



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

**Civil Case 613 of 2005**

**BIF EAST AFRICA LIMITED .....**  
**....PLAINTIFF**

**VERSUS**

**FUELEX KENYA LIMITED.....**  
**.....DEFENDANT**

**RULING**

This is an application to strike out the Plaint and to dismiss the suit herein, on the grounds that the suit is frivolous, unsustainable and an abuse of the process of the court. It was also submitted that the suit was fatally defective and bad in law.

It is the applicant's contention that this suit is an abuse of the process of the court, as it seeks to frustrate the execution of a Decree in HCCC NO. 713/99.

From the exhibits attached to this application it is evident that **FUELEX KENYA LIMITED –VS- SEED GROUP LIMITED, HCCC NO. 713 OF 1999** went through a full trial, which culminated in the judgement of the HON. MBALUTO J., on 23<sup>rd</sup> June 2000. The said judgement was in favour of the plaintiff in that suit, for a sum of U.S. Dollars 399,572.43, together with costs and interest at court rates.

After obtaining judgement, the plaintiff in that suit had his bill taxed in the sum of Kshs.1,103,811/-. Following the taxation, the learned taxing officer issued a certificate of taxation dated 10<sup>th</sup> August 2004.

In an endeavour to execute the Decree and the Certificate of Taxation, the plaintiff, in that suit, obtained a prohibitory order, for the attachment of the property belonging to the defendant, in that suit

It is noteworthy that the prohibitory order was in respect of three immoveable properties, being;

- (i) L.R. No. 12948/207, Nairobi;
- (ii) L.R No. 12948/54, Nairobi
- (iii) L.R. No. 12948/59, Nairobi

Those facts are not in dispute at all. It is also not in dispute that the plaintiff in that other suit did take appropriate legal steps to settle the terms and conditions of sale, in respect to the three properties, as a prelude to the actual sale by public auction.

Having set out those agreed facts, it needs to be noted that whereas the 2<sup>nd</sup> plaintiff and the 1<sup>st</sup> Defendant in this suit, were the Plaintiff and the Defendant, respectively, in the other suit; the other two parties herein did not feature at all in that said other case. In other words, both the 1<sup>st</sup> Plaintiff herein, as well as the 2<sup>nd</sup> Defendant herein, were not party to HCCC No. 713 of 1999.

For that reason, the plaintiffs contend that the 1<sup>st</sup> plaintiff could not be bound by orders or decrees issued in that other case. And, because the 2<sup>nd</sup> defendant herein was not a party to HCCC No. 713 of 1999, the plaintiffs' submitted that this suit cannot be said to be dealing with the same subject matter.

The distinction between the two cases is said to be founded on the causes of action. For instance, in this suit, the plaintiffs were complaining about the proposed sale by the Decree-holder, which threatens the purchase of the suit property, by the 1<sup>st</sup> defendant.

The said purchase was said to have been effected by the National Bank of Kenya Limited, who were chargees. Therefore, the purchase was said to have had nothing at all, to do with the execution process in the other case.

At the same time, the plaintiffs did concede that the subject matter was the same, in this case, as in HCCC No. 713 of 1999. Other than that fact, the plaintiffs insisted that the prayers were also completely different. Therefore, even though the 1<sup>st</sup> defendant herein had obtained judgement against the 2<sup>nd</sup> plaintiff, it is the plaintiff's contention that that fact alone could not be a bar to the plaintiffs filing and prosecuting this suit.

The 1<sup>st</sup> defendant submits that it had arranged with the 2<sup>nd</sup> defendant, to have the suit property sold to the former. In other words, Seed Group Limited had entered into contract to sell to BIF East Africa Limited, the suit property. It is said that pursuant to that agreement, BIF East Africa Limited, paid to Seed Group Limited the sum of Kshs.650,000/-, which was the 10% deposit. That payment was, according to the plaintiffs', made on 5<sup>th</sup> August 2005. Furthermore, the chargee, National Bank of Kenya Limited had given its approval to the sale, so said the plaintiffs.

For those reasons, the plaintiffs perceive as collusion and fraud, the action by the 1<sup>st</sup> defendant who **"came to court to Sanction a sale by the 1<sup>st</sup> Defendant."**

According to the plaintiffs', that is what prompted them to file this suit.

In the circumstances, the plaintiffs submitted that this court would not be right to give effect to the draconian remedy of striking out the plaint herein, as the plaintiffs believe that theirs is a genuine grievance against the defendants.

To my mind, there is no doubt that the applicant has not invoked the doctrine of res judicata. However, the question that arises is whether the claim herein arose due to the manner in which the 1<sup>st</sup> defendant was executing the Decree in HCCC No. 713 of 1999.

It must be remembered that the prohibitory order which has been registered against the three properties belonging to the 2<sup>nd</sup> defendant, was issued in the cause of the execution of the Decree and Certificate of Taxation in HCCC No. 713 of 1999. Therefore, there can be no doubt that the intended sale, by public auction, of L.R. No. 12949/207, Nairobi, was to be carried out as part of the execution process, in HCCC No. 713 of 1999.

