



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

Civil Case 321 of 2006

ANNE BUHASYO OKINYOPLAINTIFF/APPLICANT

VERSUS

HOUSING FINANCE COMPANY OF KENYA.....DEFENDANT/RESPONDENT

R U L I N G

By a Chamber Summons brought under Order VI rule 13 (1) (b) and (d) of the Civil Procedure Rules, Housing Finance Company of Kenya Limited (hereinafter referred to as the Applicant) seeks to have the suit filed against it by Anne Buhasyo Okinyo (hereinafter referred to as the Plaintiff) struck out as being vexatious and an abuse of the process of the court.

The application is grounded on the allegation that the Plaintiff has filed four previous suits against the Defendant on the same subject matter and that the Plaintiff has been guilty of non-disclosure of material facts. The application is also supported by an affidavit sworn by Joseph Kamau Kania the Applicant's Manager legal services. In the affidavit, the Deponent explains that the Plaintiff and her husband the late Fanuel Okinyo Amata obtained a loan from the Defendant which was secured on a property known as Eldoret Municipality/Block 12/140 hereinafter referred to as the suit property. The Plaintiff and her husband have defaulted in the repayment of the loan, but the Defendant's attempts to exercise its statutory power of sale have been frustrated by numerous suits filed against it by the Plaintiff and her husband. These suits include:-

- Nairobi HCCC 5905 of 1990 in which the Plaintiff obtained a conditional order of interim injunction. Civil Application No. Nairobi 178 of 1991 which sought an injunction in the Court of Appeal but which application was dismissed by the Court of Appeal.
- Eldoret HCCC No. 93 of 1993 in which the Plaintiff and her husband again obtained an interim injunction pending the hearing of the interlocutory application which was finally dismissed on 9th September 2006.
- Eldoret High Court Civil Case No. 56 of 1997 in which the Plaintiff and her husband obtained an interlocutory injunction restraining the Respondent from selling the suit premises. The interlocutory application was eventually dismissed on 8th April 2002.

To the affidavit of Joseph Kamau Kania sworn on 18th September 2006 is annexed all the pleadings relating to the aforementioned cases from which it can be seen that all the suits related to the same subject matter i.e. the suit property herein and the relief sought in all the suits essentially the same. It was also

notable that all the suits are still pending except for the interlocutory applications which have been dismissed.

Mr. Ougo who argued the application on behalf of the Applicant has submitted that the Respondent's interlocutory application is **res judicata** as per Section 7 of the Civil Procedure Act as 3 similar applications have been dismissed in 3 of the previous decision.

Relying on paragraph 434 of Halsbury's Laws of England 4th edition volume 4, Mr. Ougo submitted that the current suit was vexatious as it was not brought in good faith. Mr. Ougo maintained that this suit was merely an attempt by a Plaintiff who has been disappointed 4 times over to try his luck once more, and that the court should not countenance such an attempt but should dismiss it as an abuse of the process of the court. In this regard Mr. Ougo further relied on the following:

- A quotations from "Judicial Hints on Civil Procedure by R. Kuloba at pages 44-50
- Kamunge & Others vs Pioneer General Assurance Society [1971] EA 263.
- Pop In Kenya Limited & Others vs Habib Bank AG Zurich Nairobi Civil Appeal No. 80 of 1988 (unreported).

On the attempt by the Plaintiff to consolidate all the suits. It was submitted that this was a clear concession that the parties, the subject matter, the reliefs and the issues raised were the same and that the attempt coming after the filing of the application to strike out this suit should not be allowed.

As regards the Respondent's failure to acknowledge the presence of the previous suits at paragraph 3 of the plaint, it was submitted that it did not matter that the Plaintiff may not have been aware of the existence of the earlier suits, once the previous suits were brought to her attention she ought to have withdrawn the current suit.

In response to the application the Respondent filed a replying affidavit in which she explained that she bought the suit property from her own personal savings. Later due to pressure from her late husband, who was also an advocate of the High Court, the Respondent had the property transferred to their joint names and used the suit property as security for a loan of Kshs. 413,440/= which loan was to be repaid by her husband. The Respondent swore that she was not aware of the previous suits as they were all filed by her late husband without her knowledge. She maintained that the issues in the present suit were not substantially the same as the issues raised in the previous suits, nor were the orders and remedies sought the same and that in any case none of the suits has been fully heard and finally determined.

