



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(MILIMANI COMMERCIAL COURTS AND TAX DIVISION)

CIVIL CASE 151 OF 2008

**EUNICE WANJIRU GATHITHI the legal representative of the late FREDRICK GATHITHI
KABUE.....PLAINTIFF**

- VERSUS -

**CANNON ASSURANCE KENYA
LTD.....DEFENDANT**

R U L I N G

1. The Notice of Motion application dated **17th January 2012** seeks one main prayer i.e. that the court be pleased to order the Plaint herein dated **25th March 2008** to be struck out and the suit be dismissed with costs to the Defendant.
2. The application, which is filed under **Section 1A, 1B, 3A, 6 & 7 of the Civil Procedure Act** and **Order 2 Rule 15 (1) (b), (c), (d), Order 17 Rule 2** and **Order 51 Rule 1** of the **Civil Procedure Rules**, is premised on the grounds set out therein among them that the Plaintiff's suit herein is bad in law and an abuse of the court process as the suit is *Res Judicata* as the deceased Fredrick Gathithi Kabue had previously filed two suits against the Defendant, namely Nairobi **HCCC No. 3434 of 1993** and **Nairobi HCCC No. 1998 of 1994** over the same subject matter seeking the same order as herein for injunction, redemption of the charge and discharge of charge.
3. In support of the application is an affidavit sworn by **JOHN NG'ANG'A** dated **17th January 2012** with its annextures.
4. The Respondent opposed the application and filed grounds of opposition thereto on **8th February 2012**.
5. Briefly, the facts of this application are as follows. The deceased was a guarantor to Boma Developers Limited (the borrower) and executed a legal charge dated **10th June 1991** for **Kshs.5 million**. The borrower owed the Defendant the sum of **Kshs.2,320,089,791 (Kshs.2.3. billion)** as at **31st August 2004** of the exhibit to affidavit of Fredrick Kabue filed on **25th March 2008** in support of Notice of Motion dated **25th March 2008**. This incredible sum escalated from a debt of **Kshs.5 million** borrowed in **1991**.

The Defendant served a statutory notice dated **24th April 1992** that was fatally defective as it was not issued in accordance with **Section 69 (1)** of the repealed Transfer of Property Act.

The court in a Ruling delivered on **30th December 2011** in **HCCC NO. 532 of 1996** Cannon Assurance (K) Ltd. – Vs – Fredrick Gathithi held that:-

(i) The issue of the invalidity of the statutory demand notice dated **24th April 1992** should be determined in that suit.

(ii) *Res Judicata* did not arise and could not bar the court from dealing with issues pertaining to nullity of the originating summons, denial of a fair hearing and right of legal representations. The issue of nullity of the Originating Summons is also based on the illegality and nullity of the statutory notice that was issued in **1992**.

(iii) The order for vacant possession would not be granted as, *inter alia*, the right to redemption, challenge to the Originating Summons, had to be adjudicated in the forestalled application. Effectively, the issue of *Res Judicata* does not arise as the court has declared that all the issues must be canvassed in light of the serious issues of nullity and illegality having been raised.

The deceased Plaintiff had filed suits in **HCCC No. 3434 of 1993** and **HCCC No. 1998 of 1994** where consents were recorded in both suits and the said consents are more than **12 years** old.

The deceased plaintiff had in the past reached an agreement to settle the debt at **Kshs.15 million** which was later rejected by the Defendant. The rejection means that the Plaintiff now desires to redeem the land by paying the sum of **Kshs.5 million**. No account has been given to the Plaintiff of the total repayment made by Boma Developers.

6. The Applicant's salient grounds for this application is that the suit is *Res Judicata*. It is the Defendant's humble submission that the Plaintiff's suit herein is bad in law and an abuse of the court process as the suit is *Res Judicata* as the deceased Fredrick Gathithi Kabue had previously filed two suits against the Defendant, namely **Nairobi HCCC No. 3434 of 1993** and **Nairobi HCCC No. 1998 of 1994** over the same subject matter seeking the same orders as herein for injunction, redemption of charge and discharge of charge.

The principle of *Res Judicata* is enshrined in **Section 7** of the **Civil Procedure Act, Cap 21** of the **Laws of Kenya**, which specifically enacts therein that:-

“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 . . .”

The Defendant avers that, of particular relevance and significance to the suit herein is explanation **(4)** under the said **Section 7** which states:-

“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.”

It is the Defendant's submission that, a perusal of the pleadings (plaint, application & grounds of opposition) in the said **Nairobi HCCC No. 3434 of 1993** and **Nairobi HCCC NO. 1998 of 1994** discloses that both suits together with the present suit are between the same parties and relate to the same subject matter; hence the suit herein is *Res Judicata* in that:-

- (a) The relief/prayers sought are the same,
- (b) The charged property in issue was the same LR. No. 12832/6 referred to herein,
- (c) The parties to the two suits were the Plaintiff and the Defendant herein *inter-alia*.

