



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

Civil Case 728 of 2007

ISAAC GATHUNGU WANJOHI..... 1ST PLAINTIFF

ISAIAH KIRINDI WAMBUGU MUTONYI..... 2ND PLAINTIFF

VERSUS

MONIER TWO THOUSAND LIMITED..... 1ST DEFENDANT

A1 OUTDOOR (K) LIMITED2ND DEFENDANT

BY WAY OF COUNTERCLAIM

A1 OUTDOOR (K) LIMITED PLAINTIFF

VERSUS

ISAAC GATHUNGU WANJOHI..... 1ST DEFENDANT

ISAIAH KIRINDI WAMBUGU MUTONYI..... 2ND DEFENDANT

RULING

By chamber summons dated 06.02.08 stated to be brought under sections 3, 3A, 5 and 6 of the Civil Procedure Act, Cap.21 and Order VI rules 13 (1) (b) and (d) and 16 of the Civil Procedure Rules, the defendants in the Plaint herein applied for the following orders:-

1. That the plaintiffs' suit be struck out and/or stayed pending the hearing and determination of H.C.C.C. No.450 of 1995, Isaac G. Wanjohi & Isaiah Kirindi Wambugu Mutonyi -vs- Rosaline Macharia.
2. That the costs of this suit and this application be borne by the plaintiffs in the main suit.

The grounds upon which the application is based are:-

- i. That this suit has been filed in contravention of the provisions of section 6 of the Civil Procedure Act as the subject matter in issue herein is directly and substantially in issue in H.C.C.C. No.450 of 1995, Isaac Gathungu Wanjohi & Isaiah Kirindi Wambugu Mutonyi -vs- Rosaline Macharia which suit is pending in court awaiting hearing and determination.
- ii. That the defendants in the main suit claim and derive interest from the Defence in H.C.C.C. No.450 of 1995 and the plaintiffs' suit against the defendants raises substantially similar questions of law and fact as the ones arising in H.C.C.C. No.450 of 1995 will have a bearing on the present suit and it is only fair and just for the plaintiffs' suit to be

stayed to avoid a situation where there would be conflicting judgments arising from the same subject matter.

iii. That the outcome in H.C.C.C. No.450 of 1995 will have a bearing on the present suit and it is only fair and just for the plaintiffs' suit to be stayed to avoid a situation where there would be conflicting judgments arising from the same subject matter.

iv. That the grant of the orders sought will save the court's time and avoid duplication of proceedings.

The application is supported by the affidavit of Stephen Wanjau, General Manager of the 2nd defendant company sworn on 06.02.08.

At the hearing of the application before me on 24.09.08, the defendants/applicants were represented by learned counsel, Mr M. Osundwa while the plaintiffs/respondents were represented by learned counsel, Messrs K. Wandai and S. Waiganjo.

Defendants'/applicants' counsel contended that the suit herein was brought in bad faith without disclosing the existence of H.C.C.C. No.450 of 1995 which according to defendants'/applicants' counsel involves the same property. i.e. L.R. 209/12052 situate in Nairobi at the corner of Mombasa Road and Embakasi Road. Defendants'/applicants' counsel also referred to the interim prayers in H.C.C.C. No.450 of 1995 and, as I understood it, equated those interim prayers with the prayers in the present suit. It was defendants'/applicants' counsel's case that the property concerned is the same in both cases and referred in that connection to paragraphs 3 and 4 of the Defence in H.C.C.C. No.450 of 1995 and to paragraphs 8 and 18 (b) of the counterclaim in the said Defence. Defendants'/applicants' counsel complained that it has taken many years for the plaintiffs/respondents herein without prosecuting H.C.C.C. No.450 of 1995 and that instead they filed the present suit seeking the same prayers.

Defendants'/applicants' counsel drew attention to interim restraining orders issued on 15.08.95 by the court in H.C.C.C. No.450 of 1995 against the defendant Rosaline Macharia and pointed out that after obtaining those interim restraining orders, the plaintiffs never set down that suit for hearing.

Defendants'/applicants' counsel took issue with averment 8 in the present suit that there is no other suit pending and that there have been no previous proceedings in any court between the plaintiffs and defendants in respect of the subject matter of this suit. According to defendants'/applicants' counsel, the aforesaid statement by the plaintiffs/respondents herein is not true.

It was also defendants'/applicants' counsel's contention that the verifying affidavit to the present plaint contravenes sections 34 and 35 of the Advocates Act, Cap.16 in that it does not bear the endorsement 'Drawn and filed by', as required by those sections. Defendants'/applicants' counsel also faulted the affidavit of John Dominic Obel sworn on 07.05.08 in connection with the suit properly L.R. 209/12052 for similar reasons.

