



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

**Civil Case 510 of 2006**

**NATIONAL BANK OF KENYA.....PLAINTIFF**

**VERSUS**

**ROSELINE MARY KAHUMBU.....DEFENDANT**

**RULING**

The Defendant has by a Notice of Motion dated 20<sup>th</sup> February, 2007 and brought under Order VI rule 13(1)(b),(c) and (d) of Civil Procedure Rules and section 53 and 3A of Civil Procedure Act sought two prayers:

- 1) **THAT the Plaintiff/Respondent's suit filed on the 7<sup>th</sup> of September 2006 be struck out.**
- 2) **THAT the costs of and occasioned by such striking out of the suit be borne by the Plaintiff/Respondent in any event.**

**The application is premised on the following grounds:**

- 1) **THAT the suit is an abuse of the court process**
- 2) **THAT the pleadings are scandalous, frivolous and vexatious**
- 3) **THAT the suit currently filed will prejudice the fair trial of the proceedings and orders issued in High Court Civil Suit No. 1336 of 2001.**
- 4) **THAT the Plaintiff/Respondent is guilty of material non disclosure and is trying to mislead the honourable court.**
- 5) **THAT the Plaintiff/Respondent is attempting to circumvent the "unless order" of the Honourable Justice Mbaluto and the order of the Honourable Justice Njagi striking out the Plaintiff/Respondent's defence and the order of the Honourable Justice Njagi dismissing the application for review seeking to reinstate the above said struck out defence filed in HCCC No. 1336 of 2001.**
- 6) **THAT Plaintiff/Respondent has willfully failed to comply with the terms of orders issued by the Honourable Court.**

7) **THAT Plaintiff/Respondent is guilty of perjury for deposing to facts that are false.**

8) **THAT it is just and equitable to grant relief**

There is an affidavit sworn by the Defendant ROSELINE MARY KAHUMBU the Defendant herein, in support of this application.

The application is opposed. There is a replying affidavit, sworn by **DAMARIS GITONGA**, a Manager in the Plaintiff Bank and dated 27<sup>th</sup> April, 2007. Mr. Amoko argued this application on behalf of the Defendant/Applicant. Counsel submitted that the Applicant wished to rely on the ground of ‘abuse of court process’. Counsel submitted that there was a previous suit Hccc No. 1336 of 2001, in which the Plaintiff was the Defendant and the Defendant herein the Plaintiff. That in that suit, Mr. Amoko contends, that the Plaintiff Bank’s defence was struck out due to failure to obey a Court order with respect of discoveries and, that the Bank’s attempts to have Court’s order reviewed failed. That the Bank thereafter filed the current suit and filed an application seeking to have 1336 of 2001 consolidated with the instant suit. Counsel takes issue with paragraph 15 of the plaint in the instant suit and paragraph 4 and 8 of the supporting affidavit to the Plaintiff’s application dated 28<sup>th</sup> November, 2006. Paragraph 15 of the Plaint avers:

15) The Defendant has previously filed suits against the Plaintiff seeking to defeat the Plaintiff’s Mortgage over the suit property including HCCC NO. 1650 OF 1984, HCCC NO. 1143 OF 1997 (O.S), HCCC NO. 3274 OF 1995 AND HCCC NO. 1336 OF 2001(subsisting), which suits, do not cover the subject matter of the present suit. It is intended that HCCC NO. 1336 OF 2001 be consolidated with the present suit for hearing and determination.

Paragraph 4 and 8 of the supporting affidavit stipulate as follows:

4) **THAT both suits are in relation to the property L.R No. 7583/41 Mwituu Estate Nairobi, whose registered owner at all times material to this suit was one John Francis Kahumbu.**

8) **THAT the issues to be determined are similar in both suits, which are yet to be heard and finally determined. Annexed herein and marked “LG-1” is a copy of the plaint in HCCC NO. 1336/2001.**

Mr. Amoko submitted that the latter two paragraphs contradicted the Plaintiff’s plaint, in that the Plaintiff had pleaded that the previous suits filed by the Defendant/Applicant did not cover the subject matter of the instant suit. Mr. Amoko contends that attempt to consolidate the instant suit with 1336/2001 was circumnavigation of the ultimate sanction of the Court by rulings of **Mbaluto, J** and **Njagi, J**, in the latter suit;

Mr. Amoko relied on his authorities numbers 2 to 6 and urged the Court to follow the findings of the Courts in cited cases that a party who files subsequent proceedings after their pleadings were struck out due to failure to obey peremptory orders of the court should have the suit struck out.

