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

Civil Case 757 of 2009

BASIL CRITICOS..... PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED(As the successor in business to Kenya National Capital Corporation Limited "KENYAC".....**...DEFENDANT**

R U L I N G

This application has been brought by way of Notice of motion under Sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act, Section 69C of the Transfer of Property Act. It seeks the following orders:

1. The 1st Defendant do forthwith be ordered to pay to the Plaintiff or his advocates the sum of Kshs.

35,000,000 being the residue of the money so received by the 1st Defendant presenting the surplus of the proceeds of sale from the Plaintiff's property L.R. No. 5865/2, I.R No. 2097 measuring 15,994.5 acres or thereabouts within 7 days of the order of this court.

2. An order directing the 2nd Defendant to allow the Plaintiff's authorized valuer Mwaka Musau Consultants unlimited access to the property L.R. No. 5865/2, I.R No. 2097 measuring 15,994.5 acres or thereabouts for purposes of carrying out a valuation report in respect for the claim for damages as against the 1st Defendant

3. Any further relief that this Honourable Court may deem fit.

4. Costs be in the cause

During the hearing of the application, it became evident that the plaintiff viz, Basil Criticos is a co-owner of the property - LR. No 5865/2, IR No. 2097 measuring 15,994.5 acres with Mama Ngina Kenyatta. The correspondence exchanged between the parties also reveals that the plaintiff is a former Assistant Minister. It is also not in doubt, that between the year 1990 and early 1991, a limited liability company called Agro Development Company Limited, in which the plaintiff was a director and shareholder borrowed the sum of Kshs.20,000,000/= from Kenya National Capital Corporation Limited (KENYAC). The plaintiff revealed in his affidavit that in his capacity as guarantor he executed a legal charge dated 29th January, 1991 over the above property which is owned by him and Mama Ngina Kenyatta as tenants-in-common. According to the plaintiff, it was understood that Mama Ngina Kenyatta did not covenant to pay the principal money, interest and other charges except that the mortgaged property and the interest therein is charged as security for the repayment by the borrower of all sums of money due thereunder. Prior to the hearing of the application both learned counsels presented to the court, skeleton arguments to support their clients. Briefly, the plaintiff's counsel, listed three main issues:

(1) Is the plaintiff's liability under the charge limited to the sum of Kshs. 20 million?

(2) Has the bank or KENYAC issued a valid statutory demand notice?

(3) Is the bank a trustee of the surplus of the proceeds of sale and therefore obliged by law to pay the sum of Kshs. 35 million to the plaintiff?

On the other hand, the defendant/respondent has raised the following issues to be determined by the court:

(a) That the court has no jurisdiction to hear or determine the plaintiff's suit and the underlying application.

In support of the above, the learned counsel referred the court to paragraphs 3 and 4 of the defence, and paragraphs 6, 7 and 8 of the affidavit, and paragraphs 4, 5, 6, 7, 8 and 9 of the further affidavit.

(b) That in any event, the suit and application are an abuse of the court process.

(c) That the application amounts to a backdoor request for summary judgment, and the court has no power to grant an order which would amount to dismissal of the defendant's defence.

(d) The prayer in the application for a declaration as to the validity of the statutory notice is statute barred by virtue of the time.

Since the respondent's counsel has raised the issue of jurisdiction of the court, it is incumbent on me to deal with the same. First, section 6 of the Civil Procedure Act, Cap 21 states as follows:

> "***No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.***
>
> *Explanation. –* ***The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court."***

When the above was raised, I requested the Deputy Registrar to bring up the above files for my perusal and consideration. My investigations revealed the following facts.

(1) HCCC No. 108/2006 (Milimani)

Parties: Agro Development Co. Limited vs. National Bank of Kenya Limited

- Pending the hearing of a notice of motion by the Defendant to dismiss the suit for want of prosecution.
- Charge of Kshs.159,634,350.55
- L.R. No. 5865/2 Taveta

(2) HCCC No. 292/2007 (Milimani)

Parties: Basil Criticos vs. National Bank of Kenya Limited

- Case pending with no hearing date
- Charge of Kshs.20 million.
- L.R. No. 2097 Taveta – LR. No. 5865/2

(3) HCCC No. 270/2007 (Milimani)

Parties: Arnos Mutuku Mutungi & Another vs. Basil Criticos & Others

- Case pending with no hearing date
- Property No. L.R. No. 5865/2 Taveta
- No charge

(4) HCCC No. 1420/2007

- Not filed at Milimani

(5) HCCC No. 132/2009

- File being traced at the registry.

From the above, analysis, it is crystal clear that in the first three matters, the applicant and the disputed land are deeply involved and connected. In addition to the above, the relevant charges are the crucial issues. Nobody can honestly deny the connection between the above cases and the present one. In the case of **GIMALU ESTATES LIMITED & REDHILL FLOWERS (K) LIMITED VS. INTERNATIONAL FINANCE CORPORATION & NATIONAL BANK OF KENYA LIMITED** it stated as follows: -

> "***In my view the actions of the Plaintiffs is a contemptuous game to***

contaminate the due process of the court with a view to create a conundrum or contagious disease within the corridors of justice.

I am saying that the conduct of the plaintiffs amounts to a conundrum to contaminate the due process simply because different judges would give different and contradictory judgments over the same subject matter, that would be difficult to resolve. If such were to happen parties would hold the court in contempt for the contagious disease created by different judges arriving at different decisions. It appears that is the main and design employed by the plaintiffs in their multiple and piecemeal litigation over the same subject matter."

Though the views of Warsame, J. are not binding on this court, I do wish to state that it is desirable and significant for parties to ventilate all the issues in a case in one file to enable us to hear all the parties and deliver a well reasoned and informed judgment. In that way, cases will be handled expeditiously and efficiently without clogging the judicial system through piecemeal litigation. Apart from the above, it is obvious to this court that in the event that I concede to the application it will in effect result in summary judgment against the defendant/respondent. No doubt, the law provides for summary procedure under order XXXV of the Act which states as follows: -

"***1(1) In all suits where a plaintiff seeks judgment for –***

(a) A liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose tem has expired or been determined by notice to quit or before forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mense profits.

(2) The application shall be made by motion supported by an affidavit either of the Plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) sufficient notice of the motion shall be given to the defendant which notice shall in no case be less than seven days."

Unfortunately, the present application was not brought under the above provisions of the law. Neither was summary judgment pleaded at any stage.

In conclusion, I am of the considered opinion that the parties should consolidate all the pending cases to enable us determine the rights of the parties in an expeditious and efficacious manner. The upshot is that I hereby dismiss the application given the above clear position of the law. Costs to the respondent in any event.

MUGA APONDI
JUDGE

Ruling read signed and delivered in open court in the presence of:

Karungo for Gichuhi - Applicant’s Counsel

Rachuonyo - Respondent’s Counsel

Mwendwa for 2nd Respondent

MUGA APONDI
JUDGE
3RD DECEMBER, 2009