



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

Civil Case 560 of 2006

HENRY WANYAMA KHAEMBAPLAINTIFF

VERSUS

STANDARD CHARTERED BANK OF KENYA LIMITED.....DEFENDANT

RULING

The plaintiff is the registered owner of property known as L.R. No.209/3890 Nanyuki road Industrial area of Nairobi. Through a charge dated 5th November 2002 the Plaintiff charged his property to the defendant to secure a loan facility to the defendant's customer. The plaintiff was a guarantor by a deed dated 1st November, 2002 for the said facility.

There was a default in the repayment of the loan and the defendant put up the charged property for sale on 28th January, 2005. The plaintiff contends that the scheduled sale of his property was illegal as no right of sale had accrued and the purported exercise of the power of sale is in contravention of the law. And as a result the plaintiff filed Milimani HCCC No.45/2005 against the present defendant and 3 others seeking inter alia:

- (1) a permanent injunction to restrain the 1st defendant either by itself, servant and/or agent from swelling, alienating, disposing and/or in any way interfering with the plaintiff's ownership and/or possession of L.R. No.209/3890.**
- (2) A declaration that the 3rd and 4th defendants should indemnify the plaintiff for any payment, loss and/or costs incurred in redeeming L.R. No.209/3890.**

The plaintiff then sought an order of injunction which was heard before **Ochieng J.** And in a well reasoned ruling dated 19th July, 2005 the court dismissed the plea for injunction as unmeritorious. **Justice Ochieng** in dismissing the application for injunction held;

“In analyzing the material which was placed before the court, I have already come to the conclusion that the plaintiff has not made out a prima facie case with a probability of success. He does not dispute the fact that he executed the legal charge over the suit property. He does not deny that the 1st defendant (Bank) lent money to the 4th defendant and that the security was in the form of the legal charge over the suit property. He also acknowledges that the 4th defendant did not service the loan, thus implying that the debt is not disputed. He has exhibited the legal charge which bears a certificate confirming that an Advocate had explained the effect of section 69(1) and 100A of the Transfer of property Act 1882 of India. And that the was satisfied that he understood the same.

I have also found on the basis of evidence at the moment available to the court that the statutory notice was served upon the plaintiff....In the light of the fact that the notice period is THREE MONTHS FROM THE DATE OF SERVICE I hold that is in compliance with the law. For all those reasons, I cannot see that the plaintiff is likely to get a permanent injunction to stop the 1st defendant from realizing the security”.

On 5th October, 2006 the plaintiff's then Advocates **M/S Nelson Harun & Co. Advocates** filed a notice of discontinuance of the said suit dated 4th October, 2006. It is pertinent to note that the Advocates who filed HCCC No.45/2005 were **M/S Gachiri Kariuki & Kiai** Advocates. And on 6th October 2006 the present suit was filed by the plaintiff against the defendant seeking interlia an order of permanent injunction restraining the bank by itself, its servants and/or agents from selling by public Auction or otherwise the plaintiff's parcel No.209/3890 Nairobi. The said plaint was accompanied by a verifying affidavit sworn by the plaintiff who avers;

“That I confirm that all averments are correct and are as per my instructions”.

According to Order 7 Rule 1(1) (e);

“The plaint shall contain the following particulars;

- (e) an averment that there is no other suit pending and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter**
- (2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.**
- (3) The court may of its own motion or on the application of the defendant order to be struck out any plaint which does not comply with subrule (2) of this rule”.**

I have gone through the verifying affidavit accompanying the plaint subject of this suit and it is clear beyond doubt that it does not disclose the existence of the earlier suit which was between the same parties over the same subject matter. It is therefore clear that the verifying affidavit to this suit does not comply with the clear provision of Order 7 rule 2 of the Civil Procedure Rules, thus implying the facts and averments in the plaint are not factually true.

No doubt the plaintiff filed the present suit with the full knowledge that the same was contrary to the provisions of the law prohibiting the subsequent filing of suits based on the same facts over the same subject matter. The plaintiff filed a Chamber Summons application at the time of filing the present plaint, which was heard exparte on 11th October, 2006. It is alleged that on the day of the interpartes hearing of the application, the defendant was served but failed to attend the hearing. And after hearing the application exparte **Lady Justice Kasango** in a ruling dated 17th October, 2006 issued an order of injunction in favour of the plaintiff. The grant of the injunction was based on the fact that the evidence adduced by the plaintiff was uncontroverted and/or unchallenged. And the court after assessing all the uncontroverted evidence presented before court found the plaintiff had undoubtedly shown a prima facie case with a probability of success.

