

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 455 of 2008

TIMOTHY MWANGI NJUGUNA..... PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA.....1ST DEFENDANT

JOHN NJUGUNA TIMOTHY

t/a MUTHU ENTERPRISES2ND DEFENDANT

ANTONY
RULING

NAHASHON

NGUNJIRI.....3RD

DEFENDANT

On 11th August 2008, the plaintiff, Timothy Mwangi Njuguna filed the present suit seeking the following orders of the court: He sought a permanent injunction to restrain the defendants by themselves or their agents from interfering with or in any manner dealing with the plaintiff's parcel of land known as Loc 1/Kiriaini/7 (*hereinafter referred to as the suit land*). He further sought a declaratory order of the court declaring the subsequent borrowing leading to the sale of the suit land as illegal and unlawful. He sought a declaration that the sale of the suit land by the 1st defendant to the 3rd defendant is null and void *ab initio*. He further sought an order of the court for the revocation of transfer of the suit land to the 3rd defendant and the register be rectified accordingly.

In paragraph 13 of the plaint, the plaintiff averred that:

"In an effort to stop the sale of the plaintiff's property, the 2nd defendant without the knowledge of the plaintiff, filed several suits namely HCCC Nos. 836 of 1998, 480 of 2003 and 170 of 2004 all in Nairobi and whose outcome the plaintiff is not aware of."
In paragraph 14 the plaintiff averred that:

"The plaintiff states that he was never privy to the said suits and his consent and authorization as the registered proprietor of the subject property was not sought."
In paragraph 4 of the affidavit sworn in verification of the plaint, the plaintiff deponed that:

“*THAT there is no other suit pending and there has been no previous proceedings in any court between the plaintiff and the defendants over the same subject matter save as stated in paragraph 13 of the plaint.*”

Contemporaneous with filing suit, the plaintiff filed an application seeking interlocutory orders of injunction to restrain the defendants by themselves or through their agents from interfering or adversely dealing with the suit land pending the hearing and determination of the suit. The application is supported by the annexed affidavit of Timothy Mwangi Njuguna, the plaintiff.

On 12th August 2008, the advocate for the plaintiff, Mr. Mwititi appeared before Lesiit J under certificate of urgency. He urged the court to grant the plaintiff interim orders of injunction pending the hearing and determination of the application. The court granted interim preservative orders pending the said hearing of the application *inter partes*. The plaintiff was directed to serve the defendants for the hearing of the application *inter partes*. Upon being served, the 1st defendant filed grounds in opposition to the application. In the said grounds, the 1st defendant stated *inter alia*, that the plaintiff’s suit and application were both *res judicata* in accordance with Section 7 of the Civil Procedure Act and ought to be dismissed with costs. The 3rd defendant, apart from filing two replying affidavits in opposition to the application, filed a notice of preliminary objection to the plaintiff’s suit and application on the grounds that the same was *res judicata* since the issues brought in court for determination had already been determined by courts of competent jurisdiction in the previous suits expressly admitted in paragraph 13 of the plaint. The 3rd defendant further asserted that the entire suit and application were overtaken by events in view of the provisions of Section 77(3) and (4) of the Registered Land Act and therefore no reasonable cause of action was disclosed as against the 3rd defendant. The 3rd defendant was of the view that the suit against him amounted to an abuse of the process of the court and should be dismissed since the only remedy in law available to the plaintiff, if aggrieved by the said sale, was to sue for damages against the 1st defendant.

At the hearing of the application, I heard the submissions made by Mr. Jengo for the plaintiff, Mr. Mburu for the 1st defendant and Mr. Muthomi for the 3rd defendant. The 2nd

defendant

John Njuguna appeared in person. He also made submissions in support of the plaintiff's application. Upon carefully evaluation of the said submissions made, and also reviewing the pleadings filed by the parties to this application, it was evident that the issue that required determination by this court was whether the present suit was *res judicata* and whether the application filed by the plaintiff seeking the order of injunction was in abuse of the due process of the court. Although the plaintiff averred in paragraphs 13 and 14 of his complaint that he was unaware of the contents of the pleadings filed in the previous suits filed in respect of the suit property, it was apparent that the plaintiff was not candid. For instance, the plaintiff failed to disclose to the court that he was the one who had filed Nairobi HCCC No. 836 of 1998. In the said suit, the plaintiff sought to restrain the 1st defendant from exercising its statutory power of sale by chargee by selling the suit property.

In the said suit, the plaintiff sought similar orders of injunction as in the present application.

The plaintiff did not prosecute the application and on 5th March 2003, when the plaintiff was issued with notice to show cause why the suit should not be dismissed for want of prosecution, the plaintiff's advocate informed the court that the suit should be marked as settled. The court marked the suit as settled. The plaintiff failed to disclose this fact to the court when he made the *ex parte* application seeking to be granted orders of injunction. The plaintiff was therefore guilty of non-disclosure of material and relevant facts when he canvassed his application to be granted interim reliefs pending the hearing *inter partes* of the application.

