



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

Civil Case 65 of 2007 (OS)

GIMALU ESTATES LIMITED1ST PLAINTIFF

REDHILL FLOWERS (K) LIMITED2ND PLAINTIFF

VERSUS

INTERNATIONAL FINANCE CORPORATION.....1ST DEFENDANT

NATIONAL BANK OF KENYA LIMITED.....2ND DEFENDANT

RULING

The two defendants herein raised objections to the whole of the plaintiffs' case. According to Mr. Gachuhi Advocate for the 1st defendant the whole of the plaintiffs' case is a gross abuse of the court process, as there is already in existence various suits involving the same parties in this matter concerning the securities and debt due from the plaintiffs to the 1st defendant. He submitted that the present originating summons filed on 8th February, 2007 seeks to raise issues relating to the plaintiffs' debt to the defendants. And that dispute is the subject of HCCC No.606/2003 – Milimani Commercial Court.

Mr. Gachuhi contended that it is not permissible to raise issues such as questions of interest by way of a new suit as has been contemplated by the plaintiffs in this suit. Interest in itself is not a cause of action but it is a consideration that arises from a debt and the debt is already the subject of another suit. And so as long as **HCCC No.606/2003** is still in existence, the present plaintiffs have no right to bring another suit over the same subject matter. And if the plaintiffs feel that there is a matter in issue that they would want the court to determine, they would have the liberty to apply for an amendment of the earlier plaint and make it an issue in that suit.

It is the contention of the 1st defendant that the issue of interest would in any event be an issue as to the amount of debt and owing. The figure of principal and interest is an issue in the earlier suit. To allow this suit to proceed would be in gross violation of section 6 and 7 of the Civil Procedure Act, which is mandatory. An issue of interest would be substantially in issue in **HCCC No.606/2003**. This court may make a determination in one way and ultimately the court in **HCCC No.606/2003** may make a different determination. To avoid that happening the 1st defendant prayed that this suit be dismissed as the court has no jurisdiction to deal with this matter.

On its part the 2nd defendant filed a notice of preliminary objection dated 13th February, 2007 in which it fully supported the position of the 1st defendant. **Mr. Rachuonyo** Advocate submitted that the

Chamber summons application filed by the plaintiff offends Section 7 of the Civil Procedure Act as the entire proceedings are an abuse of the court process in the face of numerous suits filed by the plaintiffs.

Regarding **HCCC No.606/2003** the 1st and 2nd defendant were parties to that suit. It related directly to the rights of the defendants to realize their mortgages issued by Gimalu Estates Limited. That suit is still pending therefore the present suit cannot be filed. In the affidavit filed it admitted expressly that **HCCC No.606/2003** is still pending before this division for determination. It is the position of the 2nd defendant that there should be no reason why there should be two suits which both seek an injunction and an interpretation of the mortgage documents.

On *res judicata*, **Mr. Rachuonyo** Advocate submitted that in **HCCC No.606/2003** the same plaintiffs in this suit had also filed an application for injunction to restrain the defendants from selling the two properties. That application was heard in full over a period of 3 years which was eventually dismissed as it relates to the 2nd defendant. There is no reason why a second injunction should be filed and the court should not be asked to consider a matter which is already determined. The plaintiff in this case of course purports that all it is doing is maintenance of the status quo. According to **Mr. Rachuonyo** Advocate that is a disguised application for injunction.

Mr. Rachuonyo Advocate further listed 5 other cases in which the plaintiffs either themselves or through agents canvassed the subject in issue before different courts;

- 1) **HCCC NO.1295/2006** Nairobi Central Registry – **Gimalu Estates Ltd. Vs Garam Investments and National Bank of Kenya**, which resulted in the grant of a temporary injunction. And as the matter was due for interpartes hearing the suit was withdrawn and the present matter filed. It was a suit of convenience.
- 2) **CM.CC. No.12396** (Milimani Commercial Court) It was also filed between the parties herein and *ex parte* order of injunction was obtained. On the date fixed for hearing the plaintiffs did not show up and the application was dismissed together with the suit.
- 3) Succession cause No. **HCCC No.20/1983**, an application for injunction was filed on it on 6/12/2006 and it was heard and dismissed by the succession court at the Central Registry of the High court Nairobi.
- 4) **Machakos HCCC No. 7/2007** which was purported to be a suit between a 3rd party who had entered into a contract to buy the suit property from the plaintiffs in this suit. And an order of injunction was obtained stopping the Auctioneers appointed by the defendants from selling the two properties as scheduled.
- 5) **HCCC NO. 133/2007** which is purported to be a suit between the directors of the plaintiffs but in which they are seeking an order of injunction to restrain the sale of the same properties.

