REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CASE 280 OF 2008

SURJIT SINGH HUNJAN.....………..……...……………...... 1ST PLAINTIFF

DARCHAN KAUR HUNJAN ……………..………………….2ND PLAINTIFF

VERSUS

THE DEPOSIT PROTECTION FUND BOARD

(SUED AS THE LIQUIDATOR OF

THE PRUDENTIAL BUILDING SOCIETY ………………...…DEFENDANT

RULING

On 3rd April, 2008, the Plaintiffs took out an Originating Summons under Order 36 Rules 3A and 7 of the former Civil Procedure Rules raising several questions for determination relating to plot LR Nos. 12565/26 and 12565/29 (hereinafter 'the suit properties') in which they averred that they were the registered proprietors. The issues relate to a Charge in favour of the Defendant registered over the suit properties sometimes in 1995/96. Both the Plaintiffs swore the Verifying Affidavits verifying the said summons.

In support of the summons, Surjit Singh Hunjan swore an Affidavit on 2nd April, 2008 which raised various issues touching on the conduct of the Defendant in relation to the suit properties. Some of those issues are that out of the Ksh.10milion for which the properties were charged, only a sum of Kshs.7,400,000/- was released by the Defendant, that one of the suit properties, to wit, LR No.12565/29 was sold and transferred to a 3rd party on the 27th February, 2001 and the proceeds thereof have never been accounted for, that the other suit property is rented out and the rentals therefrom to date is collected by the Defendant and has never been accounted for. One of the questions raised is whether in view of the Defendant's conduct, the Charge should not be discharged and titles released to the Plaintiffs.

The Defendant did file a Replying Affidavit sworn by one Doris Mugambi on 4th April, 2011. In it she, inter alia, admitted that LR No. 12565/29 was sold to a 3rd party, she also admitted that the Defendant has been collecting rent from the remaining suit property. She produced a partial statement of account for the period 01/01/2000 to 28/02/2011 showing the debt standing at Ksh.57,790,533.30. For the period covered by the Statement of Account produced, the Plaintiff's had made payments totaling Kshs.11,509,764/-. One thing that the court noted is that despite the allegations by the Plaintiffs about failure to give accounts, the Defendant did not exhibit the Statement of Account for the period prior to 2000, that in the entire Affidavit the exact amount received from the sale of LR No.12565/29 was never disclosed nor its whereabouts alluded to, the monthly rentals received from LT No. 1256/26 was also not

disclosed. Those then are some of the issues the Plaintiffs presented to this court for determination.

On 2nd August, 2011, the Defendant brought a Notice of Motion expressed to be under Order 51 Rule 1 and Order 19 Rule 6 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application sought three orders in the alternatives. Firstly, to strike out the Originating Summons for having been instituted by a party with no capacity to file a suit, secondly, to strike out the Supplementary Affidavit dated 10th May, 2011 for being scandalous, vexatious and an abuse of the court process and thirdly, to strike out paragraphs 5, 9, 12, 13 and 14 of that Affidavit. The same was supported by the Affidavit of Doris Mugambi sworn on 27th July, 2011.

Mr. Odhiambo learned Counsel for the Defendant submitted that the 1st Plaintiff had on 9th November, 2001 filed his own bankruptcy and had a receiving order issued against him, that the suit was filed in April, 2008 when the receiving order was still in force, that that order was only lifted on 20th May, 2011. In his view, Counsel submitted that a person against whom a receiving order has been issued has no capacity to sue, he should have sought leave of court or sued through the Official Receiver.

On Prayer No. 2, Mr. Odhiambo submitted that the Supplementary Affidavit contained matters that are scandalous, that it avers on matters of fraud without giving particulars. In the alternative, Counsel submitted that Paragraphs 5, 9, 12, 13 and 14 be struck out as they allege that the accounts were falsified. He further submitted that under Order 19 Rule 3, the court had power to grant the orders sought. Counsel cited the cases of **Shirika La Kusaidia Watoto Wa Kenya & Another –vs- Rhodah Rop & others, Lila Vadgama –vs- Mansukhal Shantilal Patel, Delaco Ltd and 3 others –vs- Jacob Okuna Oyugi & 4 others** and **Simon Isaac Ngui –vs- Overseas Courier Services (K) Ltd** in support of the proposition that if an Affidavit contains scandalous matters that cannot be proved, the same should be struck out. Counsel urged the court to allow the application.

The Plaintiff filed a Replying Affidavit sworn by Darshan Kaur Hunjan on 1st November, 2011. The Plaintiffs contended that the application was a late attempt by the Defendant to avoid the trial, that the deponent was still the registered proprietor of the suit property, that the bankruptcy of the 1st Plaintiff does not bar him from filing this suit, that the issue of bankruptcy had been dismissed by the court on 11th July, 2011 whereby the court had ordered that the suit do proceed for trial, that the deponent has never been involved in **HCCC No.1129 of 2003**, that there are triable issues which should be settled at the trial. The Plaintiff denied that the Supplementary Affidavit of 11th May, 2011 was scandalous or an abuse of the court process as contended by the Defendant.

