



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

Civil Case 287 of 2005

PHOENIX PROPERTIES LTD.....PLAINTIFF

VERSUS

EQUIP AGENCIES LTD1ST DEFENDANT

INTERTRACTORS CO. LTD.....2ND DEFENDANT

PAPERMART E.A. LTD.....3RD DEFENDANT

COFTEA MACHINERY SERVICES LTD.....4TH DEFENDANT

INTERMART MANUFACTURERS LTD.....5TH DEFENDANT

KIPKELION CORNER LTD.....6TH DEFENDANT

UNICOM LTD.....7TH DEFENDANT

-

RULING

This application by way of Notice of Motion expressed to be brought under Section 3, 3A and 6 of the Civil Procedure Act seeks Orders that the proceedings in the instant suit and any further or subsequent proceedings independent or arising therefrom dealing with or raising similar issues be stayed pending the hearing and determination of High Court Civil Suit No. 1227 of 2003 and APPEAL NO.269 OF 2004.

The application is based on the grounds:

1. That the High Court Civil Case No.1227 of 2003 between the said parties to the instant suit is pending before this Honourable Court.
2. That the issues raised and subject of determination in HCCC NO. 1227 OF 2003 are similar to the issues raised in the instant suit.
3. That more specifically the Defendants in the instant suit who are the plaintiffs in HCCC NO.1227 OF 2003 are contending vide the Chamber Summons Application dated 12th August 2004 which is pending, that the issues of any rents owing and/or subjected of the instant suit have been compromised and/or adjusted by acts of the parties.
4. That the matters pending in Civil appeal No. 269 of 2004 now pending, though not directly relating to any money or rental, claiming are invariably connected with the issues subject matter of the instant suit and HCCC NO.1227 OF 2003.
5. That it would a grave abuse of the process of this court to allow the instant suit to proceed during the pending of HCCC 1227 OF 2003 and CIVIL APPEAL NO. 269 OF 2004.

The application is supported by an affidavit sworn by DIVYESH KUMAR INDUBHAI PATEL who has deponed thus:-

1. That he is the Director of all the Defendant Companies and he is conversant with the facts of this case and he is duly authorized and competent to swear the affidavit.
2. That he is the 2nd Plaintiff in HCCC CIVIL CASE NO. 1227 OF 2003 (the said suit) between themselves and the Plaintiff herein, who is the Defendant therein.
3. That on 12th August 2004 the 1st Plaintiff and himself filed a Chamber Summons Application dated the same date vide which they sought Orders of Injunction against the instant Plaintiff (Defendant in the said suit) copy annexed DK1PV.
4. That the Hon. Justice Nyamu issued orders of temporary injunction vide the said Application which application is pending to date. The issues raised vide the said Application are presently the subject of Civil appeal No. 269 of 2004 (copy annexed DP1P2).
5. That he is advised by his Advocates on record which advise he verily believes to be time that the issues raised in the said suit now pending and partly in the pending Appeal Proceedings are similar directly by necessary implication to the issues now raised in the instant suit.
6. That he verily believes that the filing of the instant suit during the pending of the suit and of the Court of Appeal proceedings constitute an abuse of the process of the court.
7. That in a bid to further abuse the process of this court the plaintiff herein has now threatened to commence winding up proceedings premised on the same issues subject matter of the said suit and of the instant suit.

The plaintiff filed Grounds of Objection thus:

1. The defendant's application dated 20th January 2006 are an abuse of process of the this Honourable Court.
2. The Defendants have obtained an ex parte order by gross misrepresentation and/or concealment of material facts.
3. There is no similarity between the causes of action herein and in any other pending suit or appeal

between the parties herein or otherwise. Mr. Odera for the applicant relied on the affidavit of Divyesh Kumar Patel above and submitted that the basis of this application is grounded on Section 6 of the Civil Procedure Act. Section 6 provides thus:

“6” No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceedings between the same parties or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having in Kenya to grant the relief claimed. Mr. Odera submitted that the issues raised in the instant suit HCCC NO. 287 OF 2005 are the issues directly and or substantially in issue in HCCC 1227 OF 2003 and CIVILAPPEAL NO. 269 OF 2004.”

The proceedings in HCCC NO. 1227 OF 2003 relate to a suit between the defendants in the instant suit and the plaintiff in that suit and the defendants in HCCC NO.1227 OF 2003. In that suit an application for injunction was filed among others to restrain the plaintiff in this suit from alienating or seeking the plaintiff's goods on the ground of the alleged rent arrears.

