REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUSIA

Civil Case 12 of 2006

GEORGE MARCELO…….....……PLAINTIFF/APPLICANT

VS

HOUSING FINANCE OF KENYA LTD…….....……DEFENDANT/RESPONDENT

RULING

By a plaint dated 4th May 2006, George Marcelo (hereinafter referred to as the plaintiff) sued Housing Finance of Kenya Ltd (hereinafter referred to as the defendant).

The dispute, according top the plaint, is in respect of L.R.NO.BUKHAYO/BUSIBWABO/968 (hereinafter referred to as the suit property).

The plaintiff brings the suit in his capacity as a personal representative of Joseph Ochieng Musigo who died on 6th December 2003. The plaintiff's case as pleaded, is that on or about 1993, his father (since deceased) was granted a loan of Ksh.300,000/= by the defendant. To secure the charge, the plaintiff charged the suit property.

The plaintiff further pleaded that the charge registered against the suit property is null and void and/or unenforceable for want of proper attestation and/or execution.

The plaintiff also pleaded that at the time of his late father's demise he (Joseph Ochieng Musigo) had substantially repaid the loan and the purported outstanding amount is on account of illegal interest charged thereto.

That by reason of the foregoing, the amount demanded is questionable and he is entitled *inter-alia* to an order of accounts.

That in any event, he has not been served with the requisite statutory notice entitling the defendant to exercise its purported power of sale. The power of sale has not accrued and if it has then the same is illegal.

The plaintiff also argued that the defendant is also canvassing matters of evidence as preliminary points of law. For those reasons the plaintiff seeks *inter-alia* judgment against the defendant for orders that:

(a) The threatened sale of L.R.NO.BUKHAYO/BUSIBWABO/968 be stopped.

(b) Costs.

(c) Any other or further alternative relief the court deems expedient to grant.

Together with the plaint, the plaintiff filed a Chamber Summons of even date seeking injunctive reliefs of injunction to restrain the respondent by itself, its agents and/or servants from selling the suit property.

The defence of the defendant, as pleaded is as follows:

It is admitted that it (defendant) loaned the late Joseph Ochieng Musigo the sum of Sh.300,000/= and to secure the said loan, the deceased charged the suit property to the plaintiff as collateral for the repayment of the said loan. The charge is therefore valid and enforceable.

That during his lifetime, the deceased seriously defaulted in loan re-payment such that as at 31st January 2006, the total arrears of loan stood at Ksh.8,427,654/85. The same continuous to grow on account of ledger fees and insurance premiums, payable thereon.

That the defendant has all along charged lawful interest mutually agreed thereon and hence entitled in law to recover the balance of principal amount and interest as aforesaid.

That the defendant has served the plaintiff with the requisite statutory Notice before the sale and regularly sent statements of accounts.

By reason of the foregoing, the defendant contended that the intended realization of the security charged in exercise of its statutory power of sale is lawful.

It was the defendant's last and final position that in any event the suit herein offends the mandatory provisions of sections 6 and 7 of the Civil Procedure Act in that, the plaintiff has filed two similar suits against the defendant over the same subject matter being BUSIA SRM CC NO.642/1996 and BUNGOMA H.C. MISC. CIVIL APPLICATION NO.123/1998 which has since been dismissed. That in any case, the current suit is equally fatally and incurably defective.

In reply to the affidavit in support of the Chamber summon dated 4th May 2006 by the plaintiff, the defendant annexed the mortgage application form (exhibit 'JM1'), the subject charge, (exhibit 2), statement of accounts (exhibit 3), demand notice (exhibit 4), notice of increment of interest (exhibit 5), letter from defendant acknowledging the debt (exhibit 6 and 7(a), letter forwarding part payment (exhibit 7b), a copy of plaint and defence in respect of BUSIA SRM CC NO.642/1992 and the injunction application relating thereto (exhibit 8) and proceedings.

By a Notice of Preliminary Objection dated the 8th day of June 2006 the defendant urged me to dismiss the injunction application dated 4th day of May 2006 and the suit itself on five grounds:

(1) That the suit is fatally and incurably defective for non-compliance with Order VII rule 1(1) (e) of the Civil Procedure Rules.

(2) That the said application and the suit are res-judicata.

