



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 1032 of 2006

L'ILE DE FRANCE PASTRY LIMITED.....PLAINTIFF

VERSUS

GIGIRI SHOPPING CENTRE LIMITED.....DEFENDANT

RULING

The Plaintiff herein has filed this claim against the defendant vide a plaint filed herein dated 27th September, 2006 and filed the same date. Paragraph 16 of the said plaint reads “*save for the aforementioned suits Nairobi Chief Magistrate’s Civil case No. 7390 of 2004 and Nairobi High Court Civil Appeal Number 726 of 2005 the plaintiff states that there have been no previous proceedings involving the parties and issues to this suit*”

The defendant filed a statement of defence dated 30th October 2006 and filed the same date. In paragraph 2 thereof the defendant has averred that in response to paragraph 16 of the plaint the matters in issue in this suit are also directly and substantially in issue in other suits and involve the same parties namely **CMCC NUMBER 7390 OF 2004 NAIROBI HIGH COURT CIVIL APEPAL NUMBER 726 OF 2005 AND NAIROBI HIGH COURT CIVIL APPEAL NUMBER 749 OF 2005** and that this Court is barred from proceeding with the trial of this suit. In paragraph 3, they contend that filing of this suit during the pendency of the aforesaid suits is a gross abuse of the process of the court by the plaintiff. In paragraph 4 they contend that the plaintiff is estopped in law and or barred from bringing this suit against the defendant or claiming the reliefs sought in this suit by dint of a consent order recorded on 14th February 2006 in the said **NAIROBI HIGH COURT CIVIL APEPAL NUMBER 726 OF 2005** and also having failed to sue or claim such reliefs in **NAIROBI CMCC NUMBER 7390 OF 2004**. There is no reply to defence on the record.

Against that background the defendant has filed a preliminary objection to the suit listing 11 grounds touching both a pending application filed by the plaintiff and the pending suit. For purpose of the record these are:-

1. The application is brought under a non-existent provision in law.
2. The application is not supported by a valid affidavit
3. The application is an unprocedural attempt to obtain Summary Judgment.

4. The application is bad in law for uncertainty and is legally vague.
5. The application should be by way of motion.
6. The verifying affidavit in support of the plaint is invalid and incurably defective rendering the plaintiff's suit bad in law.
7. The deponents of the verifying affidavit in support of the application has perjured herself and the applicant is not worthy of reliefs sought.
8. The Plaintiff has stated on oath that there are previously instituted pending proceedings involving the same parties and issues.
9. The defence is not scandalous, frivolous and vexatious and the defence cannot and does not prejudice, embarrass or delay the fair trial of the action.
10. The subject matter of the plaintiff's suit is subjudice.
11. The subject matter of the plaintiff's suit is resjudicata.

The preliminary objection as presented is what can be termed as an omnibus objection which is attacking the suit as well as the interim application. However at the argument stage the objection was limited to the main suit.

The major grounds are:-

1. that the dispute arose and the defendant sought eviction orders against the plaintiff herein in CMCC NO. 7390/04 which eviction orders were issued.
2. An appeal was filed to the High Court which is still pending. The appeal emanates from the proceedings in NAIROBI CMCC 7390/04.
3. There was a turn of events and the eviction in CMCC 7390/04 was set aside and the plaintiff reinstated in the premises.
4. The defendant paid costs of reinstatement. The proceedings in the CMCC Court case No. 7390/04 are still pending.
5. They agree loss of profits for the period the plaintiff was evicted is not subject to the previous proceedings but issues whether the plaintiff was legally or illegally evicted is still an issue both in the CMCC No.7390/04 and the appeal. On this account the matters subject of the previous proceedings and the current ones are directly and substantially the same. On that account these proceedings cannot proceed until the other proceedings have been determined.

In response Counsel for the Plaintiff submitted that it is true the plaintiff was violently evicted but reinstated

- (2) That the suit herein concerns the loss of mesne profits for the period the plaintiff was thrown out of the premises.
- (3) That the claim for mesne profits cannot be incorporated in the lower court proceedings as the lower court has no jurisdiction to entertain the claim(may be due to momentary jurisdiction limits.
- (4) That they are entitled to claim damages for trespass during the period of eviction and it is their stand that this is a distinct cause of action and this suit should be allowed to proceed and there is no basis to stay this suit.

- (5) That no prejudice will be suffered by the defence as they have put in a defence and counter claim.
- (6) That incorporating the lower courts proceedings into the current proceedings will be tantamount to usurping the appellate courts jurisdiction.

In response Counsel for the defendant objector maintained that if this matter were to proceed and final orders made, these orders are likely to prejudice the pending proceedings.

- (2) That reinstatement of the plaintiff back into the premises is an interim order pending appeal.

On the Courts assessment of the arguments on this preliminary objection it is clear that there is in existence two other proceedings one an appeal and another in the lower court whose causes of action have some relation with the current suit. The cause in the CMCC 7390/04 has some relation to the appeal in that the appeal pending arises from the orders issued in that file. It has some relation to this suit because the eviction orders issued in the lower court by virtue of which the plaintiff was kept out of the premises are the ones giving rise to the cause of action herein as the plaintiff is claiming loss of profits for that period. It also has some relation to the pending appeal which is yet to determine whether the eviction was legal or illegal and which should it rule in the negative that the eviction was legal then that would automatically knock out the claim for loss of profits herein. However should the appeal be heard and determined and then the negative decision given when a decision has already been granted in this matter in favour of the plaintiff for mesne profit, the defendant will be greatly prejudiced and the two proceedings will be embarrassed as opposing parties are likely to end up with orders in their favour which are in opposition to each other and which will be unenforceable thus rendering both entire proceedings nonsensical and a waste of judicial time.

This court has further been informed that the plaintiff cannot be told to incorporate these proceedings because there will arise an element of excess jurisdiction. Likewise the lower court proceedings cannot be swallowed up or incorporated into these proceedings as in doing so the court would be short circuiting the pending appeal.

The objection having been raised by way of a preliminary objection, by its every nature it rules out recourse to evidence. This is now trite law. See the case of MUKISA BISCUIT MANUFACTURING CO. LTD versus WEST END DISTRIBUTORS LTD [1969] EA 696. At page 701 per A-B as per Sir Charles Newbold. A preliminary objection raises a pure point of law which is argued as the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained.”

Apart from the averments in the paragraph 16 of the plaint and paragraph 2,3, and 4 of the defence, this court has no way of assessing the pleadings and orders in those other proceedings to verify what is being stated in order to confirm their relationship to the current proceedings. What the court has are statements in submission from the bar. The court needs to confirm the correctness of the information using the pleadings and proceedings in these other cases.

The foregoing being the case although the defendant has a genuine complaint, the best way to raise the objection should have been by way of an application for stay of proceedings to which all the pleadings and proceedings or relevant orders from the other cases could have been annexed for this court's perusal in order to make an informed decision. It is this court's view that it is not safe to act on the submissions of Counsel as regards the position of the other cases when there is a better way of bringing such information on board.

For the foregoing reason the preliminary objection will only be upheld and an order made staying the proceedings pending the filing of an appropriate application for staying of the proceedings, to bring on board all the relevant information to enable the court make appropriate orders.

The preliminary objection is therefore upheld and there will be stay of the proceedings herein for a period of 45 days pending the filing of an application for stay of proceedings in the manner advised above.

(2) Costs will be in the cause.

DATED, READ AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY 2007.

R. NAMBUYE

JUDGE