



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**Civil Case 5 of 2004**

**1. INFINITY G. LIMITED**

**2. NITIN N. SHAH**

**3. MOSES MWANGI KIAGO.....PLAINTIFFS**

**VERSUS**

**1. SEHRA ENGINEERING LIMITED**

**2. KENYA COACH INDUSTRIES LIMITED**

**3. KULDEEP S. SEHRA**

**4. NARAN SINGH SOKHI.....DEFENDANTS**

**RULING**

I have before me an application to strike out the plaintives suit on two main grounds: that the same is *res judicata* and that it is statute barred. The plea of *res judicata* has been raised because in Mombasa HCCC No 326 of 1999 between Abberbarn Limited and Infinity Gemstone Ltd, objection proceedings over the property in dispute were lodged by the 1<sup>st</sup> and 2<sup>nd</sup> defendants and determined in their favour. The defendants therefore contend that this suit is an attempt to re-open the issues determined in the objection proceedings. With regard to the plea of limitations, the defendants contend that the plaintiffs' suit is founded on a contract entered into in 1997 and the suit has consequently been filed out of time.

The application is expressed to be brought under the provisions of Order VI Rule 13 (1), (b), (d) and 16 of the Civil Procedure Rules, Sections 3A and 7 of the Civil Procedure Act and all enabling provisions of the Law. The application is supported by an affidavit sworn by Mabeya Alfred, Learned counsel for the applicants. The affidavit is an elaboration of the said grounds for the application.

In opposition to the application, the 2<sup>nd</sup> plaintiff, Nitin N. shah, has sworn a replying affidavit which he avers, has been sworn on the authority of the 1<sup>st</sup> and 3<sup>rd</sup> plaintiffs. In the affidavit, the plaintiffs contend *inter alia*, that their suit is neither *res judicata* nor is it statute barred.

When the application came up for hearing before me on 21<sup>st</sup> October 2009, counsel agreed to file written submissions which they duly filed by the 27<sup>th</sup> November 2009. The submissions substantiated their clients' stand-points.

I have considered the application, the affidavits filed both for and in opposition to the application and the submissions of counsel. Having done so, I take the following view of the matter. With regard to the plea of *ResJudicata*, the applicants exhibited copies of objection proceedings in **Mombasa HCCC No. 326 of 1999** and the ruling thereon delivered by Maraga J, on 28<sup>th</sup> July 2006. The proceedings were between the 1<sup>st</sup> and 2<sup>nd</sup> defendants and the original parties in the said case i.e.:- **Abbeybarn Limited and Infinity Gemstones Limited**. It can be observed immediately that, the plaintiff in that case, Abbeybarn Limited, is not a party in these proceedings. Neither were the 2<sup>nd</sup> and 3<sup>rd</sup> plaintiffs and the 3<sup>rd</sup> and 4<sup>th</sup> defendants' parties in **HCCC No. 326 of 1999**. No application has been made to strike out the 3<sup>rd</sup> and 4<sup>th</sup> defendants from these proceedings. The 2<sup>nd</sup> and the 3<sup>rd</sup> plaintiffs have, on their part not alleged to have been improperly joined as plaintiffs. As to whether their interest in these proceedings is nominal or not cannot be determined in this application. At this stage it is observed that their various interests were not determined in HCCC No. 326 of 1999.

I also note that the pleadings in the said suit were not exhibited. There is, at any rate, no allegation that the main dispute in that suit was the same or similar to the dispute in this suit.

I have perused the ruling of my Learned brother Maraga J on the said objection proceedings. The application made before the Learned Judge was for one order expressed as follows:-

**“In view of the consent order entered herein between the plaintiff and the defendant adjusting, compromising and fully settling the suit as between the plaintiff and the defendant this Honourable Court do order that the goods attached on 3<sup>rd</sup> November 1999 as set out in the Proclamation dated 3<sup>rd</sup> November 1999 be released by the plaintiff and the defendant to the objectors forthwith.”**

The plain language of the prayers made by the objectors is clear that the objectors wanted release of the property attached because, the plaintiff and the defendant had adjusted, compromised and fully settled the suit. The foundation of the objector's application for release was not their having proved ownership of the attached property but that the basis for the attachment had collapsed by the adjustment, compromise and settlement of the plaintiff and the defendant. Indeed the Learned Judge at page 2 of his ruling said as follows:-

**“That application (objection) has apparently not been heard.”**

That observation was repeated at page 5. In his own words:-

**“When the plaintiff intimated that it wished to proceed with attachment the objectors promptly filed an application by way of Chamber Summons under Order 21 Rule 57 of the Civil Procedure Rules which application as I have already said has not been heard.....”**

In view of the above, it cannot be said that the legal ownership in the attached property was conclusively determined in the objection proceedings which Maraga J observed had not been heard.

The plaintiffs have also pointed out that this case was filed on 27<sup>th</sup> April 2005. There can therefore be no dispute that this suit was filed before Maraga J delivered his ruling on the objector's application for release of the attached goods. The application itself was in fact lodged on 24<sup>th</sup> September 2006 long after this suit had been filed.

In all those premises, I cannot agree with the defendants that this case is *Res Judicata* by reason of the decision of Maraga J on the objection proceedings lodged in HCCC No. 326 of 1999 on 24<sup>th</sup> September 2006.

With regard to the plea that the plaintiffs' suit is statute barred, the defendants, in ground (i) of their application, state that the

plaintiffs' cause of action is founded on contract from 1997. In paragraph 9 of the supporting affidavit it is deponed as follows:-

**“9) That in any event the suit herein is time barred in that it was filed well out of the limitation period the subject contracts having been entered in or about 1997. Any cause of action if any was statute barred as at 2003.”**

The alleged contracts were not exhibited. In any event, the plaintiffs specifically denied that the cause of action arose in 1997. In paragraph 12 of the replying affidavit, it is deponed, on advise of counsel, that infact the cause of action arose in November 1999 and this suit was therefore filed in time. Those are the pleadings of the parties. They have not been amended and they cannot be amended in submissions. In the premises, the defendants have not persuaded me that the plaintiffs claim is time barred.

In the end, there is no material to demonstrate that the plaintiffs' suit is frivolous, vexatious or otherwise an abuse of the process of the court. The defendants' application dated 15<sup>th</sup> October 2007 is without merit and is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 19TH DAY OF FEBRUARY 2010.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Mr. Mutisya holding brief for Mr. Kadima for the plaintiff.

**F. AZANGALALA**

**JUDGE**

**19TH FEBRUARY 2010**