

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 265 of 2008

AGGREY PETER THANDE PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LIMITEDDEFENDANT

R U L I N G

Application by Notice of Motion dated for 23/6/08 was scheduled for hearing but the defendant counsel filed a Notice of Preliminary Objection on the ground that the suit is res judicata under Section 7 of the Civil Procedure Code Act. The parties agreed that each of them will file written submissions for court to decide on the issue.

The provisions of law cited namely Section 7 of Civil Procedure Code Cap.21 states:

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been 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.”

The plaintiff submits that the Preliminary Objection is misconceived. The previous suit was a claim for outstanding debt of Shs.22,757,181/45. The issue there was whether the plaintiff should be compelled to pay. It is to be noted that the debt was secured. In present suit the issue is not whether plaintiff is indebted to defendant. The defendant was not seeking orders to dispose of suit property but to compel the plaintiff to pay the debt because they were unable to sell their security. The advertisement for sale of property purportedly in exercise of powers of sale pursuant to the charge, in the circumstances a new cause of action arose. I have perused the plaint filed in this court. The plaintiff seeks to restrain the exercise of right of sale by the defendant. It is clear that in HCC No.508/2003 the defendant compromised its rights when it entered in a consent with the plaintiff. The consent order is not breached and the plaintiff herein has protection of that court order until he shall make default of any one instalment. The defendant’s right now is to execute for the unpaid balance in case of default.

The plaintiff has a new course of action to prevent the purported sale of the property while he is able to comply with consent order. This land is registered under Registered Land Act Cap.300. The remedies of chargee are listed under Section 74 of the Act and are consecutive not concurrent. The defendant having chosen to sue for the money and having entered into a compromise on how the money shall be repaid there is no right to sell the property while the order for payment is still valid.

I have read the authorities relied upon by the respondent. It is very clear that the issues now arising could not have been raised at that other suit.

I therefore find no merit in the Preliminary Objection and I overrule the same with costs to the plaintiff.

DATED and DELIVERED at Nairobi this 15th day of July 2008.

JOYCE N. KHAMINWA

JUDGE