



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

Civil 182 of 2006

CHEPCHIRCHIR BOMETT FRASER (*suing as a representative of*

***the estate of ERICK BOMETT (DECEASED)*.....PLAINTIFF/APPLICANT**

VERSUS

NATIONAL BANK OF KENYA LIMITED.....DEFENDANT/RESPONDENT

RULING

By way of an amended plaint filed on 30th November 2006, the plaintiff instituted this suit against the defendant and sought for orders of injunction, declaratory orders, an assessment of the amount of money due to the defendant and a refund of the excess of monies paid and also the discharge of the security held by the defendant.

Simultaneously with filing of the suit, the applicant also filed a chamber summons of the same date which is expressed to have been brought under the provisions of Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules. The applicant sought for an order that the defendant by itself, servants or agents or otherwise howsoever be restrained by way of temporary injunction from disposing off, selling, wasting, repossessing or in any other way dealing with the deceased's parcel of land known as L.R. No. 15333/3 (IR No. 60776) measuring approximately 350 acres pending the hearing and determination of this suit.

At the hearing of the application, Counsel for the respondent raised a preliminary objection on the following grounds: -

- 1. That this matter is sub judice as there is in existence another suit being Milimani (Commercial) Civil case No.1514 of 2001 Erick K. Koros Bomett & Transkenya Green Groweres Rongai Limited –Vs- National Bank of Kenya Limited & Garam Investments in which the same issues raised in this suit are in issue. The said suit is set for hearing on 11th December 2006. A preliminary objection in terms shall be raised notice whereof is hereby given.**
- 2. That the applicant undertook to redeem the charged property at Kshs.24 Million which she has totally defaulted.**
- 3. That the respondent cannot be stopped from exercising its statutory powers of sale where there is till a default in repaying the loan.**

4. **That there are no good grounds to grant the orders sought.**

5. **That the plaintiff's affidavit contain misrepresentation on**

(i) *Amounts already paid.*

(ii) *The existence or otherwise of competent charge documents and guarantees.*

(iii) *Previous realization of security.*

(iv) *Indulgence previously given by the respondent to the applicant.*

(v) *The bank's intention on the charged property.*

6. **That the plaintiff's suit and application is an abuse of the process of court.**

7. **The affidavit or affidavits to be sworn in reply.**

On the part of the applicants, Learned Counsel opposed the preliminary objection and pointed out that the suit being **Milimani Commercial Court number 1514 of 2001** involved a 2nd plaintiff – ***Transkenya Green Groweres Rongai Limited*** and also a 2nd defendant – ***Garam Investments***. The subject matter in that suit, that is, **L.R No. 15333/3** which is the subject matter in this suit is not the subject matter of the suit before the **Milimani Commercial Court**. He therefore urged this court to find that this suit is properly before this court and to dismiss the preliminary objection with costs.

In considering the preliminary objection before me, it is important to bear in mind that a preliminary objection should consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to infer the dispute to arbitration. [See the case of **Mukisa Biscuits Company –Vs – West End Distributors E.A.L.R [1969] page 696.**]

The issue arising from the present preliminary objection is that there is another suit pending before another court and involving the same parties and the same subject matter. In the present suit, the plaintiff is suing on behalf of the estate of Erick **Bomett** (*deceased*) who was the 1st plaintiff in the suit before the Milimani Commercial Court. The 1st defendant is the same although before the Milimani Commercial Court, there is a 2nd defendant who I believe was joined in the suit as there was an intention to sell the charged property by auction.

According to the **Civil Procedure Rules Order I Rule 1 and 3** provide for the parties who can be joined as either plaintiffs or defendants in a suit as follows;

Order I 1 provides

“All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transaction is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.

Order 3

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

The principle issue for determination arising from the plaintiff's suit involves the borrowing and lending certain sums of money between the estate of the deceased and the defendant. It also involves the determination of the legality of the deceased property known as **L.R 15333/3** which was charged as security for the borrowing. These are the same issues that are principally in issue before the *Milimani Commercial court* and by a ruling delivered by that court on 5th day of March 2003; *Ondeyo J* remarked that the plaintiff should have amended their pleadings to include **L.R. 15333/1** to be considered alongside **L.R 10302/6 and L.R 15333/1**.

I find that the plaintiff in this suit is representing the estate of the 1st plaintiff in the *Milimani Commercial Court*. She ought to have substituted the parties in the existing suit and to have amended the same suit to include **L.R 15333/3** as earlier directed by the court. The present suit is a duplication and it is obviously an abuse of the court process which should be discouraged.

I therefore allow the preliminary objection but direct that this suit be transferred to *Milimani Commercial court* and be consolidated with **Milimani Commercial Court case number 1514 of 2001** for hearing and determination. The cost of this application shall be in the cause.

Ruling read and delivered on 2nd day of March 2007.

MARTHA KOOME

JUDGE