The defendant has now filed an application dated 24th August, 2007 seeking;

- (1) THAT the contents of the plaint in their entirety be struck out for reasons that the issues raised contradict and contravene the Oaths Statutory Act Chapter 15 of the Laws of Kenya and further the issues raised are Res judicata and cannot be maintained in law as an earlier suit namely High court civil Case No.45 of 2005 (Milimani Commercial Courts) between Henry Wanyama Khaemba vs. Standard Chartered Bank Kenya Limited and 3 others was decided upon due process of the law and upon legal merits in favour of the Defendant/Applicant and the suit herein is accordingly res judicata.**

(2) THAT the Plaintiff/Respondent is estopped and precluded from maintaining his claim as against the Defendant/Applicant by reason that the Defendant/Applicant's right of exercising its statutory power of sale over L.R. NO.209/3890 is proper valid and enforceable under the perfected charge dated 5th November, 2002.

(3) THAT the Plaintiff/respondent's claim as against the Defendant/Applicant be dismissed with costs by reason that the same is frivolous and vexatious and an abuse of the process of the court and is contrary to the principle that in the public interest there should be an end to litigation.

Mr. Muturi learned counsel for the respondent/plaintiff submitted that the grounds of res judicata does not avail itself to the applicant. He contended the plea does not avail itself to the applicant because if the plea was to be sustained it ought to have been raised at the stage of hearing the injunction application granted in favour of the plaintiff. He submitted that HCCC No.45 of 2005 has no basis for the plea of res judicata. He contended the said case was never heard on merit and in fact that suit filed by the plaintiff was withdrawn. He further contended that the plea of res judicata applies where the same parties are litigating over the same subject matter. And from the exhibit No. 7 and 8 would show the parties in the earlier suit are 4 defendants while in this suit there is only one defendant. Hence the parties are different and the issue is also different.

Mr. Muturi further submitted that it is a well established principle that pleadings would not be terminated without proper caution. And since the plaintiff is challenging the interest charged on his account by the bank and since the plaintiff was a guarantor to a principal debtor then he should be allowed to agitate the cause of action in this present suit.

I have considered the pleadings in HCCC No.45 of 2005 and the ones filed in this suit. I have also considered the affidavits in support of the present application and the one filed by the defendant in reply to the same. I have also taken into consideration the submissions of both sides. The issues for determination is whether the issues in the present suit were the same and/or similar as in HCCC 45 of 2005. Secondly whether the parties and the cause of action as in HCCC 45 of 2005 is the same or similar as in the present suit. The disputed fact is that both the present plaintiff and the defendant herein were plaintiffs and defendants in HCCC 45 of 2005. The present plaintiff was the plaintiff in that suit while the defendant was the 1st defendant in the earlier suit. An application for injunction was made by the present plaintiff in HCCC 45 of 2005 which was canvassed before **Ochieng J** and which was dismissed on merit. The present plaintiff did not challenge the refusal of Ochieng J to stop the realization of the security property in which the plaintiff has obtained an order of injunction in the present suit. In essence the question is whether the suit in the present form legally challenges the orders of **Ochieng J** of 19th July, 2005. Those orders are basically enforceable. In my view the manner in which the plaintiff has brought this suit is indirect challenge to those orders. It is clear no attempts have been made to challenge those orders through review or appeal. The orders of **Ochieng J** cannot be discharged and/or overtaken through filing a new suit over the same cause of action and getting an ex parte injunction.

It is clear in my mind that parties cannot be allowed to go on in litigating the same subject matter with the same parties before different courts of equal jurisdiction simply because he makes cosmetic changes to the parties and often times the issues in an attempt to get what could not have been obtained in the earlier suit involving the same parties over the same subject matter. It is often desirably that there ought to be an end to litigation no matter how unpalatable and/or unpleasant the result may be to the aggrieved party. The discontinuance of the former suit, the failure to disclose the refusal of **Ochieng J** to grant the injunction sought and the filing of the present suit were all designed and/or employed to mislead this court and defeat the right of the bank to exercise its statutory power of sale.

It is unfortunate that **Lady Justice Kasango** was not aware of the earlier ruling of **Ochieng J** refusing the grant of an injunction to the plaintiff. Had she been aware I do not think the plaintiff would have been in a position to convince **Justice Kasango** to grant the orders she granted. But with non disclosure of essential and material evidence by the plaintiff and the legal ingenuity employed by his advocates the Honourable Judge was misled to grant an order of injunction which the plaintiff was not legally entitled. In my humble view it was incumbent upon the plaintiff to disclose that he had discontinued a similar suit

filed before this court after his plea for an order of injunction was disallowed. But without disclosing the reason for the said discontinuance and without notice to the bank it was not open for him to file the present suit and seek an order already refused by Judge sitting in Milimani commercial court and who is of similar jurisdiction.

