REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

(MILIMANI COMMERCIAL COURTS)

Civil Case 494 of 2008

BENJOH AMALGAMATED LTD ……..……PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....…..…....1ST DEFENDANT

BIDII KENYA LIMITED…….2ND DEFENDANT

RULING

The second defendant has filed an application dated 16th February, 2009 by Chamber Summons under **Order VI rule 13 1(b), (C)** and **(d) Civil Procedure Rules** and **Section 3A** of **Civil Procedure Act** seeking orders to strike out plaint dated 28/8/2008. That application was presented by Mr. Gantama leading Mr. Sehmi.

There is also an application dated 22/1/2009 filed by first defendant brought under same **Order 6 rule 13(1) (b)** and **(d)** and **Section 3** and **3A Civil Procedure Act** seeking orders that plaintiff's application dated 12/11/08 and 5/11/08 respectively be struck out for being ***Res Judicata***, scandalous, fradulour, vexatious and an abuse of court process. This application was presented by Mr. Nyachoti Esq.

Their two applications were consolidated by agreement of parties for hearing purposes since they sought similar orders.

The applications were opposed by Mr. Wachakana led by Mr. Kingara. Both applicants state that the suit is Res Judicata and that the issues raised in the suit have been directly and substantially raised in a number of suits previously filed by the plaintiffs between substantially the same parties as herein which suits have been heard and finally determined and dismissed by High Court. That this court has said that matters raised by the plaintiff are ***Res Judicata*** and that the 2nd defendant purchased the property LR10075 and is now registered owner.

The applications are supported by affidavit of Rahul Dilesh Bid sworn on 16/2/2009 which states that the plaint was filed by Wachakana & Co. Advocates for two plaintiffs. On 29/9/2008 the suit against the 2nd plaintiff was discontinued and that the first plaintiff has never been owner of the suit property LR 10075 Thika town and enjoys no ***locus standi*** in relation to the said property and that the judgment of **Judge Warsame** in HCC No.122 of 2007 has dealt with all issues raised herein and that also this court **(Khaminwa Judge)** has held that the matters raised herein are ***Res Judicata*** and there is no evidence of fraud. The application by first defendant seeks to strike out applications by plaintiff dated 12/11/08 and 5/12/2008 respectively on the ground that on 3/11/2008 this court made a finding that this suit and all the

issues are ***Res Judicata*** and that the court order has been finally complied with.

The application was supported by affidavit of one Chris Theuri sworn on 22/1/2009. That affidavit confirms that the plaintiff has a relationship with the first defendant of lender and borrower and on 12/11/1989 the plaintiff was granted financial accommodation secured by legal charges over property No.LR.12411/1 and LR 14916/11 and LR 10075. Subsequently, there was default and sale was scheduled to take place on 5/3/1992 but a date before 5/3/1992 the plaintiff and his guarantor filed suit. A consent was entered into on 4/5/1992 when the plaintiff and guarantor undertook to pay the debt by 31/7/1992 and confirmed that the first defendant could sell the securities if they failed to do so. The decree is annexed and marked CT2. the plaintiff and his guarantor did not comply with decree. Therefore the first defendant put up the property for sale but a suit was filed HCC 285/1993 against the first defendant. The plaintiff filed another suit 1520/1996 and when it was heard inter partes the application was dismissed with entire suit. Another suit **HCC No.1611 of 1996** sought that the purported sale was irregular, unlawful and null and void. That suit was struck out. Another suit was filed in **Nyeri HCC No.24 of 1997**. This suit was struck out on 9/5/1997. The plaintiff and the guarantor attempted to set aside the consent decree made **in HCC 1219/1992**. That the said application was heard and allowed but first defendant was aggrieved by that decision and filed an appeal in **Court Of Appeal** in **Appeal No.276 of 1997**. The **Court of Appeal** quashed the decision of High Court in **HCC No.1219 of 1992** setting aside the consent and the consent decree stands to date. Again on 6/8/1999 another suit 1576/1999 seeking statements of account showing amount owing from them was filed. That suit was heard and dismissed. Appeal field by plaintiff and guarantor was dismissed on 31/3/2006. Thereafter plaintiff and guarantor filed **HCC No.337 of 2006**. it was renumbered 243 of 2006. This suit was struck out at the application of the first defendant. Then constitutional petition was filed by the plaintiff. This application was struck out. Once more the plaintiff as guarantor filed **HCCC No.122 of 2007** against the first defendant and 3 others. This suit was struck out for being ***Res Judicata***. Thereafter the suit property was sold to 2nd defendant who is now registered owner.

