



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Commercial Suit 12 of 2010

HUSSEIN DAIRY LTD.....PLAINTIFFS

VERSUS

1. SOUTHERN CREDIT BANKING CORPORATION LTD

2. AKBAR A. K. KURJI.....DEFENDANTS

RULING

This is an application by the defendants seeking two main orders in the alternative. The first main prayer seeks the striking out of the suit for being an abuse of process of the court. In the alternative the defendants seek an order staying this suit pending the hearing and determination of **Nairobi (Milimani) HCCC No. 252 of 2008**. The application is brought under the provisions of **Order VI Rule 13 (1) (b) and (d) of the Civil Procedure Rules sections 1A, 1B, 3A, 6 and 7 of the Civil Procedure Act and all other relevant provisions of the law**. The main reasons for the application are that the issues raised in this suit are directly and substantially in issue in the said Nairobi case in which the parties are the same and an application for injunction has infact been determined and an appeal is pending before the Court of Appeal from the said determination. The application is supported by an affidavit sworn by one Brian Asin, the 1st defendant's legal officer. To the affidavit, are annexed the pleadings and rulings in the said Nairobi case and the Court of Appeal.

The application is opposed and there is a replying affidavit sworn by one Mahmood Kassam MiyANJI, one of the directors of the plaintiff. It is deponed in the affidavit that the plaintiff is not aware of the suits stated by the applicant and this suit and application for injunction are therefore neither *res judicata* nor *subjudice* by reason of any other suit.

I have considered the application, the affidavits filed and the submissions of counsel. Having done so, I take the following view of the matter. I have perused the suit filed at Nairobi (Milimani) High Court. It is HCCC No. 252 of 2008 between **Hussein Dairy Limited as the plaintiff and Southern Credit Banking Corporation Limited and Akbar K. Kurji as defendants**. Those are the same parties in this suit. The plaint in the Milimani case seeks several prayers including injunctions restraining the repossession attachment or in any way interfering with several vehicles and trailers including the ones the subject matter of this suit; an order canceling the registration of the debenture charges and Hire Purchase Agreements and several declaratory orders. The dispute in the Milimani case therefore concerns the charge over LR No. 1196/1/MN, the Hire Purchase Agreements in respect of several vehicles and trailers and a debenture held by the 1st defendant over the plaintiff's property.

In the Milimani case the plaintiff lodged an application for an interim injunction restraining, *inter alia*, the selling, disposing off, offering for sale or in any other manner whatsoever alienating and/or repossessing several trucks and trailers including the trucks and trailers which are the subject matter of the plaintiff's application herein. That application was heard by Kimaru J, who dismissed it with costs on 27th November 2008. That ruling is the subject of an appeal before the Court of Appeal.

The present application by the plaintiff is therefore clearly barred by *res judicata*. Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya reads as follows:-

“No court shall try any suit or issue in which the matter 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.”

It is now settled that the res judicata plea is available with respect to applications as much as it is available with respect to suits themselves.

In view of my finding, I find and hold that the plaintiff's application dated 22nd April, 2010 is barred by *res judicata* and is struck out with costs.

The defendants have also sought the striking out of the plaintiff's suit for being an abuse of the process of the court or in the alternative an order staying the suit pending the hearing and determination of the Milimani case. The plaintiff is the one which instituted the Milimani case. It is the same one which has also instituted the present suit. The foundation of both suits is the same namely the Loan/Hire Purchase Agreement and the debenture. The plaintiffs claim herein can be entertained in the Milimani court. If any relief it has arising from the relationship it has with the defendants needs clarification, that can be achieved quite simply by an appropriate amendment rather than in fresh proceedings in a different court. It is our Law that a party should plead his whole case and not litigate by instalments

The plaintiff has not done equity either. I say so because, notwithstanding the clear affidavit evidence of the existence of the Milimani case, it denies being aware of the same. The replying affidavit in this application has been sworn by Mohamood Kassam Miyanji, one of the directors of the plaintiff. He is the same director who swore the affidavit which verified the plaint in the Milimani case and also the affidavit in support of the application for injunction. He is the same director who also swore the affidavit verifying the plaint in the suit and the affidavit supporting the application for injunction. It was not candid of him to depose in the replying affidavit to this application that there are no other suits which raise the same issues and involve the same parties and that the plaintiff is not aware of any such suits.

To my mind the plaintiff is clearly abusing the process of the court. These are the suits that clog our court system and should be discouraged. In view of that conclusion, I find and hold this suit ought not to have been filed in this court at all in view of the litigation in progress at Milimani and the pending appeal before the Court of Appeal. In the result, the defendants' application dated is allowed in terms of prayer C thereof. The defendants shall have the costs of the application.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 1ST DAY OF JULY, 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Koech holding brief for Mr. Munyithya for the Defendants.

F. AZANGALALA

JUDGE

1ST JULY 2010