REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 201 of 2008

PAN AFRICAN CREDIT & FINANCE LIMITED (IN LIQUIDATION)……PLAINTIFF

VERSUS

NICHU INVESTMENTS LIMITED.…..………………........………..1ST DEFENDANT

RAJNIKANT KHETSHI SHAH……..………........…………………2ND DEFENDANT

HASMUKH SUMARIA………………………….......………………3RD DEFENDANT

R U L I N G

The Application under consideration is a Chamber Summons dated 4th August, 2008. It has been brought by the Plaintiff and seeks to have the defence filed on 18th June, 2008 struck out and judgment entered for the Plaintiff as prayed for in the plaint. It is expressed to be brought under Order VI Rule 13(1) (b), (c), (d) and 16 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. There are three grounds on which the application is based.

(a) That the defence filed herein is frivolous and vexatious.

(b) That the defence filed herein is meant to embarrass and delay the fair trial of the Plaintiff's action.

(c) That the defence filed is an abuse of the court process.

The application is supported by an affidavit which is sworn by DORIS M. MUGAMBI, the Liquidation Agent with the Plaintiff. I have considered the content of the affidavit together with the annexures.

The application is opposed. The Respondent has filed a replying affidavit sworn by RAJNIKANT KHETSHI SHAH, the 2nd Defendant in the suit, dated 8th August, 2008 whose content I have considered. On the 9th October, 2008, the Respondents filed a Notice of Preliminary Objection in which four grounds are raised namely:

(a) The Plaintiff's suit is barred by the Limitation of Actions Act, Cap 22, Laws of Kenya as the alleged debt for which the Plaintiff seeks replacement mortgages as security thereof accrued on 20th March, 1987.

(b) The Plaintiff's suit is barred by the doctrine of *res judicata* as the matters in issue herein was

directly and or substantially in issue in Nairobi HCCC No. 2671 of 1995 between the same parties hereto, which was heard and determined on 30th July 2004.

(c) The suit as a whole is incompetent, bad in Law and an abuse of Court process as there is a decree of the Court in HCCC No. 2671 of 1995 in respect of the alleged mortgage debt for which the Plaintiff now seeks a replacement mortgage as security thereof.

(d) The 2nd and 3rd Defendants have been wrongly enjoined to the suit in which the subject matter is clearly a disputed debt arising out of mortgage instruments execut3ed between the Plaintiff and the 1st Defendant, an independent and separate legal entity on 20th December, 1984 and 25th September 1985.

The Preliminary Objection was argued by the Respondents as part of their response to the instant application.

The principles that apply to an application for striking out of the defence and for entry of summary judgment are now well settled. It is trite that a pleading should not be struck out except in plain and obvious cases and where no triable issue has been raised. In the case of RAMJI MEGJI GUDKA LTD. VS. ALFRED MICHIRA & 2 OTHERS [2005] eKLR TUNOI, O'KUBASU and WAKI JJA held:

"*In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham. A defence on merit does not mean a defence which must succeed but it means a defence which raises a triable issued to warrant adjudication by the court.*"

If I find that the defence raises even a single triable issue, then the application must fail and the Defendant will be entitled to defend the suit.

The facts of the case were that the 1st Defendant applied for and obtained a mortgage facility for which the 2nd and 3rd Defendants, as directors of the 1st Defendant executed various documents including a mortgage dated 13th September, 1982, a further mortgage dated 20th December, 1984 and a second further mortgage dated 25th September, 1985 to secure Kshs.5 million, Kshs.5 million and Kshs.3 million respectively. The mortgaged properties belonged to the 1st Defendant and were two properties.

The Plaintiff's case is that the 1st Defendant defaulted in repayments of the mortgages causing crystallization of the Defendant's exercise of the statutory power of sale over the mortgaged properties. The attempt to sell the properties was the subject of another suit filed by the 1st Defendant against the Plaintiff, being Milimani HCCC No. 2671 of 1995. The pleadings of the said suit are annexed as DMM4 (a), (b), (c), (d) and (e). Also annexed as DMM5, is a copy of the judgment entered in favour of the Applicant's counterclaim for the mortgage debt. The 1st Defendant has appealed against the judgment as evidenced by annexure DMM6. The Applicant's contention is that since there is no stay of execution of the said judgment the same remains enforceable.

