



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 205 of 2009

BENJOH AMALGAMATED LIMITED.....PLAINTIFF

VERSUS

HALKANO MOLU.....1ST DEFENDANT

CHRIS THEURI 2ND DEFENDANT

JOSEPH KIAMBATI 3RD DEFENDANT

EVAS MOSE4TH DEFENDANT

KENYA COMMERCIAL BANK LIMITED5TH DEFENDANT

RULING

On 26th March 2009 the plaintiff instituted this suit against the defendants. The statement of claim contains allegations of fraud on the part of the defendants in the sale by way of auction of LR 1211/1 Nyandarua and LR No.100775 Kiambu. The plaintiff also seeks for damages for breach of contract and negligent misstatement, particulars to be proved at the hearing. The defendants filed a statement of defence in which they denied liability in general and in specific terms by a statement of defence filed on 11th April 2009.

On 26th May 2009, the defendants filed a chamber summons application under order VI r 13 (1) b and d of the Civil procedure Rules, which is now before me for determination. The defendants are seeking for orders that the suit filed by the plaintiff be strike out on the grounds that the suit is res judicata, sub judice, scandalous, frivolous and an abuse of the court process. The plaintiff has filed several previous suits against the 5th defendant in which similar issues which are substantially the same issues repeated in this case have been raised. This application is supported by an affidavit of Chris Theuri the relationship manager of the 5th defendant, who is also the 2nd defendant in this case.

The second respondent has given a detailed chronology of how the plaintiff was granted certain banking facilities which were secured by L.R No.12411/1, L.R. No.14916 Nyandarua, and LR No.10075 Kiambu (herein referred to as the suit premises). The plaintiff defaulted in the loan repayment, the 5th defendant set out to recover the loan through a sale by public auction and the properties were advertised for sale scheduled for sale on 5th March 1992. However before the auction, the plaintiff and Muiro Coffee Estate Limited (the guarantor) filed a suit in HCCC No. 1219 of 1992 against the 5th defendant. The cause of action in that suit was in respect of the three suits properties herein.

On 4th May 1992, through a consent order recorded in court, the plaintiff and the guarantor admitted liability and undertook to liquidate the loan due to the 5th defendant and failure to do so, the 5th defendant was at liberty to sell the charged properties. The plaintiff and the guarantor failed to honor the consent order and the suit property was re advertised for sale which was scheduled to take place on 23rd January 1993. A day before the scheduled auction, the plaintiff yet filed another suit being HCCC No. 285 of 1993 against the 5th defendant and injunctive orders were issued. The matter was heard inter parties and dismissed on 8th February 1993 with costs to the 5th defendants.

The auctioneers were once again instructed to realize the security and the suit properties were re advertised for sale on 26th June 1996. Once more two days before the auction, the plaintiff and the guarantor filed HCCC 1520 of 1996 against the 5th defendant. The application and the entire suit were dismissed on 26th June 1996.

The plaintiff yet filed another suit in HCCC No 1611 of 1996 seeking for a declaratory order in respect LR NO.10075 Kiambu. That suit was struck out on 26th January 1998. The 5th defendant instructed the auctioneers to realize the security and the sale was scheduled on 19th February 1997 this time the guarantor filed a suit in Nyeri against the 5th defendant that is; Nyeri HCCC No.24 of 1997 where interim orders of injunction were granted. The application was heard inter parties and the entire suit was struck out on 9th May 1997.

After all the attempts to stop the sale of the suit properties failed, through these multiple suits, the plaintiff reverted to HCCC No.1219 of 1992 and filed an application seeking to set aside the consent decree. This application was allowed on 31st October 1997. The 5th defendant appealed against that decision in Court of Appeal in CA 276 of 1997. The court of appeal quashed the decision of the High Court, in effect, High Court Civil Case No. 1219 of 1992 remains settled. After the Court of Appeal decision the plaintiff and the guarantor did not rest they sought a consolidation of HCCC No. 1219 of 1992 and HCCC No.285 of 1993. The application was struck out but the applicants went on to seek for review of the application in Hccc1219 of 1992 which application was also dismissed.

On 6th August 1999, the plaintiff and the guarantor filed HCCC No.1576 of 1999 against the 5th defendant seeking to be furnished with accounts. This suit was dismissed on 23rd July 2004, but the plaintiff and the guarantor appealed against the judgment before the Court of Appeal in CA 239 of 2005, which appeal was dismissed. The 5th defendant reasonably believing the litigation had come to an end was surprised when the plaintiff and the guarantor filed yet another suit in HCCC No. 337 of 2006 which was transferred to the commercial division and assigned a new No. HCCC No. 243 of 2006. This suit was struck out on 16th March 2007.