That application in that file was dismissed. The suit HCCC NO. 1227 OF 2003 is still subsisting. The defendants in that suit filed a defence and the matter is yet to be heard. But subsequently on 12th August 2004 the defendants in this suit who were the plaintiffs in HCCC NO. 1227 OF 2003 filed a Chamber Summons under Certificate of Urgency. The plaintiffs had filed HCCC NO. 1227 OF 2003 on behalf of the other defendants listed in this. By the application dated 12th August 2004 the defendants in HCCC NO. 285 OF 2005 sought to restrain the plaintiff in HCCC NO.287 OF 2005 from selling his diverse movables allegedly on the claim of rent arrears.

On of the grounds on which the application was based is that the entire suit (HCCC NO.1227 OF 2003) had been adjusted or compromised by the parties. The orders were issued by Nyamu, J in that file HCCC NO.1227 OF 2003. That orders was breached by counsel and his client for which contempt proceedings have been filed. Counsel and his client were committed for contempt against which order counsel appealed hence Civil Appeal No.269 OF 2004 which is still pending.

The application of 12th August 2004 is still pending with a result that whether the suit HCCC NO. 1227 OF 2003 was compromised or adjusted has not been determined.

The defendants in this suit HCCC NO.287 OF 2005 who were the plaintiffs in HCCC NO. 1227 OF 2003 have an injunction against the present plaintiffs stopping them from selling allegedly to recover rent arrears. The goods are in the premises.

The plaintiff in the instant suit (HCCC 287 OF 2005) filed this suit to recover Shs.23,699,000/= balance of agreed rent for the demised premises from May 2002 to October 2004.

The outstanding rent arrears in a matter directly and or substantially in issue in HCCC NO. 1227 OF 2003. As long as that issue of rent remains outstanding it is impossible for the plaintiff in this suit to file another claim for the alleged rent arrears. The alleged outstanding rent arrears in both suits arises out of the same suit premises LR NO.209/7722 Mr. Ismael counsel for the plaintiff suit submitted the issues in that previous suit were not identified since the pleadings were not made available to the court. He submitted that the issues raised in the instant suit are not directly and or substantially the same as the issues raised in the other suit HCCC NO.1227 OF 2003.

The ex parte orders issued by Njagi J was through misrepresentation of material facts as the rental part of it was not even payable when the previous suit was filed. None of the issues raised in the instant suit could be covered by that previous suit.

Counsel went on to submit that the application dated 20th January 2006 seeks to stay suit and other proceedings. This is not tenable and also that the orders sought in paragraph 3 of the application cannot

be made under Section 6 of the Civil Procedure Act as no such powers are given in Section 6 of the Civil Procedure Act.

The issues raised in the instant suit are not the same as those raised in HCCC NO. 1227 OF 2003 and the CIVIL APPEAL NO. 269 OF 2004 has nothing to do with rent arrears. On the issue of threats to commence winding up proceedings, counsel submitted that this has nothing to do with civil proceedings. He further argued that the matter in issue means the entire matter before the court. There is no relationship between HCCC NO.1227 OF 2003 and the present suit. It must be a live matter and since the court had made a holding in the previous suit, there is no disputed matter pending.

The applicant had failed to discharge the burden by producing the plaint and other documents to prove similarity. But Mr. Odera in reply submitted that the plaintiff in the instant suit has acknowledged that the issues in the two suits are actually similar. The dispute in the two suits is over rent arrears and all relate to the suit premises LR. 209/7722.

In paragraph 12 of the plaintiff in the instance suit the plaintiff makes the following declaration:

***“There is no other suit pending and there have been no previous proceedings in any court between the Plaintiff and the Defendants over the same subject matter except HCCC 1227 OF 2003 being a suit filed by the first named Defendant and D.I. Patel against the Plaintiff which is pending.*”**

The object underlying Section 6 is to avoid two parallel trials on the same issues by two courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit.

Matter in issue in Section 6 of the Civil Procedure Act does not mean any matter in issue in the suit, but has relevance to the entire subject matter in controversy; it is not enough that one or some issues are in common. The subject matter in the subsequent suit must be covered by the previous suit, not vice versa See JADVA KARSAN VS. HARNAM SINGH BHOGAL 1952 EACA 74.

For these reasons I would allow the application and order a stay of the proceedings in the instant suit pending the hearing and determination of High Court Civil Suit No. 1227 of 2003 and Civil Appeal No. 269 of 2004. I order that costs be costs in the cause.

Dated and delivered at Nairobi this 13th day of June 2006.

J.L.A. OSIEMO

JUDGE