It is sworn that all issues between plaintiff were conclusively determined in HCC No.1576 of 1999 and **Civil Appeal No.239 of 2005** and all the issues raised in this suit and the said applications have been fully determined and that the final account has been rendered and therefore application by plaintiff dated 17/12/2008 is misconceived and that this suit ought to be struck off. This deponent was cross-examined by Mr. Wachakana for the plaintiff on the matters he had deponed to in this affidavit.

Firstly, in the long history of these disputes between the plaintiff and his guarantor and first defendant Mr. Theuri has been in the picture for only 5 years and was able to give evidence on matters which happened long time ago. He said that final statements were produced and he was aware of page 185 of first defendant's bundle page 7 of the ruling made by court. He stated that the loan was disbursed in 1986-1999. The account was not operational during the period 1989-1991 and nothing happened during that time. The letter of offer directed the first defendant pay the money direct to suppliers. He also stated that the statements do not disclose what amounts were paid to the suppliers and how much to Benjoh. There is no exhibited accounts to the suppliers. He admitted that he would not know how much was outstanding. He admitted he did not know the interest rate applied.

On 11/11/2005 the demand letter was for Kshs.70,100,456.75. The notice was for payment "***within three months***". That was not for 3 months. It was for less period than three months and was not adequate statutory notice to enable the first defendant to exercise its statutory power of sale. Again Mr. Theuri states that a sum of Kshs.45,900,000/= was written off but thereafter reinstated in the account making a demand of Kshs.70,100,456/=. This sum he said was without interest. The property was sold on the lesser amount of Kshs.70,100,456/=.

On consent decree, it is clear the amount to be paid is not mentioned. On 17/7/1995 the balance was Kshs.21,156,426.02 rate of interest was 16.50%. On 8/3/1996 the amount was Kshs.24 million rate of interest was 23%. Within 9 months account rose by Kshs.3 million. The witness was not able to answer why the amount became Kshs.44,358,583/=.

From 9/5/1996 to 9/5/2006 the amount was Khs.143,844,249.59. A letter written on shows that the first

defendant had not been able to trace statements for the above account save for the period December, 2003 to May, 2006 – files and bank statements got lost or misplaced. The amount currently outstanding was Ksh.24,202,456.40. That letter was written on 29/5/96. It is also disclosed that in 1996 a total of Kshs.45,900,000/= was written off which would bring the total to Ksh.70,102,456.40. This letter is allegedly covered by client/advocate privilege. There is authority of Privy Council which states that evidence which is relevant which will be accepted by court no matter how it was obtained. Notice was issued to the guarantor of defendant and requested to pay the outstanding money within the three months. Therefore, the replying affidavit of Samwel Kungu Muigai states that the securities were oringinaly only of Kshs.11,500,000/= all inclusive. According to Chris Theuri, some money was paid direct to suppliers and only some to plaintiff. It is not recorded how much was paid to suppliers or the plaintiff. Again the first defendant breached the contract by:-

(a) Declining to finance the packaging of flowers.

(b) Declined to pay air freight for flowers and therefore the flowers withered.

(c) Declined to release the shippers funds.

Furthermore, the method for disbursing the loan the bank (first defendant) required would be authorized to pay suppliers in writing and would obtain receipts. These receipts would be accounts documents to be supplied to the plaintiff. Despite demands these accounts have never been supplied to the plaintiff. It is admitted that for along period statements and bank documents got lost. Therefore it must be concluded that the statements exhibited from September 1991 to June, 2008 amounting to Kshs.168,065,347.80 less Kshs.14,468,937.35 is all interest debited in account. It is manufactured accounts. Plaintiff states that when the first defendant declined to fund, the project collapsed. The operations were commence din 1989 not 1991. By 11/1/2005 the outstanding sum was Kshs.122,680,404/= but the demand letter was written for Kshs.70,100,456/=. Final notification of sale as for Kshs.70,102,456/= on 22/8/2007 but outstanding sum in the statement on the same date was Kshs.167,384,841/=.