In short the 2nd defendant concluded that there can be no more serious abuse of the court process than what the plaintiffs are doing. There are 7 suits filed relating to the same properties and seeking in essence the same reliefs.

According to **Mr. Rachuonyo** Advocate these suits are compromising the integrity of the process of the court and the least this court should do is to struck out the present suit.

The contention of the defendants was strongly opposed by **Mr. Mbabu** learned counsel for the plaintiffs who submitted as follows: He started by saying that the present suit does not raise the same issues the plaintiffs could have raised in **HCCC No.606/2003**. That **HCCC No.133/2007** and **Machakos HCCC No.7/2007** have been filed against the plaintiffs by 3rd parties and they related to the mortgage properties. The plaintiffs have no control over other persons who file proceedings against them.

Mr. Mbabu further submitted that the issues raised in this particular suit have not been determined by

this court, therefore the matters raised are not *res judicata*. The prayers in the present suit are for determination of whether the respondent should pay interest to the defendants to the suit or not by virtue of the provisions of the Limitations of Actions Act. Therefore **Mr. Mbabu** Advocate contended that the issues raised in the present suit would not have been raised in any other suit, neither would they have been raised by way of an amendment to a pending suit. The procedure adopted by the plaintiffs is deliberately calculated to enable this court to determine the issues in dispute as quickly and as expeditiously as possible.

Now let me endeavour to resolve this protracted but delicate matter. No dispute that the plaintiffs approached the court through the main door, window and even through the ceiling with view to delay the day of reckoning. The justification for an approach is hard to appreciate and understand, but of late the court has been a theatre for defaulters to delay the dues and debts of the banks. Be that as it may, let now address the merits of the two objections raised by the defendants.

The objections of the defendants is based on section 6 and 7 of the Civil Procedure Act. It is pertinent to reproduce the said section.

Section 6 states;

“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 proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed”.

The above section is supported by the provisions of Order 11 Rule 1 (1) of the Civil Procedure Rules, which states;

“Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action but a plaintiff may relinquish any portion of his claim”.

It emerges from the documents filed by the parties herein that the plaintiffs in this case have filed 6 other suits concerning the same subject matter.

In **HCCC No.239/2004 Nakuru Abdi Hashi Duale vs. National Bank of Kenya & 2 others; Kimaru J** held;

“The plaintiff has filed suits left, right and centre to achieve only one purpose: to frustrate the 1st defendant from realizing the security that the plaintiff had charged to it. The plaintiff does not give a hoot if by filing multifarious suits means that he is breaching the same laws that he is seeking to have enforced and protect him. As a consequence of failing to disclose the existence of the other suits, the plaintiff in the verifying affidavit in support of the plaint swore a false affidavit. In the circumstances of this case, I would hold that the plaintiff abused the due process of the court when he filed this suit”.

In the present dispute the plaintiffs have not only filed suits left, right and centre but they have taken the process of the court forward and backwards simply to achieve a desired result of restraining the defendant from the exercise of the statutory power of sale. In my view there must be an end to the designs employed by the plaintiffs to abuse the process of the court. The plaintiffs have inundated the court with an imaginary cause of action with an intention to agitate and litigate in court for ever may be to defeat the rights of the defendants.

There is no need for the plaintiffs to file multiplicity of suits over the same subject matter. The plaintiffs' contention is that the issues in **HCCC No.606/2003** Milimani Commercial Court and the present issues in this matter are different. I have gone through the pleadings in **HCCC No.606/2003**, the reliefs sought in that suit and the lengthy decision by **Justice Emukule** and I have come to the conclusion that the dispute,

contest, controversy, matters and issues in that suit are the same as in the present matter.

I do not see any reason or justification why the plaintiffs would file another suit when that suit is still pending and crying for determination. **Justice Emukule** gave service and labour to the issues in dispute between the parties concerning the charged properties and the rights that flow from that contractual relationship. In my view **Justice Emukule** defined the road map for the plaintiff to follow in order to achieve an answer for its perceived infringed rights. It beats logic for a party to be told in no uncertain words that there is no way forward but starts another suit to seek answers for questions already answered by a court of competent jurisdiction or questions which can be answered in the earlier suit. It means the party is not interested in the earlier decision or verdict or may be it has no ears to hear or it is virtually disinterested in seeing sense of the true position available to it. By filing different suits in different foras to address the same issues, the plaintiffs are tying the hands of the court and closing the road for itself. If a party closes the road to the court, then it has to blame its own action or omission. I think that is what the plaintiffs have done in this matter.

