REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 206 of 2012

BARCLAYS BANK OF KENYA LTD……..…….…. PLAINTIFF

VERSUS

ELIZABETH AGIDZA ……..……..1ST DEFENDANT

NATHAN ONDEGO MDEIZI ……..……..… 2ND DEFENDANT

ALFRED SAGWA MDEIZI……3RD DEFENDANT

R U L I N G

1. On 29th March, 2012, the Defendants herein filed a suit in Kisumu, viz, **KSM HCCC No. 61 of 2012 Nathan Ondego Mdeizi and 2 others –vs- Barclays Bank of Kenya Ltd** (hereinafter **"the Kisumu suit")** seeking an order for accounts and damage for wrongful sale of **"the charged properties."** That suit was served upon the Plaintiff herein on 30th March, 2012. On 5th April, 2012, the Plaintiff filed this suit against the Defendants claiming Kshs.30,175,325/78 together with interest at 17.75% P.A on 30th April, 2012, the Defendants entered appearance under protest and on 14th May, 2012 they filed a motion on Notice to strike out the suit under Sections 1A, 1B, Order 2 Rule 15 1(d) of the Civil Procedure Rules and Section 63(e) of the Civil Procedure Rules. The grounds upon which the application is brought is that the suit is barred by Sections 6 and 7 of the Civil Procedure Act and having been filed with the express knowledge of the existence of the Kisumu suit, the suit is an unmitigated and flagrant abuse of the process of the court.

2. In support of the application Nathan Ondego Mdeizi swore that the Plaint and summons to enter appearance in the Kisumu suit was served upon the Plaintiff on 30th March, 2012, that the subject matter of the Kisumu suit arose from legal charges, guarantees and loan agreements touching on the properties known as Kisumu Manyatta/3085, Kanyamkago/Kawere II/3089, Kanyamkago/Kawere II/1176 and Suna East/Waswea I/863 (hereinafter **"the suit properties")** all charged to the Plaintiff and that this was the basis of the Plaintiff's statutory notice to a company known as Fanana Investments Ltd for Kshs.23,975,738/14. That the Plaintiff had the liberty of filing a counterclaim and join other parties and prove its claim in the Kisumu case.

3. Mr. Wasilwa, learned Counsel for the Defendants in his submissions set out in detail the nature of the documents the basis of the Kisumu suit, he identified the parties thereto, the guarantors, the accounts and the legal charges the subject matter of the Kisumu suit. He sought to show the similarity of the Kisumu suit with the present suit save that the first Defendant in this suit is not a party in the Kisumu suit. Counsel was of the view that the matters in issue in the two suits are similar and submitted that the present suit falls foul of Section 1A and 1B of the Civil Procedure Act and was an abuse of the court process.

4. The Plaintiff opposed the application. It filed a lengthy Replying Affidavit by Ken Kiurah, a manager with the Plaintiff. He swore that both suits were drawn on the same date, 28th March, 2012 and therefore there was none that was first in time to the other, that the parties in both suits are different and that the matters in issue in both suits were different. He further swore that the Defendants had at all times known that the Plaintiff would file the current suit and that therefore the application was mischievous and an abuse of the court process. Mr. Karugo, learned Counsel for the Plaintiff submitted that the application was incompetent as Sections 6 and 7 of the Civil Procedure Act do not provide for the striking out of the suit, that the parties and matters in issue in both suits are different. Counsel cited the text of **Judicial Hints on Civil Procedure Vol. 1** by Justice Richard Kuloba on the proposition that the matter in issue in the subsequent suit must be entirely within the previous suit and not partly for Section 6 of the Civil Procedure Act to apply.

5. I have considered the Affidavits and exhibits on record, the written submissions and the law relied on. The jurisdiction to strike out a suit or pleading was well spelt out in the case of **D.T Dobie & Co. Ltd –vs- Muchina (1982) 1 KLR** wherein the Court of Appeal at page 9 thereof held:-

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually informed so as to deal with the merits without discovery, without oral evidence tested by cross examination in the ordinary way." (Emphasis supplied)

6. It is clear from the foregoing that in exercising the jurisdiction to summarily strike out a pleading, the court has to be very careful so as not to unseat a party from the seat of justice without having heard the case on merit. The issues that fall for determination in this matter in my view are whether the plaintiff's suit falls foul of Sections 6 and 7 of the Civil Procedure Act and if so, whether the same should be struck out.

7. From the outset, I should state that there is no material before me to show that Section 7 of the Civil Procedure Act is applicable in this case. There is no allegation that there has been any decision made in the Kisumu application or suit for the doctrine of *Res Judicata* to apply in the present case. To that extent, the present application is misconceived and incompetent.

8. As regards Section 6, I agree with the submission of Mr. Karungo that for that provision to apply, the entire subject matter in the subsequent suit must be covered by the previously instituted suit. That proposition of law is informed by the extract from the learned text in **Judicial Hints on Civil Procedure Vol. 1** by Justice Kuloba where at page 42 it is stated:-

"Authorities are clear that 'matters in issue' does not mean any matter in issue in the suit but has reference to the entire subject matter in controversy, it is not sufficient that one or some issues are in common. The subject matter of the subsequent suit must be covered by the previously instituted suit and not vice versa. Sir Newnham Worly, VP, in Jadna Karsan –Vs- Harnam Singh Bhogal (1953) 20 EACA 74 at 76 (10th March, 1953)."