In determining whether a suit is *Res Judicata* or otherwise, the Defendant relied on the Court of Appeal's holding in **KAMUNYE & OTHERS – VS – THE PIONEER GENERAL ASSURANCE SOCIETY**

LTD. (1971) E.A. 263, where at page 265 therein the court stated that:-

“the test whether or not a suit is barred by *Res Judicata* seems to me to be - is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which had already been put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of *Res Judicata* applies not only to points upon which the first court was actually required to adjudicate but every point which properly belonged to the subject to litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

It is the Defendant's submissions that applying the above test to the suit herein, it is clear beyond peradventure that the suit is barred by *Res Judicata*. The facts in support of this are that:-

- (a) The parties are litigating over the same subject matter being LR. No. 12832/6 arising from the same transaction, namely the charge dated **10th June 1991** the Defendant holds over the said property for the loan of **Kshs.5,000,000/=** together with interest advance to the Plaintiff by the Defendant, and
- (b) The relief sought in all the three suits is that firstly an injunction to issue against the Defendant to restrain it from selling, transferring and/or in any way disposing off the charged property and secondly a prayer that the charge be discharged.

In further support of the plea of *Res Judicata* applying herein the Defendant relied on the case of **HOYSTEAD – VS – TAXATION COMMISSIONER (1925) ALL E.R. 56** where at page 62, the court held that:-

“Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of documents or the weight of certain circumstances. If this were permitted, litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law this cannot be permitted and there is abundant authority reiterating that principle.”

7. In response to the above submissions the Respondent raised the following issues for determination:-

§ Did the Ruling in **HCCC NO. 532 OF 1996 CANNON ASSURANCE (K) LTD. VS – FREDRICK GATHITHI** determine that both the Court of Appeal and Justice Warsame in **HCCC No. 151 of 2008** determine that the issues to, *inter-alia*, nullify proceedings be determined in **HCCC No. 532 of 1996**?

The Respondent's answer was in the affirmative. The Respondent submitted that the present application to dismiss the suit was an abuse of the court process for the reasons set out in the replying affidavit of Eunice Gathithi and the grounds of opposition. The Respondent went ahead and gave a summary of the said reasons. The Respondent averred that, Lady Justice Nambuye (as she then was) held on **30th December 2011** that both the High Court and the Court of Appeal held that the issues to, *inter-a-alia* nullify proceedings ought to be determined in the Originating Summons. The Respondent referred to the grounds of opposition filed on **6th February 2012** that had the Ruling of Justice Nambuye (*as she then was*) delivered on **30th December 2011** at page 36 paragraph (f).

The Respondent's case was that the present suit ought to await the determination of the pending application in **HCCC No. 532 of 1996**.

That there was no delay in prosecuting the present suit as there was a stay of executing the order for vacant possession pending the determination of the constitutional petition. Consequently, the present suit had to await the outcome of the constitutional petition.

The Respondent noted that the present application was *mala fides* as it was only brought after the delivery

of the Ruling in **HCCC No. 532 of 1996** and after a request to seek an amicable settlement was made in January 2012.

§ Did the court in **HCCC No. 532 of 1996 CANNON ASSURANCE (K) LTD. - VS – FREDRICK GATHITHI** hold that the Petitioner should not be denied access to justice and should be heard on the serious issues raised regarding illegalities, nullities and irregularities in the pending Notice of Motion dated 14th April 2008 in **HCCC NO. 532 OF 1996 CANNON ASSURANCE (K) LTD. – VS – FREDRICK GATHITHI**.

The Respondent's answer was in the affirmative. The Respondent submitted that the Defendant was anxious to deny the plaintiff justice by seeking to delay the fair determination of the suit. That the legal representative was a widow who had taken over the fight initiated by her late husband who fought valiantly to redeem his family home. The Respondent submitted that it was an abuse of the court process for the Defendant to file the present application because:-

- (a) It will be an affront to the Ruling of Lady Justice Nambuye (as she then was) who delivered a Ruling declaring the right to a fair trial and determination of the issues in the application seeking to nullify proceedings.
- (b) The Defendant's application cannot override the Ruling of a constitutional court that has made declarations and directions.
- (c) The Defendant is asking the present court to sit on appeal of the Ruling of a Constitutional court by ignoring the express directions and declarations made.

§ Do both **HCCC NO. 532 OF 1996 CANNON ASSURANCE K LTD. VS FREDRICK GATHITHI** and the present suit have any issues in common?

The Respondent averred that, the issues common in both suits were as follows:-

- (a) Illegality of the statutory notice.
- (b) Right to redemption.
- (c) Vacant possession of charged property.