In my humble view parties must go to court with all their causes of action and must sue all the persons they ought to sue. The doctrine of res judicata prohibits parties by suing in bits and pieces or giving a subsequent case a legal face lift by removing parties who are part of the earlier dispute and/or case filed and determined. The plaintiff was aware that HCCC No.45 of 2005 concerned the same subject matter as in the present suit. And if there was a defect in the earlier suit the opportunity of amendment was not exercised. The earlier suit was challenging the sale of the plaintiff's property which challenge was lost through the ruling of **Ochieng J** delivered on 19th July, 2005. In my humble view since application of injunction was dismissed in HCC 45 of 2005 and the plaintiff discontinued that suit and filed the present suit and obtained an order of injunction, the said action amounts not only to a res judicata but a fragrant abuse of court process. I take the view that the present suit should not have been filed without sufficient reasons and before payment of the costs incurred in the earlier suit by the bank. That has not been done by the plaintiff. And since the issues and the parties are similar and/or the same, the plaintiff by removing three defendants from this suit cannot purport to change the subject in this suit. In any case the three other defendants left out in this suit are not essential to the determination of the suit. The important thing is that in both suits the plaintiff intends to stop and/or injunct the defendant from realization of the security.

In **HCCC 958 of 2001 Milimani Commercial Court Nairobi - George Omondi vs National Bank of Kenya Limited and 2 others Ringera J** as he was then held;

“I accept the submissions by counsel for the defendants that the doctrine of res judicata would apply not only to situations where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction but also to situations where either matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit. They are bound to bring all their case at once. They are forbidden from litigating in installments”.

It is fundamental precedent to the plea of res judicata that the previous suit should have been heard and determined by a court of competent jurisdiction. No doubt the question of whether the plaintiff is entitled to an order of injunction in respect to the suit property was made an issue in HCC No.45 of 2005 and **Ochieng J** upon considering the case of each side decided that the plaintiff was not entitled to the orders sought. In short he gave a green light to the bank to realize and/or sell the suit property. The essence of the present suit and the orders obtained ex parte before **Kasango J** is meant to disregard and/or discharge the orders refused by **Ochieng J** in the earlier suit. In my humble view the present suit involves the same subject matter as in earlier suit and what is at stake in the present suit is similar and/or the same as in the earlier suit. The plaintiff herein was also the plaintiff in the earlier suit while the defendant was the 1st defendant in that suit hence the present parties are litigating in the same capacity over the same subject matter. I do not think the withdrawal of the suit where the battle was lost by the plaintiff can be a legitimate reason to enable the plaintiff to seek similar orders as was earlier refused. I take the view that the discontinuance was meant to circumvent and/or defeat the court process since the plaintiff wants to have a bite at the cherry for the second time. I think the plaintiff has used the process of the court wrongfully in attempting to seek yet again orders very similar and/or the same to those sought in the earlier case and refused.

As stated earlier the issues in this suit had been adjudicated upon and determined as far as the issue of injunction is concerned. The central issue in the present suit is whether the plaintiff is entitled to an order of injunction and I think that has been determined by **Ochieng J** in his earlier ruling. It is not the case of the plaintiff that it has discovered new issues or facts which were not brought to the attention of the court in the earlier suit. The fact that the plaintiff has failed to disclose the existence of the earlier suit and refusal of **Ochieng J** to grant an injunction against the bank is a clear testimony that the defendant acted

in bad faith.

I therefore make a finding that the plaintiff's alleged cause of action against the defendant in this suit is frivolous, vexatious and without any basis or foundation. I also agree with the Advocate for the defendant/applicant that the plaint in this suit has been instituted in bad faith for it is speculative in that the plaintiff seeks to recover what was lost in earlier suit. It is also my position that the essence of the present suit was to enable the plaintiff to buy time which he achieved.

All in all, I am in agreement with the advocate for the defendant that this suit as expressed is res judicata and an abuse of the court process. Accordingly the orders granted by Kasango J on 17th October, 2006 is hereby discharged and the suit struck out with costs to the defendant.

Dated and delivered at Nairobi this 9th day of April, 2008.

M. A. WARSAME

JUDGE