9. To this statement of the law however, I should add that if the controversy in the subsequent suit can be conveniently and properly adjudicated upon in the previous suit, by virtue of the enactment of Sections 1A and 1B of the Civil Procedure Act, Section 6 will still apply. This is so because the overriding

objective of the Civil Procedure Act is for expeditious and proportionate resolution of civil disputes between parties. My view is that the circumstances obtaining in 1953 when the **Jadna Karsan –vs- Harnam Singh Bhogal** was decided are completely different from the circumstances obtaining now. The circumstances obtaining at the time of the enactment of Sections 1A and 1B of the Civil Procedure Act were that there is constraint in judicial time and therefore a lot of pressure on the courts to expedite resolution of civil disputes. My view therefore is, if a substantial part of the matters in issue of controversy in the subsequent suit is covered by the previous suit, Section 6 should be invoked to save the previous judicial resources.

10. I have seen the Plaint in the Kisumu suit, the parties are Nathan Ondego Mdeizi, Alfred Sagwa Mdeizi and Fanana Investments Ltd and Barclays Bank of Kenya Ltd. In the present suit the parties are the same save that one Elizabeth Agidza has been joined as a Defendant in respect of a guarantee she executed. Also Fanana Investments Ltd has been left out since the present suit is basically to enforce the guarantees given by the Defendants to secure the liabilities of the said Fanana Investments Ltd. As regards the matters in issue, in the Kisumu suit the issue touches on the facilities granted by the Plaintiff herein to Fanana Investments Ltd and an entity called Metro Cash and Carry. There is an averment that the Plaintiff had been paid a total sum of Kshs.14,030,860/- as at 30th December, 2007 and the right of redemption accrued. There is also the issue that there was illegal interest charged on the facilities. That was the basis for the prayer for accounts refund and damages. In the present suit, the issue is the enforcement of guarantees given by the Defendants herein to guarantee the liabilities of Fanana Investments Ltd. From the record, it is clear that the Defendants have reiterated the averments in the Kisumu suit.

11. The mischief sought to be avoided by Section 6 of the Civil Procedure Act is a likelihood of two different courts adjudicating a similar matter, with similar issues between the same parties and yet arrive at different positions. That will be embarrassing to the judicial process. Some of the issues to be determined in the Kisumu suit is whether the Plaintiff had levied illegal interest charges, whether having paid Kshs.14,030,860/- as at 30th December, 2007 the Plaintiff was entitled to dispose off the suit properties, whether having allegedly recovered a total sum of Kshs.11,720,000/- by virtue of Section 44 of the Banking Act, whether there was any amount due to the Plaintiff or whether there had been an overpayment and the refund therefor, if any. In the present suit, the issues raised in the Kisumu suit will invariably be raised.

12. I have carefully considered the pleadings, the witness statements and the documents on record, I have formed the view that both suits are intertwined and that the entire matter in issue in the present suit, to the effect that **whether the Defendants owe the Plaintiff** is entirely covered in the Kisumu suit. The fact that one party in the Kisumu suit is absent in the present suit and one party in the present suit is absent in the Kisumu suit does not make much change. The likelihood of the courts in Kisumu and Nairobi arriving at different conclusions on similar issues is but real. That is what Section 6 of the Civil Procedure Act sought to prevent. My view therefore is that the present suit falls foul of Section 6 of the Civil Procedure Act.

13. Having come to that conclusion, what is the order to be made. The Defendants have urged under order 2 Rule 15(1)(d) that the suit is an abuse of the process of the court and should be struck out. The Plaintiff has urged that where Section 6 has been breached the remedy is to stay the suit. The Plaintiff may be correct but with the enactment of Sections 1A and 1B of the Civil Procedure Act the position in my view has changed. There is pressure on the courts to conclusively expeditiously and proportionately determine civil disputes. What will the stay of the proceedings achieve if the issues herein can be subsumed and be determined in the Kisumu suit?

14. I have considered that it has not been denied that the Kisumu suit was served upon the Plaintiff herein on 30th March, 2012. It has also not been denied that before filing the present suit the Plaintiff was aware of the existence of the Kisumu suit. It is also not denied that the cause of action took place in Kisumu as the securities and the lendings took place in Kisumu. It is also not in dispute that the Plaintiff herein could have sought the very prayers in the present suit in the Kisumu suit thereby considerably saving the precious judicial resources. It is also not in issue that the Defendants are residents of Kisumu. In my view

it is not proportionate to file a suit and have it stayed in Nairobi for future prosecution where the Defendants are resident in Kisumu where the cause of action took place. In my view, to drag the Defendants all the way from Migori and Kisumu to Nairobi whilst there is a court in Kisumu where the cause of action arose and there is pending a similar suit in that court where the issues raised in the present could be conveniently raised and determined is unacceptable. The totality of all these is that the present suit amounts to a blatant abuse of court process which should not be encouraged. To rush to this court five (5) days after being served with the Kisumu suit, the Plaintiff's intention can be otherwise than bona fides. There can be no injustice in striking out such a suit. A joinder of parties and counterclaim in the Kisumu suit will do well for the Plaintiff.

15. Accordingly, I am persuaded that the Defendants Notice of Motion dated 8th May, 2012 is meritorious. I allow the same and strike out the suit herein with costs to the Defendant.

DATED and DELIVERED at Nairobi this 28th day of September, 2012.

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A. MABEYA

JUDGE