The Respondent submitted that a Ruling was pending seeking to transfer **HCCC No. 532 of 1996** to the present division.

The Respondent further noted that the present application was *mala fides* as it was only brought after the delivery of the Ruling in **HCCC No. 532 of 1996** on **30th December 2011** and after a request to seek an amicable settlement was made in **January 2012**. No explanation had been proffered to explain the delay in filing the application. The Respondent averred that an application to strike out pleadings ought to be filed at the outset. The Defendant has waited for **4 years** to file the application and only after it lost in opposing the constitutional petition.

8. I have carefully considered the application, the opposing submissions and affidavits. The case before the court is complex and has taken the best energy of all the parties, and also of the court, over a long period of time. It is the kind of case which, in my view, does not lend itself to be determined on technical grounds. For justice to be done to all parties this matter can only proceed to full hearing so that all the issues are determined once and for all on their merits. It is also clear to me that certain aspects of this matter may also be the subject of the rule on *Res Judicata*. However, there are serious outstanding issues which touches on the constitutional right of the Plaintiff which would not allow this case to be summarily determined. Most of these issues have been identified by Mr. Gichuhi for the Respondent in his submissions. However, for the avoidance of doubt I will mention some of them again.

In submitting that striking out a suit was a very drastic action, the Respondent relied on the case of **MARY KUBAI & ANO. - VS - VIJAY MORJARIA & 15 OTHERS MILIMANI HCCC NO. 308 OF 2009**, in which the court declined to strike out the suit and held:-

‘striking out pleadings without a hearing on merits of the case is a very drastic action to taken. No court will usually take that step. Where justice would be done by allowing the case to be fixed for hearing, the court ought to refuse an application to dismiss a suit or strike out a defence. In the instant case I am satisfied that justice of the matter dictates that the Plaintiff’s suit proceed to full trial. In CRESCENT CONSTRUCTION CO. LTD. case the court was urged not to dismiss a suit,

‘no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable action and it is so weak as to be beyond redemption.’

The Respondent submitted that several triable issues had been disclosed in the present suit.

The Respondent averred that the Defendant’s main theme was on *Res Judicata*. It was their submission that the Defendant seemed to have a severe allergic reaction to the constitution Ruling of Lady Justice Nambuye in **HCCC NO. 532 OF 1996 CANNON ASSURANCE (K) LTD. – VS – FREDRICK GATHITHI** where the court specifically held that *Res Judicata* did not arise. That all the authorities cited by the Defendant on the issue were irrelevant as **HCCC No. 532 of 1996** had already dealt with facts common in both suits.

The Respondent submitted that the Defendant sought to usurp the Ruling of the constitutional court and that they purported to ask the court to sit on appeal of that Ruling, and that it was unconstitutional to deny the Plaintiff a fair hearing and seek to strike out its suit that sought to redeem the charged property. It was the Respondent’s case that allowing such an application was to open a Pandora’s box of legal complexities, delays and frustrations. The Respondent then listed the following as the trial issues to be determined:-

- (a) Can the statutory power of sale arise on the basis of a fatally defective statutory notice?
- (b) What is the effect of a fatally defective statutory notice?
- (c) Is the Plaintiff entitled to seek redemption when there has not been any lawful demand of the guaranteed debt?
- (d) Is the debt time barred as the consents in the two previous cases HCCC No. 3434 of 1993 and HCCC No. 1998 of 1994 are more than 12 years old?
- (e) Did the Defendant’s claim to recover its debt expire on 2nd June 2006?
- (f) Has the Defendant counter claim for its debt?
- (g) Is the Defendant frustrating the Plaintiff’s right to redeem he charged property?
- (h) Is the Defendant breaching article 159 in seeking an amicable settlement?
- (i) Is the Defendants’ advocate barred from representing the Defendant as he is both is employee and its advocate?

9. I wish to note that on **9th May, 2012**, the Plaintiff, with apparent approval of the Defendant (*as the same was not opposed*) amended her Plaintiff and brought in new paragraphs **8, 9, 10 and 11**, and prayer **(b)**. The effect of these amendments may have significant impact in the Plaintiff’s case. Natural justice would demand that the Plaintiff be given time to ventilate these new issues together with the old issues.

As a parting shot, justice would not in my view, be served, should the orders sought in this application be

granted. By the very nature of this case, the time it has taken, and the dynamic constitutional provisions, the country is now operating, applications founded substantially on technical issue will rarely see the light of day, even if these applications, like the one at hand, may appear to have some semblance of merit.

10. I dismiss the Notice of Motion application dated **17th January 2012** with costs to the Respondent.

It is so ordered.

DATED, READ AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2012

E. K. O. OGOLA
JUDGE

PRESENT:

N/A for the Plaintiff

Thuo for the Defendants

Teresia – Court Clerk