In **ASEA BROWN BOVERI LTD VS BAWAZIR GLASS WORKS LIMITED, [2001]2 E.A 336** the court ruled.

***“The Court can on its own motion under its inherent jurisdiction make such orders as may be necessary for the ends of justice or to prevent an abuse of it’s process.”***

In cited case, **Ringera, J** as he then was, expunged an application filed by the Plaintiff for the striking out of the Defendant’s defence, on grounds the Plaintiff’s precious application for summary judgment had failed and the appeal it filed to challenge the Courts refusal to enter summary judgment was yet to be prosecuted. In **JANOV VS MORRIS [1981]3 ALL ER 780**, the Court of Appeal of England held:

***“Held- Where an action had been struck out on the ground of the Plaintiff’s disobedience of a peremptory order of the Court and the Plaintiff commenced a second action within the limitation***

*period raising the same cause of action, the court had a discretion under RSC order 18 rule 19(1)(d) to strike out the second action on the ground that it was an abuse of the Court's process. In exercising that discretion the Court would have regard to the principle that Court orders were made to be complied with. Accordingly, because there had been no explanation by the Plaintiff for his failure to comply with the peremptory order made in the first action and there was no indication that he was likely to comply with orders made in the second action, the commencement of the second actions was an abuse of the process of the Court and the Court would exercise its discretion under Order 18 rule 19(1) (d) to strike it out."*

The rest of the cases cited by the Defendant, just like **JANVOR**, supra, are English cases and they repeat the same principle.

Mr. Ojiambo represented the Plaintiff/Respondent and relied on the replying affidavit. Counsel contended that apart from the instant suit, all other suits filed relating to the suit property were instituted by the Defendant in order to obtain injunction orders to stop auction sales and that currently, the Defendant was enjoying one such order as a consequence of which, no action is being taken to have suit heard.

Mr. Ojiambo submitted further that the application had failed to demonstrate what it is that the Respondent had done which was an abuse to the Court process.

Mr. Ojiambo submitted further that the fact the Respondent's defence in 1336/2001 was struck out does not mean that the Respondent has been shut out. He relies on **BULLEN AND LEAKE, PRECEDENTS OF PLEADINGS 12<sup>TH</sup> EDITION** on the definition of Abuse of Court Process which is given as:

*"The term "abuse of the process of the Court" is a term of great significance. It connotes that the process of the Court must be carried out properly, honestly and in good faith; and it means that the Court will not allow its function as a Court of Law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation.*

*An action is an abuse of the process of the Court it is "pretenceless" or "absolutely groundless", and the court has power to stop it summarily and prevent the time of the public and the Court from being wasted".*

Mr. Ojiambo also responded to the Applicant's list of authorities. On authority No.3 Counsel submitted that the party had brought one suit which was struck out. They brought a second one which court disallowed. Counsel sought to distinguish this case with the instant suit on grounds the Plaintiff in both cases was the same while in instant case, the Respondent had only filed one suit. Counsel submitted that the Applicant had filed numerous suits, as deponed to by Damaris in the replying affidavit, and which averment had not been controverted.

Counsel urged the Court to find that it was the Applicant who was abusing the process. On authority 3 and 5, Mr. Ojiambo said both were irrelevant. On authority 4 he submitted that the same could be distinguished from the instant suit in that in the cited case a party who lost a matter filed a new suit as an attack to Court's decision in the previous suit, which court disallowed. On authority 6, Mr. Ojiambo submitted it emboldened his clients case. The sixth case is **SECURUM FINANCE LIMITED VS ASHTON AND ANOTHER [2000]3 WLR 1400** in which the Court of Appeal of England held:

