



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 323 of 2007

FOUR NINETY INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

ANTHONY AMBAKA KEGODE.....1ST DEFENDANT

ELIZABETH ANN KEGODE.....2ND DEFENDANT

UHAI LIMITED.....3RD DEFENDANT

R U L I N G

By a plaint filed on 22nd June 2007, Four Ninety Investments Limited, (hereinafter referred to as the Plaintiff), brought a suit against Anthony Ambaka Kegonde, Elizabeth Ann Kegonde, and Uhai Limited (hereinafter referred to as the Defendants), seeking judgment against the Defendants, jointly and severally for: -

- (a) U.S.\$ Two Million together with interest at court rates;
- (b) Sterling £ 191,886/= together with costs and interest;
- (c) General damages;
- (d) Costs and interest.

The Plaintiff's claim is grounded on an agreement dated 4th June 2004 entered into between the Plaintiff and the Defendants which agreement the Plaintiff claims has been vitiated by fraudulent misrepresentation and/or in the alternative breach of contract.

The Defendants duly entered appearance and filed a defence denying the Plaintiff's claim and contending *inter alia* that the Plaintiff's suit is sub-judice as it raises matters directly and substantially in issue in previously instituted suits.

By a Chamber Summons dated 30th of August 2007, the Plaintiff sought orders under Section 3A of the Civil Procedure Act and Order XXXVIII rules 1, 2 and 12 of the Civil Procedure Rules, as follows: -

- 1.) That this application be certified as urgent and be heard *ex parte* in the first instance.
- 2.) That a warrant of arrest do issue against the 1st Respondent to show cause why he should not deposit his passports in court as security for his attendance.

- 3.) That a warrant of arrest do issue against the 2nd Respondent to show cause why she should not deposit her passport in court as security for her attendance.
- 4.) That in the alternative to prayers 1 and 2 hereinabove, a warrant of arrest do issue against the 1st and 2nd Respondents herein to show cause why an order to deposit into court U.S.\$ 2,000,000/= as security for their attendance should not be issued.
- 5.) That an order for attachment before judgment do issue in respect of shares held by the 1st Respondent in the following companies.
 - I. Agem Properties Limited.
 - II. Kwasi Properties Limited.
 - III. AGM Services Limited.
 - IV. Zinda Holdings Limited.
 - V. Jalili Limited
 - VI. Elijah Investments.
 - VII. Makujo Intelon Limited.
 - VIII. Zawaridi Limited.
 - IX. Handhari Limited.
 - X. Elijah Investments Limited.
 - XI. Imali East Africa Limited.
 - XII. Air Bateleur Limited.
 - XIII. Eliant Investments Limited.
 - XIV. East Africa Soya Beans Limited.
 - XV. Dafi Limited.
 - XVI. Baragumu Limited.
 - XVII. Hози Nensi (K) Limited.
- 6.) That an order for attachment before judgment do issue over LR. NO.2327/162 and L.R.2327/285.
- 7.) That the costs of this application be borne by the Respondents.

On the 31st of August 2007, the Plaintiff's advocate appeared before Warsame J. and the Chamber Summons was certified as urgent and admitted to hearing during the High Court vacation. On the 4th of September 2007, both parties' advocates appeared before Warsame J. and the matter was stood over to 18th September 2007 for hearing.

In the meantime, the 2nd Defendant filed a Replying Affidavit opposing the Plaintiff's Chamber

Summons. The defendants' advocate also filed a Notice of Preliminary Objection raising an objection to the Plaintiff's suit on the grounds that the suit is sub-judice and that the court lacks jurisdiction to deal with the same. It is this objection which was heard on the 18th September 2007.

Prof. Mumma who argued the preliminary objection before this court, submitted that the preliminary objection was grounded on Section 6 of the Civil Procedure Act. He contended that the court has no jurisdiction to proceed with the current suit as there are two other previously instituted suits, which are still being actively litigated. He identified these suits as Milimani HCCC No.379 of 2004 and HCCC No.345 of 2004 both of which involve the same parties as the present suit.