A perusal of the record of proceedings in that case, shows that on 9<sup>th</sup> June 2005, the learned Deputy Registrar settled the terms and conditions for the sale of the suit property. One of the conditions stipulated by the said Deputy Registrar, was to the effect that the person who would conduct the auction was Mr. Joseph M. Gikonyo, Trading As Garam Auctioneer. It is by that order that the 2<sup>nd</sup> defendant herein was given the mandate to sell the suit property. Therefore, the plaintiffs got it wrong when they

asserted, at paragraph 12 of the Plaint, that **"the 1<sup>st</sup> Defendant wrongfully contracted the 2<sup>nd</sup> Defendant to sell the suit premises by public auction."**

The correct legal and factual position is that the learned Deputy Registrar gave an order on 9<sup>th</sup> June 2005, inter alia, appointing Mr. Joseph M. Gikonyo T/A Garam Auctioneers, as the auctioneer. That order was made whilst the said Deputy Registrar of this court was settling the terms and conditions of sale, of the suit property. And, as I have already previously stated hereinabove, that process is in a lead-up to the sale by public auction, whilst executing the Decree and Certificate of Taxation.

That being the case, the Defendants hold the considered view that the provisions of Section 34 (1) of the Civil Procedure Act would come into play. That section stipulates as follows;

**"All questions arising between the parties to the suit in which to the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit."**

To the extent that the 2<sup>nd</sup> plaintiff herein was a party in HCCC No. 713 of 1999, wherein execution was being levied, it should have raised any questions relating to the execution or discharge of the decree, in that very suit. That statutory provision expressly bars the 2<sup>nd</sup> Plaintiff from filing a separate suit to raise issues which relate to questions in the other suit. However, insofar as the 1<sup>st</sup> Plaintiff was not a party to HCCC No. 713 of 1999, the provisions of Section 34 (1) of the Civil Procedure Act would not constitute a bar to its filing a separate suit against the defendants.

Meanwhile, the question that arises is whether or not the 1<sup>st</sup> plaintiff should have moved the court pursuant to the provisions of Order 21 rule 53 of the Civil Procedure Rules. That rule provides as follows;

**"53 (1) Any person claiming to be entitled to or to have a legal or equitable interest in the whole of or part of any property attached in execution of a decree may at any time prior to payment out of the proceeds of sale of such property give notice in writing to the court and to the decree-holder of his objection to the attachment of such property."**

As I understand it, the 1<sup>st</sup> defendant is, by this suit, asserting that the defendants ought to be restrained by an injunction from interfering with the plaintiffs' rights of possession, or from selling the suit property, or from interfering with the plaintiffs' ownership of title to and/or interest in the suit property. The plaintiffs also wish to have the defendants "restrained from restricting the intended sale," by private treaty, from the 2<sup>nd</sup> plaintiff to the 1<sup>st</sup> plaintiff.

Those claims, in my considered opinion, are founded on the plaintiffs' perceived legal or equitable interest in the property which was attached, in execution of the Decree in HCCC No. 713 of 1999. Therefore, the plaintiffs ought to have pursued their claims, in that regard, in that suit.

If the 1<sup>st</sup> plaintiff were to be allowed to institute and sustain a separate suit, with a view to challenging the execution process in HCCC No. 713 of 1999, the results might bring the court into disrepute. I say so because in one case, the court has settled terms and conditions of sale, through which the suit property herein was to be sold off by public auction. The 2<sup>nd</sup> defendant herein was appointed as the auctioneer, to carry out the said public auction. In effect, he has been lawfully authorised to conduct the public auction. Therefore, if any person believes that he should not undertake that task, it would only be proper that the challenge is mounted in the same case wherein the authority was given.

Similarly, the 1<sup>st</sup> defendant had taken steps to execute the Decree issued by this court. If there was anybody who felt that the Decree should not be executed, or that the manner in which it was being executed was not compatible with the law, I believe that that person should launch his challenge in the same file.

If we were to allow people to challenge execution processes through separate suits, the end-result could be two or more inconsistent decisions, by courts of concurrent jurisdictions. For instance, the court herein might possibly find that the execution process should be put on hold permanently. If that were to happen, there would be two decisions of the superior court, relating to the same properties, but with orders pulling in different directions. In the one case, the court would have given the go-ahead to execution, whilst in the other case, the court would have stopped that very same execution.

I would be loathe to permit the development of a possibility. And, in my view, the only way to ensure that the court is not exposed to the possibility of inconsistent decisions, is by allowing the application dated 15<sup>th</sup> December 2005. Accordingly, the plaint filed herein is hereby struck out, and the plaintiff's suit is dismissed. The costs of the application dated 15<sup>th</sup> December 2005, and the costs of the suit are awarded to the Defendants.

Dated and Delivered at Nairobi this 23<sup>rd</sup> day of June 2006.

**FRED A. OCHIENG**

**JUDGE**