The Plaintiff's instant suit was necessitated because leases over the mortgaged property expired on 30th October, 2003, before the Plaintiff could exercise its statutory power of sale. The Plaintiff contends that it successfully applied to the Commissioner of Lands for extension of the leases by a further 50 years from 1st November, 2003 and that it paid all necessary fees for the extension. The Plaintiff contends that it also embarked on formalization of an extension of the lease by preparing a re-assignment of mortgage and replacement of mortgage. The Plaintiff contends that the Defendants have refused to execute the re-assignment of mortgages and replacement mortgages. It is the Applicant's/Plaintiff's contention that it is entitled to demand that the Defendants execute the replacement mortgage and the re-assignment. That is the cause of action of the instant suit.

Mr. Mwangi for the Plaintiff relied on sections 64 and 71 of the Transfer of Property Act for the preposition that the law gave a statutory obligation on a mortgagor that a mortgagee must enjoy the

renewed lease. Counsel also relied on clause 7(f) of the 1st Mortgage document for preposition that the agreement bound the 1st Defendant to sign documents or do such acts as to facilitate the contract of lending. The Plaintiff contends that by refusing to sign the new mortgage the Defendant was flouting statutory obligations under section 64 and section 71 of the Transfer of Property Act and the Mortgage Agreement.

Mr. Isindu for the Respondent relied on grounds of opposition and the replying affidavit of the 2nd Defendant. Counsel contends that the suit was an abuse of the court process and that it was *res judicata* for the reason that at the time the High Court Civil Suit No. 2671 of 1995 was still pending before the court, the lease that is the subject of the instant suit had not expired. Mr. Isindu contended that the Plaintiff should have raised the issue of the lease in that suit as it was directly related to the matters in issue in the case. Mr. Isindu submitted that the Plaintiff in the instant application should have amended its defence and counterclaim before the suit was heard in order to include the claim that is the subject matter of the instant suit. Mr. Isindu relied on the case of Greenfield Investments Limited vs. Baber Alibhai Mawji HCCC No. 3655 of 1995 (O.S.)

Dealing with the aspect of *res judicata* wherein it becomes an abuse of the process to raise in subsequent proceedings, matters which could and therefore should have been raised in earlier proceedings, Wigram, V. – C. i*n* Henderson v. Henderson, [1843] *3* Hare 100, 115 had this to say:

"…*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 under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, put 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 points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."*

The phrase, "*every point which properly belonged to the subject of litigation*" quoted in the passage set out above was expanded in Greenhalgh v. Mallard, [1947] 2 All E.R. 255, 257, by Somervell, L.J. in these terms:

"…*res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but… it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."*

And in **Yat Tung Investment Co. limited vs. Dao Heng Bank Ltd. and another, [1975]** A.C. 581, 590E, it was observed that:

"*The shutting out of a "subject of litigation" – a power which no court should exercise but after a scrupulous examination of all the circumstances – is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless "special circumstances" are reserved in case justice should be found to require the non-application of the rule."*

Mr. Mwangi for the Plaintiff did not agree with Mr. Isindu. Counsel submitted that at the time the earlier suit was filed, that is in 1995, the lease had not expired and therefore the court could not have dealt with the extension of the mortgage at that time. Mr. Mwangi also submitted that *res judicata* could not arise as the issue of the new lease was not a matter that could have been before the other court. The renewal of that lease, Mr. Mwangi contended was granted in 2003 and that in any event, the earlier suit had been brought by the 1st Defendant and was challenging the exercise of statutory power to sell the suit property by the Plaintiffs in the instant suit.

I have considered the rival arguments of both counsel regarding the issue of *res judicata* I do not agree that the matter under consideration in this suit was *res judicata*. The issue of the renewal of the lease and of the Applicant's right to the renewed lease was never enquired into by the court in the previous suit, neither could it have been contemplated by the Plaintiff. It is therefore not caught by the plea of *res judicata*.