The plaintiff and the guarantor resulted to the Constitutional Court, where they filed petition against the 5th defendant claiming contravention of their rights to property contrary to section 75 of the Constitution. The petition was also struck out on 8th March 2007, after which the plaintiff and the guarantor filed HCCC No. 122 of 2007 against the 5th defendant and three other defendants raising the same issues as in the previous suits and this particular suit was also struck out for being res judicata.

The plaintiff has also filed another suit against the 5th defendant and a company known as Bidii Kenya Ltd being Milimani HCCC No. 494 of 2008, that suit was also by a ruling delivered on 3rd November 2008, struck out for raising the same issues which were now res judicata. At the moment, there is pending before this Court for hearing and determination, Milimani HCCC No. 90 of 2009 by the plaintiff.

Counsel for the defendants submitted that the claim against the 1st, 3rd and 4th defendants is unfounded. They are employees of the 5th defendant and whatever actions they took regarding the suit properties; it was done in the cause of their employment and on behalf of the 5th defendant not in their personal

capacity. Counsel further argued that the suit against the 1st, 2nd, 3rd and 4th defendant is unfounded. The claim against the 5th defendant has been adjudicated before and the issues raised are substantially the same as in previous suits, especially HCCC No. 1576 of 1999 and Court of Appeal Civil appeal no 239 of 2005. The issues were fully determined by the High Court and the Court of Appeal, it is an abuse of the court process to seek to re agitate the same matters which are res judicata. Counsel urged the court to strike out this suit with costs to the defendants.

This application was not opposed; Mr. Wachakana counsel for the plaintiff unsuccessfully applied for an adjournment, when the court declined to grant the adjournment he walked out of the court and did not participate in the arguments of this application. Apart from the fact that the matters raised in this application are not controverted, I have also gone through the records of the many suits filed by the plaintiff against the 5th defendant over the same subject matter. It is an amazing record of multiple suits by the plaintiff against the 5th defendant over the same subject matter. The cause of action in all those suits is substantially the same in this suit.

It is clear from the records the issues raised in this suit have been adjudicated by the High Court and the Court of Appeal, this suit is res judicata. Dealing with the issues that have already been determined is prohibited under section 7 of the civil procedure Act. The Court of Appeal held as much in Civil Appeal No. 239 of 2004 where the plaintiff was the appellant against the 5th defendant. Besides, there is another pending suit which is sub judice, that is Milimani Commercial Hccc No.90 of 2009, if there any other issues, the plaintiff should deal with them in that matter but not to litigate in installments.

I have also considered the claim against the 1st, 2nd, 3rd and 4th defendants; they are sued in their capacity as employees of the 5th defendant in respect of actions taken on behalf of the 5th defendant regarding the suit properties. In the circumstances there is no separate cause of action against them. I am vividly aware that the discretion to strike a suit should be exercised sparingly, but going by the record of the multiplicity of suits by the plaintiff which suits have been determined up to the Court of Appeal level, the suit by the plaintiff renders itself for striking out as res judicata; borrowing from the decision of the Court of Appeal, especially the holding in the case of Yat Tung Investments Co. Ltd v Dao Heng Bank Ltd & Another (1975 A.C 581); Their Lordships explained the principle in the following words:-

“But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of the process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res-judicata is the judgment of Wigram V.C. in Henderson vs. Henerson (1843) HARE 100, 115 where the judge says:

Where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open same subject of litigation in respect of a matter which might have been brought forward, only because they have, from negligence inadvertence, or even accident omitted part of their case. The plea of res-judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time.”

I need not say more over this matter save to wonder whether this court can put a bar to the plaintiff filing a fresh suit over the suit properties against the 5th defendant without first obtaining the leave of the court. Filing a multitude of cases is obviously an abuse of the court process and against public policy which requires courts to dispose of matters expeditiously, moreover, the decision by the Court of Appeal is final and litigation must be brought to an end. Multiplicity of suits causes' confusion clogs the court system, not to mention the anxiety and unnecessary expenses visited on the parties.

It is for the above reasons that I am constrained to invoke the inherent powers vested in this court under section 3 and 3A of the Civil Procedure Act, to protect the dignity of this court from abuse and bar the plaintiff from instituting any other suit against the 5th defendant over the suit properties without fist

obtaining the leave of the High Court. The application is allowed, the plaintiff's suit is hereby struck out and the defendants shall have the costs.

RULING READ AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY 2009.

M.K. KOOME

JUDGE