On 17/6/2008 a sum of Kshs.52,500,000/= was paid to Oraro & Co. Advocates by way of their fees. But this amount was paid out of defendant purchase price. In the final statement the sum of Kshs.45,900,000/= written off is not disclosed. The objections of the plaintiff to application dated 22/1/2009. It is submitted that the bank statement produced on 15th December, 2008 is erroneous incompetent and fraudulent whereas the inception of the loan was on 12/11/1989 the statements commenced in September, 1991. There is a period of several months between April, 1989 to September, 1991 when the entry of balance of Kshs.14 million arose. The plaintiff prays for an account in the plaint. The plaintiff is entitled to a proper account as contemplated under Order 19 Rules (1)(2) of Civil Procedure rules. There are serious contradictions. On 17/7/1995 the defendant advised the plaintiffs by letter that its indebtedness outstanding was Kshs.3,492,934/= and on same date the statement read kshs.21,156,426.02. Cross-examined Chris Theuri admitted that the account had problems and was erroneous. It is submitted that on 20/5/2006 first defendant advised its lawyers that a statement showed Kshs.24,202,456.46 outstanding and an amount of Kshs.45,900,000/= was written off which would bring the total to Kshs.70,102,450.40. However, at that date the statement released by the bank showed a sum of Kshs.143,844,249.59.

On issue of Res Judicata, the plaintiff refers to the case of **Manjit Sigh Sethi and Others versus Paramount V. Bank and 2 Others** HCCC No.518 of 2004. The court observed that the doctrine of ***Res Judicata*** can only be raised under **Section 7** of **Civil Procedure Act** if the suit in reference was finally heard and determined on merit. The references it is submitted that the correct suit raises important issues pertaining to fraud and accounts. On issue of consent decree which was recorded by ***Hon. Judge Githinji***, (as he was) prior to the recording, the plaintiff caused to be paid Kshs.6,000,000/= to the first defendant on or about 14/12/1994. On the issue of interest it is clear the bank was charging interest at the rate of 17% and above.

During the cross-examination, Mr. Theuri stated that plaintiff account was dormant and hence no interest was chargeable. However, a glance at the statements supplied interest only was charged every day of that

long period and in fact all sums said to be outstanding were pure interest. No deposits were recorded.

On issue of fraud, it is to be noted that a letter of 17/7/1995 demanded Kshs.3,492,934. A letter of demand dated 8/3/1996 demanded Kshs.44,358,583/=. A letter of 29/5/2006 exposed that the bank had lost records of this account and that the only records were from December, 2003 to May, 2006 and also the bank had written off Kshs.45,900,000/= in 1996. Therefore the amount claimed of Kshs.70,000,000/=is not based on any correct account. It is not proved to be due. The balance stated in first page of statements namely 1/9/1991 of Kshs.14,468,937.45 is not known where it arose form. No transactions previous are shown. Balance brought forward should indicate the commencement of the account. The way the account is maintained is indication of fraud. The first defendant made up accounts to deceive the plaintiff that Kshs.70,000,000/= was due and owing without any basis at all. And that the first defendant sold the securities on that reason alone.

On issue of Res Judicata, the court has perused the rulings and judgments referred to by first defendant:-

(1) HCCC No.1219 of 1992 it was claiming Kshs.13,125/=. In the same case on 4/5/1992 the suit was settled by consent so that the plaintiffs were to pay the total outstanding sums by July, 31st same year. In default, be at liberty to proceed with the realization of the two securities. Accordingly to statements at 31st July, 1992 the amount was Kshs.16,859,166.20 .

(2) In the HCC No.1520/96 was filed by guarantor not by the plaintiff.

(3) Also HCCC No.1520 of 1996 was by guarantor.

(4) HCC No.1611 was by guarantor.

(5) Nyeri HCC No.24/1997 was by the plaintiff herein.

The plaintiff has cited several authorities including **Civil Procedure Act Cap 21 Section 7** and **Mulla Procedure Code Act V of 1908 16th Edition** where it is stated that:-

"In order to decide the question whether a subsequent proceeding is barred by ***Res Judicata***, it is necessary to examine the question with reference to:-

(1) The competence of the court.

(2) The parties and presentations.

(3) Matters in issue.

(4) Matters which ought to have been made ground for defence or attack in the former suit.

(5) The final decision.