Mr. Isindu's other argument was that since the Plaintiff/Applicant had appointed a Receiver Manager over the suit property on the 20th March, 1987 and that since no accounts had been rendered for all the rent collected by the Receiver during that period, that it would be wrong for the court to order the 1st Defendant to execute the replacement mortgage as it would be unknown for what amount the Plaintiff would execute for in exercise of its statutory power.

Mr. Mwangi on his part submitted that the issue of Receivers was exhaustively dealt with by Azangalala, J. at the trial of the earlier suit. Mr. Mwangi submitted that the Defendant even testified in that suit on that issue and that the court made a ruling on it and that therefore it was not a matter that could be raised again in the instant suit. I agree with Mr. Mwangi that the issue of Receivers was inquired into in the previous suit and cannot therefore arise in the instant one.

Mr. Isindu raised the issue of limitation and submitted that the instant suit was debarred by limitation. Mr. Isindu contended that under the mortgage documents found at pages 52-60 of the Plaintiff's bundle, the date of Redemption was given as 7th October, 1985. He submitted that, that was the date when all the rights of the mortgage and especially the right to sue accrued. The date by which the 1st Defendant was to pay for the mortgage debt was 2nd October, 1985. Mr. Isindu argued that under Section 10 (2) (3) (4) the period of limitation was given as 12 years and that that period lapsed on the 2nd October, 1997. Mr. Isindu continued to argue that under the express terms of the Agreement between the parties, the intention of the parties when they executed the mortgages was that the mortgagee's right would be extinguished once the lease was determined. He relied on page 41 of the lease, line 13 which appears after clause 7(h) of the Agreement, where it stipulates:

"*AND SECONDLY ALL THAT piece of parcel of land situate in the city of Nairobi ….. TOGETHER WITH the buildings and equipments now or hereinafter re-erected and being on the said two pieces of land for all the residue now unexpired of the term of seventy four years from the first day of November, One Thousand Nine Hundred and Twenty Nine."*

Mr. Isindu emphasized the words "*for the residue now unexpired*" and contended that the contract between the parties was clear that the mortgage related to the residue of the unexpired lease. Mr. Isindu contended that sections 64 and 71 of Transfer of Property Act did not assist the Plaintiff because the two sections provided that they applied only in the absence of a contract to the contrary. Section 64 and section 71 of the Transfer of Property Act stipulates.

"*64. Where the mortgaged property is a lease for a term of years, and the mortgage obtains a renewal of the lease, the mortgagor, upon redemption, shall, in the absence of a contract by him to the contrary, have the benefit of the new lease.*

71. When the mortgaged property is a lease for a term of years, and the mortgagor obtains a renewal of the lease, the mortgagee, in the absence of a contract to the contrary, shall, for the purposes of the security, be entitled to the new lease."

Mr. Isindu submitted that the Plaintiff had no right to bring the instant suit and that the only right the Plaintiff had was to sue for the debt as provided under section 68 of the Transfer of Property Act. That section stipulates:

"*68. The mortgagee has a right to sue the mortgagor for the mortgage-money in the following cases only –*

(a) where the mortgagor binds himself to repay the same;

(b) where the mortgagee is deprived of the whole or part of his security by or in consequent of the wrongful act or default of the mortgagor;

(c) …

(d) …

Where, by any cause other than the wrongful act or default of the mortgagor or mortgagee, the mortgaged property has been wholly or partially destroyed, or the security is rendered insufficient as defined in section 66, the mortgagee may require the mortgagor to give him within a reasonable time another sufficient security for his debt, and, if the mortgagor fails so to do, may sue him for the mortgage-money."

With respect to Mr. Isindu, the issue whether the Plaintiff should sue under the Mortgage Agreements is not before the court in the instant application. I say no more.

