



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Civil Suit 74 of 2002

JAPHETH OGENDO OWUOR PLAINTIFF

VERSUS

AKUOM O. LEONARD & CO. AUCTIONEERS 1ST DEFENDANT

FRANCIS TUIYOT 2ND DEFENDANT

NYAUNDI TUIYOT & CO. ADVOCATES 3RD DEFENDANT

DELPHIS BANK LIMITED

(UNDER STATUTORY MANAGEMENT) 4TH DEFENDANT

CENTRAL BANK (STATUTORY MANAGER) 5TH DEFENDANT

RULING

Japheth Ogendo Owuor, who is the plaintiff in this matter, is a Veterinary Surgeon who operates in Eldoret. He claims to have deposited documents of title to his property, namely ELDORET MUNICIPALITY BLOCK 10/107, with Delphis Bank (4th defendant) which bank he alleges, later fraudulently created a charge thereon and caused its sale. He instituted this suit against the 4th defendant and four others on 25/4/2002.

The 1st to 4th defendants have now moved this court on an application in which they seek orders to have the plaint dismissed under Section 7 of the Civil Procedure Act and Order 13 1(a), (b) and (d) of the Civil Procedure Rules.

They base their application on the grounds that:

- (i) The suit is scandalous, frivolous and vexatious.
- (ii) The suit is an abuse of the process of the court.
- (iii) The suit is res judicata.

- (iv) The suit is intended merely to embarrass the defendants.
- (v) The suit does not disclose any cause of action against the defendants.

Order VI rule 13(1) (a), (b) and (d) stipulates that:

“13. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

(a) it discloses no reasonable cause of action or defence; or

(b) it is scandalous, frivolous or vexatious; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

Though the plaintiff who urges this court not to grant the orders which are being sought filed his grounds of opposition, his counsel did not appear in court to challenge the application. I have however taken the grounds into account, since they are on record.

It is clear that though the plaintiff claims that the suit cannot be dismissed as the 6th defendant has never appeared or filed a defence, there is no 6th defendant in the suit and I shall therefore disregard that ground of opposition.

In his supporting affidavit, the Manager of the 4th defendant depones that this plaintiff and Agri Millers Ltd., had sued his bank in a case filed in the High Court at Nakuru, to wit HCCC No. 455 of 1998, which case was heard and determined. He also depones that the subject matter and issues arising in the said suit, which was filed in Nakuru are the same as those that arise in this suit and it is therefore his contention that the allegations made in this suit are frivolous, scandalous and vexatious. He has attached copies of the pleadings in the Nakuru matter and the judgment, which was delivered on 18/5/2001.

It is clear from the aforementioned pleadings, which has not been seriously disputed, that the matters in both Nakuru and this court revolve around the subject property herein, over which this plaintiff had created a charge as security in favour of the 4th defendant for advances made to Agri Millers Ltd., which company failed to redeem its loans with the 4th defendant, leading to attempt by the 4th defendant attempt to realize its security. It is also clear that the matter before the court at Nakuru was heard and determined by the said court at Nakuru, whose jurisdiction has never been in issue. It is also evident that eleven months after the dismissal of the matter by the court at Nakuru, this Owour filed this particular suit.

Section 7 of the Civil Procedure Act stipulates that *“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 competent 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”*. This section is clear in its application. It is trite law that a party brings out all the issues that he wishes to canvass in his suit, for he cannot be heard to say that he saw the need to file a second suit in which he raises additional issues. In my mind, the only option that was open to him was to seek leave to amend his pleadings in the previous suit but not to file a new suit in the manner that this plaintiff did, and though he claims that the parties are different, a look at his own pleadings in this suit, reveals that the facts have never changed, nor can he be heard to claim that the facts were not within his knowledge then as he was the registered proprietor of the subject land, and he had already created a charge over it, in a bid to guarantee the loan repayment by Agri Millers Limited to the 4th defendant. Based on the fact that a similar matter was heard and determined in Nakuru, this suit is res judicata and it would demand that this suit be dismissed, for litigation must come to an end.

All in all I find that to allow this suit to remain on the records would be tantamount to encouraging a frivolous, vexatious and scandalous suit which in my mind, is intended to embarrass the defendants, and the only option for the court would be to order its dismissal.

But even if I am wrong in the above finding, a look at the pleadings reveals that the plaintiff failed to comply with the provisions of Order VII rule 1(2) for he did not file a verifying affidavit when he instituted this suit. Such omission contravenes the mandatory provisions of the said rule. A suit which lacks a verifying affidavit stands struck out.

It is for the above reasons that I do allow this application and dismiss the suit. The applicants shall have the costs of the suit and this application.

Dated and delivered at Eldoret this 17th day of January 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of:

No appearance for either party