



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 500 of 2006

DANIEL KAMITA GICHUHI1ST PLAINTIFF

JOSEPHINE KABURA GICHUHI2ND PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....DEFENDANT

RULING

The plaintiffs have filed an application dated 8th September, 2006. The application is made under **Order 39 Rules 1, 2 and 3** of the Civil Procedure Rules. In prayer 2, the applicants seek an order by this Honourable court to restrain the respondent from selling, disposing of or in any manner whatsoever dealing with the applicants' property known as **L.R. No.766/114, title No.38645, Tigoni Kiambu** pending the hearing and determination of this suit.

On 11th September, 2006 the applicants were issued and/or obtained an ex parte order of injunction, which was extended from time to time. What prompted the application is that the respondents had instructed Auctioneers to sell the suit property purportedly under its statutory power of sale. It is alleged that the premises were due to be sold on 12th September, 2006.

It is contended that, the 1st applicant was employed by a company known as **Home Savings & Mortgages Limited** as a Managing Director wherein the applicants borrowed a sum of Kshs.1.3 million which sum was secured by a legal charge over a property known as **L.R. No.7660/21** and the charge was registered on 1st March, 1983. The property was subsequently subdivided leaving parcel **No.766/114** as the property charged and secured by the loan advanced to the applicants. And since the 1st applicant was an employee of **Home Savings and Mortgages Limited**, he was given a concessionary rate of interest of 5% per annum. It is alleged the respondent herein took over the assets and liabilities of the said company under the Consolidated Bank of Kenya Act No. 5/1991. It is contended by the applicants that they were obliged to continue repaying the loan at the concessionary rate of interest of 5% per annum and not any higher rate of interest.

The response of the respondent is that the 1st plaintiff cannot avail himself of Section 5 of the Consolidated Bank Act No.5 of 1991 for the simple reason that he resigned from employment on 15th December, 1989 on the day the defendant took over management of the company in which he was Managing Director. **Miss Kirimi** Advocate urged me to look at the letter written by the 1st plaintiff himself dated 15th December, 1989 as well at the minutes of the meeting held on the same day and which the 1st plaintiff's resignation was accepted by the board of directors.

Miss Kirimi Advocate submitted that since the 1st plaintiff has no evidence to show his resignation, accepted by the board was rescinded at a later date then his claim is misconceived. He does not say what position he occupied if indeed his employment continued after 15th December, 1989. It is the contention of the respondent that the special condition of lending ceased to have effect after the 1st plaintiff ceased to be an employee, hence he cannot assert and/or claim the preferential rate of interest was applicable to him. And that the defendant was entitled to increase the rate of interest which was computed at a rate of 14% per annum.

The position of the respondent is that the previous rates applied cannot be used as a basis for seeking an injunction when statutory notices specifically indicated that the rate applied was 14% per annum. It is alleged that the 1st plaintiff seeks to muddy the waters by bringing up issues that do not relate to the matter at hand.

On my part, I have considered the application and all the material in support of the application. I have also read the written submission of **Mr. Machira** Advocate. I have also taken into consideration the position taken by the defendant and the submission in support of that position. **Miss Kirimi** learned counsel for the defendant raised two critical and pertinent issues, which are legal points for my determination. She submitted that the case of the plaintiffs is time barred and equally cannot succeed due to *res judicata*.

Section 7 of the Civil Procedure Act states;

“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 of competent jurisdiction 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”.

There is no doubt that the plaintiffs have also previously filed suits arising out of the same cause of action. The cases are;

- (1) High Court Civil case No.5056/1992 – Daniel K. Gichuhi vs Consolidated Bank. In that case the 1st Plaintiff sued the defendant for a claim of Kshs.1,435,000/= being alleged employment dues for the years 1990 and 1991. It is alleged that this matter is still pending before court awaiting prosecution and determination.
- (2) High Court case No.4520/1994 – Daniel K. Gichuhi v Consolidated Bank finance Limited. The 1st plaintiff sought an injunction seeking to restrain the defendant from selling the charged property which is the subject of the current suit. This claim is made on the same issues raised in HCCC No.5056/1992. The injunction was refused and the suit eventually dismissed for want of prosecution on 30th May, 2001.
- (3) High Court case No.466/2002 – Daniel K. Gichuhi & another vs. Consolidated Bank of Kenya Limited. The plaintiffs in that case claimed employment due and interest thereon and further sought an order that the sums claimed were sufficient to offset the amount of the loan due to the defendant. An injunction was again sought on the same grounds as the previous cases. It was denied.

In my view the allegations made by the plaintiffs in this suit regarding monies resulting from the 1st plaintiff's employment with the company are substantially the same issues raised by the 1st plaintiff in HCCC No.5056/92 and HCCC No.466/2002. There is also an injunction application which was heard and dismissed by a court of competent and concurrent jurisdiction in HCCC No.5056/1992 and HCCC No.4520/1994. It is also clear that in HCCC No.466/2002, the 1st plaintiff sought similar prayer. However the said suit was dismissed for want of prosecution on 7th July, 2006. It means the present court is the 4th attempt by the plaintiffs to prevent the defendant from exercising its statutory power of sale. I am therefore satisfied that the present application does not raise new issues or issues which require

a new suit for trial between the parties.

It is my decision that the present suit is res judicata and more so an abuse of the judicial process. My brother **Justice Ombija** in HCCC No.466/2002 (Milimani Commercial Court) rejected a similar application like the present application. He was of the view that the reliefs sought in HCCC 466/2002 were substantially similar to reliefs sought in HCCC No.5056/92, and HCCC No.4520/94. On my part I am satisfied beyond doubt that the issues and reliefs sought in this matter were substantially and directly in issue in the earlier suits. The issues now raised were raised in the earlier attempts but the court told the plaintiffs that the way ahead is blocked.

In deed it is my decision that the suit being res judicata and an abuse of the judicial process cannot stand. It cannot stand because the plaintiffs are bent on abusing the law that they seek protection from. A party cannot be allowed to seek protection from a process, which he/she continually and persistently disregard, and/or abuses. That is what the plaintiffs are doing in this matter. **The application therefore has no merit and it is dismissed with costs. And since the foundation of this suit is based on an abuse of the judicial process, it too cannot stand, it is dismissed with costs to the defendant.**

Dated and delivered at Nairobi this 26th day of June, 2007.

M. A. WARSAME

JUDGE