Regarding limitation, Mr. Mwangi submitted that it was a matter that was dealt with by Justice Azangalala in the previous suit. Mr. Mwangi drew the court's attention to page 11 of the judgment which is page 87 of the Plaintiff's bundle where the learned judge ruled:

"*The next main issue for determination is whether the Defendants claim is time barred under the provisions of the Limitation of Actions Act. This suit was filed in August, 1995, the Plaintiff on 9th March 1995 remitted kshs.1,000,000/- to the then Advocates for the Defendant in respect of the mortgaged properties. The witnesses for the Plaintiff freely admitted indebtedness to the Defendant in their evidence in Court. In my opinion on the material availed to me and on the evidence adduced even on behalf of the Plaintiff the plea that the Defendant's Counterclaim is statute barred is not available to the Plaintiff."*

I agree as is evident in the learned Judge's finding that the issue of limitation was considered in the previous suit. Even then the limitation period that applies in the instant case is not the same period as it should be considered from 2003 when the cause of action arose. The power to strike out any pleading is not mandatory but is permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the case. A lot has been argued by both counsel all of which I have considered including what is summarized in this ruling. Under paragraph 7 of the Statement of Defence, it is pleaded and I quote:

7. The Defendants further deny the allegations contained in paragraphs 12, 13, 18, 19, 20, 22 and 23 of the Plaint and aver as follows:-

(a) The mortgage instruments set out in paragraph 5 a, b, and c of the Plaint were executed in favour of the Plaintiff whereby the Plaintiff was specifically granted an interest only in the residue of the term of the leases held by the Plaintiff over the two properties, which term ended on 1st November, 2003.

(b) The rights or interests so acquired by the Plaintiff, being specific in time, expired and were duly extinguished on 1st November 2003 by virtue of the Law and the terms of the mortgage instruments which were executed as a matter of mutual agreement/contract between the parties thereto as the mortgagee's/Plaintiff's interest was subject to the known terms of the leases held by the 1st Defendant."

That paragraph was in answer to several paragraphs of the plaint including paragraph 12 and 13 where the Plaintiff pleads:

12. Further to paragraph 7 above, the Plaintiff states that notwithstanding the expiry of the leasehold interest on 1st November 2003 pursuant to the provisions of Sections 64 and 71 of the Transfer of the Property Act 1882, the Plaintiff is entitled to a renewal of the mortgaged lease and is further entitled to

register, inter alia, replacement mortgage(s) over the 1st Defendant's mortgaged properties.

13. Further to paragraph 12 above, the Plaintiff states that upon renewal of lease and registration of the replacement mortgage(a), the Plaintiff is further entitled to exercise its statutory power of sale, pursuant to, inter alia, section 69 A of the Transferr of the Property Act 1882**.**

The determination of the issues raised in paragraph 7 of the defence and paragraphs 12 and 13 of the plaint among others, will depend on the interpretation of the Agreement between the parties and particularly of clause 7 of the Agreement, an excerpt of which is contained herein above.

It is my view that this is not a plain and obvious case. It is not a matter that can be determined on an application of this kind. It cannot be said that the Defendants' defence raises no triable issue. It is not in my view frivolous or vexatious or meant to embarrass or delay the fair trial. It cannot be said that the defence herein is frivolous because it is not without substance neither is it groundless or fanciful. The issue whether the Plaintiff had any right to the renewed lease is not a frivolous issue. Again, I do not find anything vexatious or embarrassing in the Defendants' defence. An embarrassing pleading is one which is ambiguous or unintelligible or which raises immaterial matter or raises irrelevant issues which may involve expense, trouble and delay. There is nothing embarrassing about the defence and the Plaintiff has not shown what was embarrassing in the defence statement to justify the court to find that the Defendants are not entitled to pursue their defence.

For this reason, I am fully persuaded that this matter should go into full trial, where the parties will have the opportunity to give evidence and to place their facts on the table in order for the court to fully determine the issues between the parties.

Having come to the conclusion I have of this application, I find that it should fail and that the Defendants should be allowed to defend the suit.

The application dated 4th August, 2008 be and is hereby dismissed with costs to the Defendants.

Dated at Nairobi this 14th day of November, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

N/A for Mr. Mwangi for the Plaintiff

Mr. Isindu for the Defendants

LESIIT, J.

JUDGE