It is clear that the application for injunction in **HCCC No.606/2003** was heard and finally determined especially on the issues whether to preserve the subject properties through an injunctive reliefs or orders. That attempt was lost by the plaintiffs when **Justice Emukule** dealt with the matter and gave a verdict contrary to the wishes and expectations of the plaintiffs. They had the option to pursue an appeal but it is not open for them to file new suits to address the same disease. If the plaintiffs were not satisfied with the medicine and prescriptions given to them by **Justice Emukule**, then the next doctor available to them can only be found in the Court of Appeal. They have ousted and exhausted the powers of the doctors stationed in the High Court, therefore this court is deprived of the powers and skills to cure the disease and ailment encountered by the plaintiffs.

It is also contention of the plaintiffs that many of the suits either pending or withdrawn were filed by 3rd parties and that they have no control over the conduct of 3rd parties in filing suits against them. **Mr. Mbabu** Advocate submitted that **HCCC No.133/2007** and **Machakos HCCC No.7/2007** have been filed against the plaintiffs by 3rd parties. My answer is that the said suits relates to the suit properties, which are held as security for the loan advanced to the plaintiffs. In **HCCC No.7/2007** the plaintiffs in that case were asserting proprietary rights having purchased the suit properties from the plaintiffs herein. It suffices to say that the present plaintiffs have no title documents or rights to sell the suit properties for the huge sum indicated in the agreement attached to the application for injunction. It beats logic for one to assume that the persons who instigated suits were not agents or proxies of the present plaintiffs. The evidence available points an accusing fingers at the plaintiffs herein.

On 7th March, 2007 **Mr. Mbabu** Advocate stated there is a notice to discontinue **HCCC No.7/2007** and equally stated that the plaintiffs herein during the pendency of this matter have filed an application to consolidate **HCCC No.606/2003** with the present matter. All those machinations show that the plaintiffs have long embarked on a crusade to abuse the process of the court.

It is therefore abundantly clear in my mind that this suit was filed solely to assist the plaintiffs to stop the intended sale of the mortgaged properties. It is clear that the present plaintiffs either themselves or through various proxies filed numerous suits before different foras with an ultimate intention to make it difficult for the defendants to exercise their statutory power of sale. I am satisfied that the present suit is a duplication or replica of **HCCC No.606/2003** and others pending or withdrawn in different court. The plaintiff even tried to hoodwink this court by making innovative attempts to withdraw other pending suits or even consolidate **HCCC No.606/2003** with the present matter.

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.

I am saying that the conduct of the plaintiffs amounts to a conundrum to contaminate the due process simply because different judges would give different and contradictory judgements over the same subject matter, that would be difficult to resolve. If such were to happen parties would hold the court in contempt for the contagious disease created by different judges arriving at different decisions. It appears that is the aim and design employed by the plaintiffs in their multiple and piecemeal litigation over the same subject matter.

I think the convoluted design by the plaintiffs or their ilk must be checked in order to avoid judicial calamity to occur. Of course it is a judicial calamity if judges cannot agree on whether the plaintiffs are entitled to an order of injunction. The guiding principles are known and the path to follow is well lit to avoid duplication and difference. My brother **Justice Emukule** gave an indication of the plaintiffs' rights. In short **Justice Emukule** made a well considered decision in **HCCC No.606/2003** by refusing to grant an injunction. That suit is still pending for determination. I think it is in the interest of the plaintiffs to set down that suit for hearing if it feels its rights can be salvaged. The vehicle available to the plaintiffs is that which was abandoned by them. May I tell them that they are riding in a wrong bus which took them to the wrong destination. In essence they have lost their way and mine is to tell them that they have overlooked the correct approach. The compass to give them the correct direction is within their reach. It is up to them to approach the court correctly but for now the approach is through the window. A court of equity and justice cannot allow parties to go through the window in order to access justice. It is not available, the window has been shut by the unclean hands of the plaintiffs. It is time for them to go to the drawing board.

It means the plaintiffs have no right to file the present suit, it means this court has no jurisdiction to entertain the suit filed by the plaintiffs. **In the premises the objections of the defendants is allowed. The application dated 7th February, 2007 is dismissed with costs and the suit is dismissed with costs to the defendants.**

Dated and delivered at Nairobi this 10th day of May, 2007.

M. A. WARSAME

JUDGE