Finally, defendants'/applicants' counsel cited some decided cases to make the same points he had urged. The cases so cited include:- Majani Mingi Sisal Estates Ltd -vs- Kenya Commercial Bank Ltd and 2 others, High Court (Nakuru) Civil Case No.111 of 2006 which, *inter alia*, noted that the Kenya Court of Appeal had in Pop in (Kenya) Ltd and 3 others -vs- Habib Bank A G Zurich CA No.80 of 1988 adopted the following holding from Yat Tung Investment Co. Ltd -vs- Dao Heng Bank Ltd [1975] A C 581, namely:

'Where a given matter becomes the subject of litigation in, and of 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 where special circumstances permit) permit the same parties to open the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not 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 a point upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward.'

Defendants'/applicant' counsel urged this court to strike out the present suit with costs.

On the other hand, plaintiffs'/respondents' counsel opposed the application, relying on the replying affidavit of Samuel Wamutu Waiganjo sworn on 07.05.08.

It was the plaintiff's/respondents' case that the present suit and H.C.C.C. No.450 of 1995 are not substantially the same in that:-

- a) In H.C.C.C. No.450 of 1995 there is only one defendant (Rosaline Macharia) who is not a party to the present suit.
- b) Prayers in the present suit are different from prayers in H.C.C.C. No.450 of 1995.
- c) The two suits have different parties and different prayers, and that only the plaintiffs are common to both suits.

Plaintiffs'/respondents' counsel in the present case denied a claim that the plaintiffs in H.C.C.C. No.450 of 1995 took no steps from the time that suit was filed, otherwise they would not have obtained the interim restraining orders given on 24.07.95 and issued on 15.08.95.

With regard to Dominic Obel's affidavit sworn on 07.05.08, plaintiffs'/respondents' counsel submitted that it cannot be struck out as it is not the major supporting affidavit to the present case.

It was plaintiffs'/respondents' case that the fact of there being similarities between the two cases is no ground for striking out the present case.

Regarding the defendants'/applicants' complaint that the plaintiffs/respondents had not disclosed the existence of H.C.C.C. No.450 of 1995, plaintiffs'/respondents' counsel countered that there was no duty on the plaintiffs/respondents to make such disclosure because the previous suit, i.e. H.C.C.C. No.450 of 1995, had a different defendant from the defendants in the present case.

Plaintiffs'/respondents' counsel drew attention to his own list of authorities, especially the following cases:-

- a) Bulhan and Another -vs- Eastern and Southern African Trade & Development Bank [2004] I KLR 147 where the High Court (Ibrahim, J) held that:

'1. "Matter in issue" under section 6 of the Civil Procedure Act does not mean any matter in issue in the suit but has reference to the entire subject in controversy. It is not sufficient that one or more issues are in common. The subject matter of the subsequent suit must be covered by the previously instituted suit and not vice versa.'

- b) Ladopharma Company Ltd and 2 others -vs- National Bank of Kenya Ltd, High Court (Milimani) Commercial Courts Civil Suit No.1031 of 2001 to make the point made by the High Court (Ringera, J – as he then was) there that section 6 of the Civil Procedure Act does not bar the institution of a suit on the ground that another suit involving the same parties and subject matter is pending; and that what section 6 does is require a stay of the subsequent suit if there is an earlier suit involving the same parties and concerning the same subject matter pending before a court of competent jurisdiction.

Plaintiffs'/respondents' counsel submitted that the present chamber summons application dated 06.02.08 is far short of the requirements of Order VI rule 13 relating to the striking out of pleadings and urged this court to disallow the application.

In reply, defendants'/applicants' counsel contended that the 2nd defendant, A1 Outdoor (K) Limited derives possession of title from Rosaline Macharia the defendant in H.C.C.C. No.450 of 1995; that, therefore, section 6 of the Civil Procedure Act applies; and that the fact that Rosaline Macharia is not a party to the present suit is no ground for section 6 not to apply here.

With regard to Bulhan's case (*supra*), defendants'/applicants' counsel said the defendants/applicants are not pleading *res judicata* but abuse of the court process in bringing the present suit. Defendants'/applicants' counsel submitted that the court has inherent power to prevent proliferation of suits by striking out or staying them.

With regard to Ladopharma Company's case (*supra*), plaintiffs'/respondents' counsel submitted that the decision in that case is wrong since section 8 of the Civil Procedure Act bars the filing of suits filed in contravention of the rules.

Defendants'/applicants' counsel said the plaintiffs'/respondents' counsel had admitted that there are similarities between the two cases. It was defendants'/applicants' counsel's contention that the plaintiffs/respondents had a duty to disclose the existence of H.C.C.C. No.450 of 1995, which the latter had not done; that the court has power to strike out the present suit; and that the court should allow the present application.

I have given due consideration to the application now before court.

The present application is brought, *inter alia*, under section 6 of the Civil Procedure Act. The section provides:

'6. 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 proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.'