*"Held(1) that it was no longer open to a litigant whose action was struck out for delay to rely on the principle that a second action commenced within the limitation period would not be struck out save in exceptional circumstances; that in actively managing litigation, and in deciding whether to strike out a claim under Civil Procedure Rules, rule 3.4, the court had to consider the overriding objective in rule 1.1(1) of doing justice and decide whether the claimant's wish to pursue a second case against the same opponent outweighed the need to allot the Court's limited resources to other cases; and that in failing to give any weight to that objective the judge erred in his approach to the exercise of his discretion."*

It is expedient to understand the rulings of **Hon. Mbaluto, J** and **Hon. Njagi J** in order to rule on the issue whether or not there is an abut of process as alleged in this application. In **Mbaluto J's** ruling, page 6 the Hon. Judge ruled:

*“As I am satisfied that the documents listed in paragraph 4(ii) to (viii) of the Chamber Summons dated 20<sup>th</sup> June, 2002 are relevant and necessary for the fair disposal of this suit as well for the purposes of saving costs, there will be an order directing the Defendant to produce the documents within the next 14 days of the date of this ruling, failing which the Defendants’ defence will stand struck out with courts.”*

**Hon. Njagi, J** ruling he observed:

*“The documents which were set out in paragraph 4(ii) to (viii) of the chamber summons dated 20<sup>th</sup> June, 2002 were-*

*4. ii) Loan agreement between Schemes Ltd and the Defendant.*

*iii) Guarantee by John Francis Kahumbu of Schemes Limited as well as guarantees of other directors in relation to the aforementioned loan agreement.*

*iv) Memorandum and Articles of Association of Schemes Ltd.*

*v) Resolution authorizing schemes Ltd. to borrow money from the Defendant.*

*vi) The Original mortgage documents between John Francis Kahumbu and the Defendant*

*vii) Evaluation report on the property done by the Defendant in reference to the 1<sup>st</sup> and 2<sup>nd</sup> Mortgage.*

*viii) All minutes of Board meetings of the Defendant with regard to the loan agreement between Schemes Ltd. and the Defendant.*

*These were the documents which the court ordered to be produced within 14 days. It is not in dispute that all of them were not so produced. Those which have not been produced are the ones stated in paragraph 4(ii), (iii), (v), (vi) and (viii). In that context, can it be said that the Defendant has complied with the court order? If not, has it done so willfully?*

*It is as clear as daylight that the Defendant has not produced all the documents. It is contended for the Defendant that the reasons why it could not produce these documents was because the said documents were mislaid or lost. For that reason, the Defendant was not in possession of those documents and therefore could not produce them. From that perspective, it was argued that the Defendant had produced all the documents in its possession and therefore had complied with the Court order.*

*The conduct of the Defendant in relation to Mbaluto J's order for production of documents, to my mind shows a willful disregard of a court order. Such willful disregard of a court order merits the imposition of the penalty ordered by the Judge. Even though it was suggested that this application was brought as an afterthought, I think that it raises very weighty matters which cannot be swept away under the carpet of afterthoughts.*

*The Defendant has failed to comply with the court order made on 19<sup>th</sup> July, 2002, as to production. Failure to do so brings into operation the sanction prescribed by the Court for such default. In the circumstances, the Defendant's defence filed herein stands struck out with costs.*

Looking at the plaint filed herein, paragraphs 3, 4 and 8 are of interest and they state as follows:

3) At all times material to this suit, John Francis Kahumbu (hereafter called Kahumbu) was the registered owner of the property known as L.R. No. 7583/41 at Mwituu Estate in Nairobi (hereinafter called “the suit property”)

4) The suit property was by a Mortgage dated 4<sup>th</sup> July, 1978 and further Mortgage dated 28<sup>th</sup> July, 1981 (hereinafter called “the said Deeds”) mortgaged by Kahumbu to the Plaintiff to secure repayment of monies advanced as more particularly spelt out in the said Deeds.

8) That all the monies secured by the said Deeds over the suit properly remain due and owing. The Debt stands in excess of Kshs.181,564,640.30.

The substantive prayers sought in this plaint include:

a) A declaration that the legal interest of the Plaintiff in L.R. No. 7583/41 at Mwituu Estate Nairobi, overrides all interests that the Defendant may have.

b) That the Plaintiff be at liberty to advertise and sell L.R No. 7583/41 at Mwituu Estate, Nairobi.