Mr. Eshuche, learned Counsel for the Plaintiff submitted that under **Section 9 of the Bankruptcy Act,** only a creditor is barred from instituting a suit and not the debtor or the bankrupt, that where a property is subject to a Charge, there is no limitation to filing of a suit, under **Section 9 (2)** of that Act, that the Plaintiffs being man and wife, the capacity of one of them is not incapacitated by the incapacity of the other. Counsel submitted that under Order 36 of the Civil Procedure Rules the suit can either proceed by way of either affidavit or viva voce evidence and that if the Affidavit of the 1st Plaintiff offended the law, the Originating Summons can still stand, that the Supplementary Affidavit was proper. Counsel relied on the cases of **Patricia Eunice Chuma –vs- KCB, Ann Nyambura Nguru –vs- John Waweru Kamau** and **Job Brown Omboka –vs- Gordon Manyasa** in support of the proposition that a debtor is not barred from filing a suit upon a receiving order being made against him. Counsel urged the court to dismiss the application.

Those were the cases of the respective parties. The nature of the power of summarily determining a suit has been considered and the Court of Appeal has set out the principles in the case of **D.T Dobie –vs- Muchina (1982) KLR 1.** In that case the Court held from page 6:

"Per Chitty J in <u>Republic of Peru –vs- Peruvian Guano Company 36 Ch. Div 489,</u> at pages 495 and 496.

'It has been said more than once that the rule is only to be acted upon <u>in plain and obvious cases and</u>

in my opinion the jurisdiction should be exercised with extreme caution.'

Per Swinfen Eady L.J in Moore –vs- Lawson and Anor (1915) 31 TLR 418 at 419

'It is a very strong power indeed. It is a power which, if it is not be most carefully exercised might conceivably lead a court to set aside an action in which there might really after all be a right and in which a conduct of the defendant might be explicable in a reasonable way. Unless it is a very clear case indeed.

………………………………..

It has been said more than once that rule is only to be acted upon in plain and obvious cases and in my opinion, the **jurisdiction should be exercised with extreme caution.**

………..

It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases….."

Although the Court of Appeal was considering a case under the former Order VI Rule 13 of our former Civil Procedure Rules, the net effect was a prayer to strike out a suit at the interlocutory stage. Therefore, the power to strike out a suit is a draconian one which is to be exercised sparingly with extreme caution only in the clearest and exceptional cases. That the court should lean towards sustaining a suit rather than deciding on it without having the benefit of evidence and that if a suit can be saved by an amendment, such suit should be sustained rather than being struck out.

I propose first to deal with prayer No. 1. The Defendant wishes the suit to be struck out for having been filed by a person against whom a receiving order had been made. The Plaintiffs indicated in paragraph 8 of the Replying Affidavit that that issue had been determined by the Court on 11th July, 2011.

I have perused the record and I note that on the said 11th July, 2011 the Defendant's Notice of Preliminary Objection dated 18th May, 2011 came before Hon. Justice Njagi. The same was dismissed for non attendance. That Notice of Preliminary Objection read:-

"TAKE NOTICE that the Defendant will at the hearing of the Plaintiffs application dated 2nd April, 2008, urge that the Originating Summons, the Supporting Affidavit sworn on the 2nd April, 2008 and the Supplementary Affidavit sworn on 10th May, 2011 and filed on 11th July, 2003 be struck out with costs for the following reasons:

1. The Supporting Affidavit and Supplementary Affidavit in opposition to the said (sic) raises a number of facts which are contested and need proper pleadings.

2. The said Affidavits raise questions that are neither simple nor clear-cut ones, nor can they be properly determined even though the Summons has been adjourned into court with the expedition which the procedure by Originating Summons was meant to achieve.

3. The Defendant were served by the supporting affidavit outside the stipulated leave which lapsed on the 21st of April 2011 and have since filed the same without seeking first to extend the leave.

4. That the questions raised in the Affidavits are too complex which require institution of a suit in the proper way to enable parties properly ventilate their issues in open court."

From the said Notice, I do not find anything touching on the bankruptcy of the 1st Plaintiff. That issue was not raised and was therefore not determined. I dismiss the Plaintiff's allegation in that regard.