Further, it is evident that the plaintiff was less than truthful when he alleged in his complaint that he was not aware of the contents of the pleadings filed by Ayub Ng'ang'a Njuguna, his brother, who filed Nairobi HCCC No. 170 of 2004 against the 1st defendant and the plaintiff.

The plaintiff concealed from the court that his said brother had filed the said suit to restrain the 1st defendant from selling the suit property to realize its security under the instrument of charge. He further failed to disclose that this court had considered the application for injunction and dismissed it with costs.

It is therefore evident from the foregoing that the plaintiff obtained interim orders from the court by failing to disclose material or relevant facts which most likely could have

influenced
the court in reaching its decision whether or not to grant or decline to grant the interim orders sought pending the hearing and determination of the application interpartes. As was held by RSC Omolo JA in *Uhuru Highway Development Ltd vs. Central Bank of Kenya & 2 others* CA Civil Application No. NAI 140 of 1995 (65/95 UR), at page 2 of his ruling: *“Once the learned judge was satisfied, as he was, that the applicant had obtained the order by concealing other relevant material, he was entitled not to consider the applicants application any further for the courts must be able to protect themselves from parties who are prepared to deceive, whatever their motive for doing so may be and whatever the merits of the case might be. A man who is prepared to deceive a court into granting (him) an order cannot validly claim that he has a meritorious case and would have been entitled to the order anyway. If the case is meritorious, there can be no reason for concealing some parts of it from the court.”*

In *Nyanja Holdings Limited vs. City Finance Bank Ltd Nairobi HCCC No. 1965 of 1991 (unreported)*, Nambuye J cited with approval decision of the Court of Appeal in *Lilian S vs. Caltex Oil K Ltd [1989] LLR 1653 (CAK)* which set out the consequences that the court should attach to any failure by a party to make full and frank disclosure. At page 32 of her ruling she set out the principles to be considered by the court in determining whether a party had been guilty of non disclosure of material facts to the court. She held, *inter alia*, that the principles to be considered by the court is:

“the material facts are those which it is material for the judge to know in dealing with the application was made, materiality is to be decided by the court and not by the assessment of the (applicant) or his legal advisor ... if material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an ex parte injunction without full disclosure is deprived of any advantage he may derive by that breach of duty ... Whether the fact not disclosed is of sufficient materiality to justify or require immediate discharge of the order without examination of the merits depend on the importance of the fact to the issue which were to be decided by the judge on the application...”

In the present application, it was clear that failure by the plaintiff to disclose the proper and correct particulars of the previous suits that had been filed by himself and his relatives points

to no other conclusion than that the plaintiff deliberately failed to disclose the said facts so as to mislead the court into granting him interim *ex parte* orders of injunction pending the hearing of the application *inter partes*. It was further evident that the plaintiff came to court, not to canvass his suit in good faith, but rather to take advantage of the civil process to secure orders in his favour and to the detriment of the defendants. The plaintiff made false averments in his plaint and to compound it all, swore a false affidavit in verification of the said plaint. It was obvious that the plaintiff abused the due process of the court.

Further, it was evident that the present suit is *res judicata*. Although the parties in the present suit and the previous suits are not similar, what is clear is that the subject matter of the suit is the same. All the plaintiffs in the previous suits (*including the present plaintiff*) are relatives.

They sought orders to restrain the 1st defendant from exercising its statutory power of sale under the charge instrument in respect of the suit property. Under Section 7 of the Civil Procedure Act, this court cannot try any matter that was directly or substantially in issue in a previous suit between the same parties or between parties under whom they or any of them are litigating under in the same title. The plaintiffs in the previous suits were litigating under the same title. The issues raised by the plaintiff for determination by this court are the same issues which were considered by the court in the previous suits. In one of the suits alluded to earlier in this ruling, the plaintiff even informed the court that the matters in dispute had been settled. I therefore hold that the present suit is *res judicata*. Even if the plaintiff in the present suit raised a new aspect in relation to his claim over the title of the suit property, the court cannot allow the plaintiff litigate his claim by installments.

In the circumstances of this application, I will adopt the words of Warsame J in *Gimalu Estates Limited & Anor. Vs. International Finance Corporation & Anor.* Nairobi HCCC No.65 of 2007 (*unreported*), which he made when considering an application whose facts were similar to the present one. At page 12 of his ruling, he stated as follows:

“The central vein that runs through all the suits is that the plaintiffs are bent on frustrating the defendants to certain despair. The whole purpose of filing the present suit when other suits are pending for determination on the same subject matter is merely to get an injunction to stop or postpone the sale of the suit properties and not to have the issues allegedly raised in the different suits determined. Prima facie that is a contrived attempt to subvert the cause

of justice. 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.”

Having found that the plaintiff abused the due process of the court by failing to disclose material facts to the court, and further having found that the plaintiff made false averments in his plaint, and further having held that the plaintiff’s suit is *res judicata*, it is clear from the foregoing that the plaintiff’s application together with the suit must be summarily dealt with by the court.

The plaintiff’s application for injunction together with the suit herein is hereby struck out with costs to the 1st and 3rd defendants.

DATED at NAIROBI this 20th day of NOVEMBER, 2008.

L.

KIMARU

JUDGE