In the suit in which the rulings of Hon. Mbaluto, J and Hon. Njagi, J were made, the plaint dated 31<sup>st</sup> August, 2001 in paragraph 6 and 7 and the prayers sought, inter alia, prayers 1 and 2 it is averred:

6. By various agreements entered into between John Francis Kahumbu of the one part and the Defendant of the other part between 1978 and 1981 the said John Francis Kahumbu purported to convey the property unto the Defendant by way of mortgages and further mortgages over the original matrimonial home consisting of LR. No. 7583 and LR. No. 7583/19.

7. The Plaintiff avers that the mortgages are and were at all material times due to the Plaintiff’s interest in the suit property and the circumstances under which John Francis Kahumbu was registered as the owner.

#### Prayers 1 & 2 of Plaint

1. A declaration that the mortgage and further mortgage are null and void.

2. A declaration that Plaintiff’s interest in the suit premises is free from the Defendant’s interest

In the defence filed by the Bank dated 2<sup>nd</sup> May, 2002 at paragraph 6 it is averred:

6. The Defendant admits the contents of paragraph 6 of the plaint save to add that the mortgage and further mortgage over property L.R. No. 7583/41 and L.R. No. 7583/19 are legal, valid, effective and enforceable. The Defendant further avers that its legal rights over the suit property as conferred by the said mortgages rank in priority to the alleged Plaintiff’s interest thereto, to the extent that the same had not been registered on the subject title as at the time of creating the mortgages.

It is quite clear from all these pleadings and the prayers sought that the subject matter in 1336/01 was mortgages over L.R No.7583/41 and L.R 7583/19 which mortgages are alleged to have existed between the Bank and one JOHN FRANCIS KAHUMBU, the husband of the Plaintiff in that suit. The same properties and mortgages are the subject matter. In the instant suit, in which the Bank is the Plaintiff and the Defendant is the Plaintiff in 1336/01. Quite clearly the Bank, having had its defence struck out in 1336/01, has brought back the same defence through the instant suit. And to leave no doubt as to their intention, the Bank has filed herein, an application seeking to consolidate HCCC No. 1336/2001 with the instant suit.

Has there been an abuse of the court process? The Bank has circumvented the Court rulings by Hon. Mbaluto, J and Hon. Njagi, J striking out it’s defence, by bringing back the same defence in the form of

a new suit and a plaint. The very act of filing a new suit, after the orders made against it in **1336/0**. In the circumstances in which they were made is a clear demonstration that the Bank has been dishonest and has acted in bad faith. The Court cannot allow its functions to be misused, or its machinery to be used as a means of vexation or oppression in the process of litigation. By bringing back the same defence struck by the Court, clothing it in a new outfit called “**a plaint**” the Bank was putting to question the Court’s power to strike out its pleading and is an affront to the powers and jurisdiction of the Court.

It was not open for the Bank to file a new suit. The only means open for the Bank to challenge the Court’s decision, was by filing and prosecuting its appeal in the Court of Appeal. As long as the rulings of the Honourable Courts subsists, the Bank has no options but abide by them and be bound by them.

I do observe that an order was made by this court striking out the Bank’s defence in **Hccc No. 1336/01**. Court orders are made to be obeyed and complied with. It is embarrassing that a National Institution like the Bank in this suit, can take a stubborn stance in the face of a validly made court order, and take action that puts to the very question the peremptory order made, by filing a new suit. The point is this, that since the Bank failed to obey a court order in **1336/01**, it must face the consequence of the choice it made not only by having the defence in **1336/2001** struck out, but by having any subsequent action filed on the same cause of action struck out.

I do find that the Respondent Bank was in flagrant abuse of the Court process by bringing this suit. The application by the Defendant is therefore allowed. This suit is struck out with costs of the application and of the suit going to the Defendant/Applicant.

**Dated at Nairobi this 16<sup>th</sup> day of November, 2007.**

**LESIT, J.**

**JUDGE**

Read, signed and delivered in the presence of:

Mr. Kimathi holding brief Mr. Olouch for Applicant

N/A for Respondent

**LESIT, J.**

**JUDGE**