The essence of the present suit as per Complaint filed on 09.08.07 is summed up in paragraphs 5, 6 and 7 (wrongly also numbered 6) thereof, namely: that the plaintiffs are the legal owners of land parcel L.R. 209/12052 situated along Mombasa Road at the North Airport Junction; that in or about August, 2001 the defendants wrongfully entered and took possession of portions of the suit property and erected an advertisement billboard on the property and have thereby trespassed and continue to trespass thereon; and that the defendants have refused, neglected either to vacate the premises or to pay rent of Kshs.360,000/= per year for the advertisement billboards erected on the property. Accordingly, the plaintiffs prayed for judgment against the defendants as follows:-

1. A declaration that the plaintiffs are entitled to exclusive right of possession and occupation of all that piece of land known as L.R. No. 209/12052.
2. A declaration that the defendants whether by themselves or their servants or agents and/or otherwise howsoever are wrongfully in occupation of the suit property and are, accordingly, trespassers on the same.
3. An injunction restraining the defendants whether by themselves or their servants or agents and/or otherwise howsoever from erecting advertising billboards on the property.
4. Orders for the defendants to remove the billboard and to leave the site where it is erected.
5. Annual rent of Kshs360,000/= from 01.08.01 to the date of judgment and interest thereon at 21% per annum up to the date of payment.
6. General damages.
7. Costs of this suit together with interest thereon.

In a statement of defence and counter-claim filed on 05.09.07, the 1st defendant, *inter alia*, denied vide paragraph 8 that it ever occupied or trespassed upon L.R. No.209/12052. Vide paragraph 9, the 1st defendant made an alternative plea that the plaintiff's claim, being based on the tort of trespass, is time-barred. The defence also avered vide paragraph 11 that since the 2nd defendant was incorporated on 11.06.04 and commenced business on 11.05.05, it could not, *inter alia*, have been in occupation of L.R. No.209/12052.

On the other hand, the plaintiffs' claim in H.C.C.C. No.450 of 1995 is summed up in paragraphs 3, 4 and 5 of the complaint filed on 14.02.95, namely: that the plaintiffs are registered proprietors as tenants in common in equal shares of L.R. 209/12052 situate in Nairobi at the corner of Mombasa Road and Embakasi Road; that on or about 05.02.95 the defendant Rosaline Macharia and/or her agents trespassed upon the plaintiffs' aforesaid land and commenced construction thereon thereby causing damage to the land and preventing the plaintiffs from utilizing the land; that upon discovery of the trespass, the plaintiffs drew the defendant's attention thereto and called on the defendant to immediately withdraw from the land but the defendant refused and/or neglected to do so. Accordingly, the plaintiff filed H.C.C.C. No. 450 of 1995 praying for judgment against the defendant for:-

1. An order of injunction restraining the defendant her agents or servants from being or remaining on plot No. L.R. 209/12052 Nairobi or from continuing with the construction of any fences, buildings or erection of any structures on the said plot or from interfering with the plaintiffs' use and quiet enjoyment of the said plot.
2. An order directing that an inquiry as to damages for trespass be undertaken and the defendant to pay the plaintiffs such sum as may be found due upon such inquiry together with interest thereon at court rates.
3. Costs of this suit together with interest thereon at court rates.

It was contended by plaintiffs'/respondents' counsel that the 2nd defendant in the present case, A1 Outdoor (K) Limited derives possession, no doubt of the suit property L.R. 209/12052, from Rosaline Macharia/defendant in H.C.C.C. No.450 of 1995 and that, therefore, section 6 of the Civil Procedure Act applies to the case now before court.

The chamber summons application dated 06.02.08 now under consideration is supported by the affidavit of Stephen Wanjau, General Manager of the 2nd defendant company sworn on 06.02.08. One of the documents referred to in that affidavit is an agreement initially made on 05.07.05 for 3 years which expired but was renewed for a further 3 – year period on 30.07.07. The deponent annexed to his affidavit a copy of the current agreement dated 09.09.07 as ‘SW 1’. The agreement relates to a Lease by Rosaline Macharia of Advertising space in respect of L.R. No.209/11293/1 to A1 Outdoor Kenya Limited (2nd defendant to the main suit herein). It transpires from the aforesaid agreement that it relates to land other than the suit land, which is L.R. No.209/12052. *Ex-facie*, even if the 2nd defendant in the present case derived possession from Rosaline Macharia, i.e. defendant in H.C.C.C. No.450 of 1995, the possession relates to a different parcel of land L.R. No.209/11293/1 but not to the suit land L.R. No.209/12052. Therefore, the subject matter in the two cases is not the same. The records of the two cases show that the plaintiffs are the same in both cases. However, the defendants are different: in the present case, i.e. H.C.C.C. No.728 of 2007, the defendant’s are two bodies corporate whose memberships or directorships have not been made known to this court while the defendant in H.C.C.C. No.450 of 1995 is a natural person called Rosaline Macharia. The parties to the two cases are, therefore, not necessarily the same.

From the foregoing, the conclusion is inescapable that section 6 of the Civil Procedure Act relating to stay of suits is inapplicable to the case now before court. Order VI rule 13 (1) (b) and (d) providing for striking out of suits considered frivolous or otherwise an abuse of the court process does not apply to this case either. Accordingly, the chamber summons application dated 06.02.08 is hereby dismissed in its entirety, with costs to the plaintiffs/respondents.

Orders accordingly.

Delivered at Nairobi this 30th day October, 2008.

B.P. KUBO

JUDGE