Prof. Mumma referred to the plaint and the defence filed in this suit which mentioned the two suits and submitted that the presence of the two suits was not disputed. He submitted that one of the suits was before the Court of Appeal and therefore is still "pending". He maintained that the parties in the suit were essentially the same as they were litigating under the same rights. He further contended that the Plaintiff in the current suit raises the issue of the Share Sale Agreement signed on the 4th of June 2004 and that in Civil Suit No.379 of 2004 the same agreement is in issue. He relied on **Niazsons (K) Limited vs China Road and Bridge Corporation (K) 2001 2 E.A. 502.**

Mrs. Shaw who appeared for the Plaintiff submitted that the Notice of preliminary objection filed by the Defendants did not rely on Section 6 of the Civil Procedure Act, but raised only the issue of sub-judice. She submitted that the principle of sub-judice cannot apply to a court of competent jurisdiction, but can only apply to other bodies or persons, usurping the powers of the court.

Mrs. Shaw contended that the court could only make a proper determination on the applicability of Section 6 of the Civil Procedure Act where a proper application has been filed and pleadings relating to all the suits availed to the court. She submitted that the defence counsel has relied on contested issues of facts and, therefore, Section 6 cannot apply. She maintained that the preliminary objection was brought in bad faith, and is simply intended to delay the hearing of the Plaintiff's application.

Mrs. Shaw further stated that one of the suits has already been dismissed by the court and is therefore not pending. She urged the court to find that the facts relied upon in support of the preliminary objection were substantially in dispute and cannot therefore form the basis of the preliminary objection. Mrs. Shaw distinguished the case of **Niazsons (K) Limited vs China Road Bridge Corporation (K)** as applying to arbitration proceedings which was not the case herein.

In the Notice of Preliminary Objection filed on the 17th September 2007, the Defendant had given notice that it will raise an objection at the hearing of the suit and apply that the suit be struck out with costs on the ground that:

The suit as filed is sub-judice and the court lacks the requisite jurisdiction to deal with the same.

In his submissions before this court however, Prof. Mumma did not refer to this ground but based his objection on Section 6 of the Civil Procedure Act. I have considered this objection in the light of paragraph 3 of the Defence. Although it is evident that the use of the word sub-judice is rather inept, it is clear that the essence of the objection is that the matters raised in the current suit are directly and substantially in issue in previously instituted suits, which also involve the same parties as the current suit. Such an objection falls squarely within the purview of Section 6 of the Civil Procedure Act. The main question however is whether this objection qualifies to be preliminary objection. As described in **Mukisa Biscuit Company vs Westend Distributors [1969] E A 696**, a preliminary objection "***Consists 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 (as per Law, J. A.) raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of a judicial discretion (as per Sir Charles Newbold P.)***."

It is evident that paragraph 25 of the plaint makes reference to HCCC No.379 of 2004 as a suit which

involved the same parties as this suit but which according to the Plaintiff was dismissed. This is conceded in paragraph 3 of the defence wherein it is indicated that HCCC No.379 of 2004 was dismissed for want of prosecution. The Defendant however averred that it has commenced the process of appeal against the order of dismissal. This is a matter that is not conceded by the Plaintiff and therefore there is a disputed fact as to whether HCCC No.379 of 2004 is still pending.

As regards HCCC No.345 of 2004, the plaint makes no reference to this suit. It would therefore be necessary for the court to ascertain the existence of this suit, the fact that it involves the same parties as the current suit and the fact that the issues raised are substantially the same, as those raised in the current suit. I note that there is a replying affidavit which was sworn by the 2nd Defendant in response to the Chamber Summons dated 30th August 2007 which depones to some of the issues raised by Prof. Mumma. However the affidavit depones to contested matters of evidence and cannot be used in support of the preliminary objection.

For these reasons, I find that the objection has been improperly raised as a preliminary objection. Accordingly, I overrule the objection and order that the Chamber Summons dated 30th August 2007 shall proceed to hearing.

Dated, signed and delivered this 17th day of October 2007.

H. M. OKWENGU

JUDGE