



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 270 of 2005

ABDUL KASSIM HASSANALI GULAMHUSSEIN KHALA.....PLAINTIFF

VERSUS

SOUTHERN CREDIT BANKING CORPORATION LTD.DEFENDANT

RULING

This ruling is the upshot of the Notice of Preliminary Objection dated 2nd February 2006 raised against the Chamber Summons dated 14th December 2005. When the aforesaid summons came up for hearing interpartes, the Preliminary objection had to be disposed of first.

Mr. Onguto advocate for the defendant/respondent argued two points in support of the preliminary objection. The first issue argued is that the summons is resjudicata. The defendant's learned advocate pointed out that a similar application dated 20th August 2004 filed in Mombasa H.C.C.C. No. 199 of 2004 was argued before Justice Mwera. The Honourable Judge gave a well reasoned ruling on merits on the 6th day of October 2004 the consequence of which the application was dismissed.

The second point raised in support of the preliminary objection is that the summons is res subjudice in that the decision of 6th October 2004 by Justice Mwera is a subject of appeal pending before the court of appeal. Mr. Onguto urged this court either dismiss to the application or stay it altogether in view of the provisions of sections 6 and 7 of the Civil Procedure Act.

On his part, Mr. Gor Advocate for the plaintiff opposed the preliminary objection by stating that there were no final orders made arising out of the interlocutory application in Mombasa H.C.C.C. No. 199 of 2004. He was of the view that the principle of resjudicata did not apply because the rights of the plaintiff were not extinguished. Mr. Gor advocate while responding to the second issue as to whether or not the summons is res subjudice was of the view that the principle of res subjudice does not apply because the issues raised therein are not similar to those pending before the court of appeal.

I have considered the submissions tendered by both advocates representing the disputing parties. I have also considered the material placed before me. Before considering the issues raised before this court it is important to set out the legal position regarding the points raised in support of preliminary points of law. The issues of res subjudice and res judicata are pure points of law that can be mounted as preliminary objections. In deciding the two issues this court is perfectly entitled to act at the pleadings and other relevant material presented before it. Annexed to the replying affidavit of Wilfred Oroko sworn in support of the defendant bank's position are the plaint, the summons dated 20.8.2004 with the affidavit in support and the resultant ruling by Justice Mwera of 6th October 2004. The plaintiff herein, was the 4th

plaintiff in Mombasa H.C.C.C. No. 199 of 2004. The plaintiffs in the summons dated 20.8.2004 had prayed for an order of injunction to restrain Southern Credit Banking Corporation from disposing of, advertising, alienating or selling LR No. Mombasa/BlockX/211 pending the hearing and determination of the suit. The application was opposed and the outcome is expressed in the ruling of Justice Mwera of 6th October 2004 which is reproduced, in part as follows:

“ When the financial facility was not properly serviced, the defendant sent a statutory notice. This is not denied. When that notice was not heeded, the defendant began to do what the deal mandated it to do to realize the security. In that regard this court cannot and should stand in the way of the bank. It is no matter that the house in issue is a residence. When it was made a security it became a commercial object.

Disputes over accounts or interest charged do not warrant an injunction. Not even offers by the borrower (guarantor) unless it is by way of tendering the full sum due. Why can't the plaintiffs pay Kshs.11m they offer and seek indulgence from the bank? However, that is only by the way.

In sum, this application is dismissed with costs.”

The current application, the subject matter of this ruling, seeks for an order of injunction to restrain the defendant, Southern Credit Banking Corporation Limited from selling, advertising for Sale, alienating or interfering with the ownership and quiet possession and enjoyment of his property being Mombasa/Block X/211 pending the final determination of this suit.

Without much strain it is clear that the prayers being sought in the summons dated 14.12.2005 are similar to those sought in the summons dated 20th August 2004. It is not denied that the summons dated 20th August 2004 was argued and determined on 6th October 2004. It is also admitted by the plaintiff that he and the other plaintiff were aggrieved by the orders of 6.10.2004 and that they have preferred to appeal and that the appeal is pending before the court of appeal. Res judicata relates to a matter already adjudicated upon or a matter on which judgment has been pronounced. It is applicable to interlocutory application in that a party whose application has been dismissed is barred from filing a similar application on the same grounds.

The doctrine of res judicata is based on three maxims: first, that no man should be vexed twice over for the same cause. Secondly, that it is in the interest of the state that there should be an end to a litigation and thirdly, that a judicial decision must be accepted as correct.

The plaintiff's advocate has admitted that there is a pending appeal against the order of dismissal of 6th October 2004. I have already stated that the prayers sought in the Summons of 20/8/2004 are similar to those sought in the summons dated 14th December 2005. In view of the admission that an appeal is pending in the court of appeal, then the doctrine of res subjudice is applicable in this case. Res subjudice is a matter, which is pending judicial inquiry.

I have carefully considered the intricate and inter-related issues raised in the preliminary objection. Whichever angle one takes, the truth is that the two doctrines of res judicata and res subjudice are applicable in this dispute. After critically weighing the scales of arguments, I am satisfied that the most appropriate principle to apply in this ruling that of res-subjudice. The principle of res judicata will only be applicable upon the outcome of the decision of the court of appeal over the appeal against the ruling of 6th October 2004.

In the end I find the preliminary objection well founded. The same is upheld with the result that the application by summons dated 14th December 2005 is stayed pursuant to section 6 of the Civil Procedure Act pending the outcome of the appeal against the decision of Justice Mwera dated 6th October 2004. Costs of the preliminary objection to be paid by the plaintiff/applicant.

Dated and delivered at Mombasa this 23rd day May 2006.

J.K. SERGON

J U D G E

In open court in the presence of Mr. Gor for the plaintiff and No appearance for the defendant