In order that a defence of Res Judicata may succeed it is necessary to not only show that the cause of action was the same but also that the plaintiff had an opportunity of getting the relief which he is now seeking in the former proceedings. In the suits mentioned it is the applications which have been dismissed in which injunctions have been sought. The parties have not been heard in all the issues. It is stated in **Mulla** page 163 "***it is well known that Res Judicata is a mixed question of fact and law. It has to be specifically pleaded and the party relying on principle of Res Judicata should place before the court all material particulars which would be sufficient to give a finding whether the particular case is barred by the principles of Res Judicata."***

The defendants are relying on the ruling delivered by this court in this case on 3rd November, 2008. In that application the applicants were seeking orders to restrain the 1st and 2nd defendants from taking

possession of the **LR10075** in Thika District and that the first defendant be ordered to produce accounts of the plaintiff account No.3150431651017 pending hearing and determination or until further orders of this court. The said property was sold on 19/9/2007 in favour of 2nd defendant who was proposing to take possession. The bank caused an affidavit in opposition by one Chris Theuri an employee who listed several suits which were said to have been heard and determined as between plaintiff and his guarantor. They swore that all matters are now ***Res Judicata.***

On my part, I said "***I have come to the conclusion that the mattes already determined. In this dispute have been Res Judicata. No matters were stated as determined. All matters relating to the exercise of power of sale by first defendant are now Res Judicata."*** It is the issue of exercise of power of sale that the court said is ***Res Judicata***.

However, it has come to be that the first defendant has never supplied accounts to the plaintiff (borrower) since 1989 when the account was opened. The court ordered that the first defendant to produce the same. It is clear the said accounts are manufactured. This court has commented on the same above. On the date the so called purchase price was credited in that account on 17//7/2008being Kshs.52,500,000/= the balance was Kshs.168,065,347/=. That was selling the land below half purchase price. That under sale indicates fraud and the negligence of the chargee in selling the chargor property without protecting his interest.

The plaintiff has referred to authorities **HCCC 1389 of 2001 Kibogy versus Chemweno** Where judgment was set aside and an order for restitution substituted. It was also held that condition precedent the matter must be directly and substantially between some parties. **Ngunyari versus Ngunayu** where the court held that the doctrine of ***Res Judicata*** could not apply as some party was not in the previous suit. The case of **Manjit Singh Sethe and others versus Paramount Universal Bank and Others. Hon. Waweru Judge,** said "***in as much as all the issues between the parties have never been heard and finally determined. I do not find that the suit and application are an abuse of process of court".*** He dismissed the preliminary objection. Matter finally proceeded.

Regarding **Order 6(13)** on striking of pleadings out, the plaintiff refers to **Mulla again Act V of 1908** where it is quoted **Knowles versus Roberts (1888) 38 CD 263:-**

"***It seems to me that the rule that the court is not to dictate to parties how they should frame their cases is one that ought always to be preserved sacred. But the parties must not offend against the rules of pleading which has been laid down."***

In this suit after disclosures on the accounts, I do not see that there is a pleading which is scandalous and a vexatious or an abuse of court process. The plaintiff discloses a cause of action in that there is no evidence for the reason that the demand of Kshs.70,000,000/= was made and owing was made how it arose and why the security was sold for Kshs.70,000,000/= when the balance was stated as Kshs.168,065,347/=. It is possible that the plaintiff has requested order of the court for accounts but the same has not been produced. It is only this time that the first defendant has tried to furnish such an account which is not satisfactory. It exposes many more disputes and brings to doubt if the right of sale by the bank had indeed arisen and whether there was any money outstanding and due to the bank.

There are several authorities cited by all parties and the court have perused them. It is clear that there are two opinions in determination. Firstly, that once an auction has been held the transaction is impeachable. The other opinion is that there are circumstances the court can open up the transaction and if necessary cancel and nullify the transaction. The court cannot close its eyes to illegalities and unlawfulness disclosed under the guise of technical objections. The first defendant has not shown how the amount of Kshs.70,000,000/= was arrived at. It is admitted that bank documents in the plaintiff account were lost. The statements produced do not show some balance as the amount demanded. These issues can only be explained at a hearing in a trial. These issues are not ***Res Judicata***. They had not been disclosed before because although the plaintiff had applied for accounts, none had been ordered or produced.

I am of the view that the plaintiff is entitled to a hearing. The second defendant has not been in this

transaction of lending and borrowing money between plaintiff and the first defendant. However, if the court would find it justified for any reason to nullify the sale transaction, the second defendant would be an interested party. Therefore he sticks in the suit.

Regarding the application dated 16/2/2009, it is my view that the plaint cannot be struck off since it contains substantial claim on accounts. Application dated 22/1/2009 has answered this. The issue of accounts can only be resolved at the hearing of this suit.

Both applications are dismissed with costs to the plaintiff.

Orders accordingly.

Dated, **Signed** and **Delivered** at Nairobi this 17th Day of November, 2009.

JOYCE N. KHAMINWA

JUDGE