However, it is very clear that grounds 1, 2 and 3 of the Notice were directed against, inter alia, the Supporting Affidavit of 2nd April, 2008 and the Supplementary Affidavit of 10th May, 2011. The Defendant wanted them struck out, though for other reasons other than the reasons now set out in the present application. Does the law allow this? I doubt. My view is that the issue of striking out those Affidavits is Res Judicata under Section 7 of the Civil Procedure Act which provides:-

"7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties,** **or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."
(emphasis mine)

To my mind, the mischief that Section 7 explanation 4 sought to guard against was litigation by installment. Once a party approaches a court of law, he/she is required to put forth all his arsenal before the court at once. Multiple approaches to court on the same issue but from different directions is barred and won't do. The law frowns against that!

In the case before me, the issue before Njagi J on 11th July, 2011 was the striking out of, inter alia, the Affidavits of the Plaintiff that I have referred to above for their alleged incompetence. In my view, the ground of the Supplementary Affidavit being scandalous and an abuse of the court process is also an issue of incompetence. It is an issue that should have been raised in that Notice of Preliminary Objection. It was not. That Notice was dismissed. That order of dismissal has not been reversed. In my view therefore, since Section 7 applies to both applications or any proceedings as it does to suits, the Defendant is barred from raising again the issue of the incompetence of the Plaintiffs' Affidavits by any other means including the present Notice of Motion.

It may be argued that the issues in the Notice of Preliminary Objection were not determined in terms of Section 7, but the fact is, once an order of dismissal is made, a determination of an issue has been arrived at whether in a summary manner or through lengthy consideration. A determination has been made. The issue cannot be raised again until and unless that order has been set aside!

On that ground alone, I will dismiss the prayer Nos. 2 and 3 of the Defendant's Notice of Motion.

Be that as it may, on the merit of the application, I have looked at the entire Supplementary Affidavit of Darshan Kaur Hunjan sworn on 10th May, 2011 and I see nothing scandalous or vexatious. The paragraphs referred to i.e. 5, 9, 12, 13 and 14 allude to matters that in my view and estimation are not scandalous, leave alone vexatious. The Defendant has not shown how they are scandalous or amount to an abuse of the court process.

For example paragraph 5 states that the Statement of Account produced as DM3 to the Replying Affidavit of Doris Mugambi of 4th April, 2011 does not show the loan Account from inception and the deponent concludes that in so doing the Respondent intends to hide that it was not Kshs.10million that was advanced. I see nothing scandalous on this.

Paragraphs 12 and 13 states that the Plaintiffs never knew that the Respondent was ever engaged in **HCCC No. 1129 of 2003** and that the Plaintiffs were never parties to that suit. I see nothing scandalous here. It is upon the Defendant to lead evidence at the trial to rebut these facts.

I have given those examples to show that even if the Supplementary Affidavit of Darshan Kaur Hunjam of 10th May, 2011 was due for consideration, I would still have not struck out the same as I am not convinced that it is scandalous or vexatious. If they were scandalous or an abuse of the court process, the

Defendant has not in my view, shown how. I am unable to hold so.

I have considered the authorities relied on by the Defendants and I find them irrelevant to the application before me. In **Shirika La Kusaidia Watoto wa Kenya –vs- Rhodah Rop (2005) e KLR** Hon. Kimaru J found as a fact that the Plaintiff in that case had filed a Plaint, and swore a false Affidavit that there had been no other case, yet one day before filing that suit, his previous suit had been struck out by Musinga J. That is not the case with the present case. It has not been shown that the Plaintiffs knew of the existence of **HCCC No. 1129 of 2003**. In **Lila Vadgama –vs- Mansukhlal Shantilal Patel (2005) e KLR** Ojwang J (as he then was) found as a fact that the offending Affidavit was argumentative and was in the form of general, Chatty comments. That is not the case with the Plaintiff's Affidavits sought to be struck out. The other two cases are also unhelpful as they are distinguishable on their own peculiar facts. Prayer Nos. 2 and 3 therefore are unfounded and are dismissed.

This leaves me with Prayer No. 1.

Section 9 of the Bankruptcy Act Cap 53 of the Laws of Kenya provides:-

"9.(1) On the making of a receiving order the official receiver shall be thereby constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, except with the leave of the court and on such terms as the court may impose.

(2) This Section shall not affect the power of a secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed. (Emphasis mine).

My reading of that section is quite clear. The person barred from commencing or continuing with any proceeding after a receiving order has been made is a creditor and not a debtor. In the case before me, the person who commenced the proceedings was a debtor. Obviously, she had locus standi to bring this suit. She was never barred by any provision of law.

Even if the debtor was barred by that section, which is not the case, the suit by the 2nd Plaintiff cannot be defeated for the reason that his co-Plaintiff lacked locus standi to sue. A proper order would have been to strike out the suit of the 1st Plaintiff and leave that of the 2nd Plaintiff surviving. This is not necessary for the reasons I have already set out above.

For the foregoing reasons, I find the Defendant's application dated 29th July, 2011 to be misconceived and hereby dismiss the same with costs.

Dated and delivered at Nairobi this 8th day of February 2012.

A.MABEYA
JUDGE