Mr. Meto who appeared for the Respondent submitted that the application was bad in law as it was seeking summary orders which can only be granted in clear circumstances. Mr. Meto argued that in this case the Applicant has not denied that the cause of action subsists nor has it denied that none of the previous suits have been finalized. He maintained that the issues now raised in this suit have not been covered in the previous suits. Mr. Meto relying on the case of **Samuel Maina Njaria vs. The United Insurance Company Limited & Anor. Milimani HCCC 570 of 2001 (OS)**, submitted that the court could only strike out pleadings where they are scandalous which was not the case herein. Mr. Meto cited the case of **Bulhan & Anor. vs Eastern & Southern African Trade & Development Bank (2004) 1 KLR 147** for the proposition that the principle of res judicata could not apply as the issues raised in the earlier suits have not been heard and finally determined. Citing the case of **G.R. Mandavia vs Rattan Singh [1965] EA 118**, Mr. Meto submitted that jurisdiction and res judicata were two different things. Mr. Meto also relied on the case of **Yaya Towers Ltd vs. Trade Bank Ltd (in liquidation) Civil Appeal No. 35 of 2000** for the proposition that striking out of pleadings could only be done in plain and clear cases, and that in this case if such an application is allowed, it will result in a miscarriage of justice. Finally Mr. Meto submitted that there was an issue as to whether the Respondent participated in the other suits. He urged the court to exercise its discretion under Section 3A of the Civil Procedure Act, as allowing the application could cause injustice.

The following quotation from the judgement of Lakha J.A. in the case of *Yaya Towers Ltd vs. Trade Bank Ltd (in liquidation)* (supra) at pages 4 to 5 provide an appropriate guide in dealing with this application.

“where however, the application is made under Order VI rule 13 (1) (b) or (c) or (d) of the Rules or the inherent jurisdiction of Court on the ground that the claim is ‘frivolous’ or is an abuse of the process of the court (as in the present case) evidence is admissible to show that this is the case. A Plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the Plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial.”

In this case the Applicant has sought to demonstrate that the Plaintiff’s claim is objectionable as an abuse of the process of the court.

The Applicant has sought to do this by availing evidence showing that the Respondent and her husband has filed 4 previous suits against the Applicant which involves the same subject matter and same relief as the current suit, and that the Respondent failed to disclose the presence of these previous suits. The Respondent does not deny the presence of the 4 previous suits but maintains that she was not party to their filing and did not therefore know of their existence. It is further maintained that the issue of *res judicata* cannot arise since the previous suits have not been fully heard and determined.

Thirdly it is contended that the issues raised in the previous suits are different from those raised in the current suit.

Section 7 of the Civil Procedure Act states as follows:

“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.”

It is evident from the pleadings annexed to the affidavit of Joseph Kamau Kania that all the 4 previous suits and the current suit involves the same parties litigating under same title except for the fact that the current suit is brought by the Respondent alone. The suits all involve the same subject matter i.e preservation of the suit property. The issues raised in all the suits is substantially the same i.e. the exercise of the Applicant’s statutory power of sale over the suit property. It is true that there are a few subsidiary issues which vary from one case to the other such as overcharging the Respondent’s mortgage account. These are however issues which could have been raised in the former suits and are therefore deemed to have been directly and substantially in issue in the previous suits by virtue of explanation No. 4 to Section 7 of the Civil Procedure Act.

It is apparent that none of the 4 previous suits has been heard and finally decided by the court. However the interlocutory applications relating to interlocutory orders of injunction pending the hearing of the suits have been heard and finally determined including an application filed by the Respondent in the Court of Appeal. In this regard the Chamber Summons dated 20th June 2006 in this suit seeking interlocutory orders and raising substantially the same issues as the interlocutory applications in the previous suits is indeed *res judicata*. However the present suit is not *res judicata* since none of the previous suits has been heard and finally determined.

The Respondent has explained that she was not aware of the presence of the previous suits hence her failure to disclose their existence. Given the relationship between the Respondent and Fanuel OKinyo Amatta and the fact that the latter was an advocate of the High Court, the possibility of the Respondent’s husband having initiated the suits without her knowledge cannot be ruled out. On the basis of the information before me, I have no evidence that the Respondent deliberately misled the court that there

were no previous suits or proceedings involving the parties pending before the court, nor is there any evidence that she knowingly participated in the multiple suits.

In my considered view, appropriate evidence having been laid before me confirming that there are previous suits between the parties where the matter in issue is substantially the same as the present suit Section 6 of the Civil Procedure Act prohibits me from proceeding with this suit. I therefore order that the suit shall be stayed under Section 6 of the Civil Procedure Act.

I award the Applicant costs of the Chamber Summons dated 18th September 2006.

Those shall be the orders of this court.

Dated signed and delivered this 22nd day of March 2007.

H. M. OKWENGU

JUDGE