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 mine)

13. Having critically looked at the Preliminary Objection raised, I am of the firm view that the issues raised are not admitted, neither are they self evident from the pleadings. One has to critically analyse the facts before one can establish many of the facts relied on. In this regard, my firm view is that the Preliminary Objection was imprudently raised. To my mind this court has to undertake a detailed analysis of the facts before establishing them. That is only possible where the court is considering say an application for striking out. Reading the pleading on record, Affidavits and submissions, one cannot say that the facts relied on are self evident. In the case of **Barclays Bank –vs- Elizabeth Agiza HCCC NO. 206 of 2012 (UR)** cited by Mr. Gichuhi, I had to analyse the disputed facts before holding that the suit therein had fallen foul of Section 6 of the Civil

Procedure Act and was for striking out. As can be seen from the foregoing, that is not the case here.

14. In this regard, I am of the view that the Preliminary Objection was not well taken and is hereby dismissed with costs to the Plaintiff against the Defendants.

DATED and DELIVERED at Nairobi this 21st day of June, 2013.

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A. MABEYA

JUDGE