(3) That the suit and the application are bad on account of estopell by record and conduct.

(4) That the suit and the application offend the clear provisions of sections 6 of the Civil Procedure Act.

(5) That the suit and the application are otherwise an abuse of the process of the court.

It is common ground that BUSIA SRM CC NO.642/1992 and the injunction application alongside it is still pending in the subordinate court in Busia. This suit is between the plaintiff and the defendant

litigating over the same title.

It is further common ground that during the pendency of that suit, the present suit has been filed in the High Court.

It is also common ground that Bungoma H.C, Misc. Application No.123/98 between the same parties was dismissed by the court *suo-moto*.

What is in dispute is whether the five preliminary points of law raised would dispose of the suit.

What is also in dispute is whether failure to comply with the mandatory provisions or Order VII Rule (1) (e) of the Civil Procedure Rules (see L.N.NO.36/2000) renders the suit incompetent.

Lastly, but not least, what is in dispute is whether the suit is bad in law by reason of the doctrine of estopell by record in that the plaintiff having withdrawn the first Busia Application (by consent at the time of the hearing) is now estopped by conduct and record from bringing a similar application. That the Bungoma suit aforesaid having been dismissed, a similar suit by the applicant against the defendant attracts the wrath of the doctrine of estopell by record and/or conduct.

A preliminary objection consist of a point of law which has been pleaded or which arises by clear implications out of pleadings, and which if argued as a preliminary point may dispose of the suit. This was the dita of *LAW J. A IN LAW IN MUKISA BISCUIT MANUFACTURING CO. LTD -VS- WEST END DISTRIBUTORS LTD AND ANOTHER (1969) E.A 696.* I take the position that the same is a correct proposition of the law.

I equally hasten to quote the dicta of *SIR CHARLES NEW BOLD in MUKISA BISCUITS MANUFACTURING CO. LTD -VS- WEST END DISTRIBUTORS LTD (supra)* at page 710:

"*...The second matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objections. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts as pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion.*

The improper raising of points by way of preliminary of objection does nothing but unnecessarily increases costs and on occasion, confuse issues. This improper practice should be estopped…."

On the basis of the pleadings herein, my task is to decide whether any or all of the five limbs of the preliminary objections is/are sound in law having regard to the plaintiff/applicant's position that the defendant/respondent is canvassing matters of evidence to sustain a preliminary objection. That the proper procedure to be followed should have been by invoking the provisions of Order VI of the Civil Procedure Rules to strike out the pleadings and the application by extension. I undertake to approach my task having regard to the afore quoted dicta's of eminent jurists. The first point which falls to be decided is whether the suit is fatally and incurable defective for failing to comply with the mandatory provisions of Order VII Rule 1(1) (e) of the Civil Procedure Rules: Order VII Rule 1 (1) (e) provides:

"*an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter."*

It has been held time and again that a plaint must comply with the mandatory provisions of Order VII Rules 1 and 2 (*See PAUL KOINANGE -VS- DONALD KIPKORIR & 2 OTHERS (MILIMANI COMMERCIAL COURT /CIVIL SUIT NO.2040/2000*) where Onyango Otieno (J), as he was then struck out the plaint on the grounds that is was not accompanied by a proper verifying affidavit. The suit herein does not comply with the aforesaid order and hence is fatally and incurably defective.

The second point which falls to be decided is whether the application and the suit are therefore res-

judicata.

The court of Appeal *(NRB CIVIL APPEAL NO.80/1988 POP-IN (K) LTD & 30 OTHERS -VS- HABIB BANK A.G. ZURICH* discussed at length the principle of res-judicata in its extended sense thus:

"*The admission of a fact fundamental to the decision arrived at cannot be withdrawn and fresh litigation started with a view of obtaining another judgment upon a different assumption of facts. Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new version which they present as to what should be a proper apprehension of the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would never end, except when legal ingenuity is exhausted. It is a principle of law that this can never be permitted.…..*"

In the premises, I am inclined to find and hold that the respondent's main and final position is well within the decision of *YAT TUNG INVESTMENTS CO. LTD V DAO HENG BANK LTD & ANOTHER (1975 A.C 581)* as embodied in the passage following:

"*But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of the process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The locus classicus of that aspect of res-judicata is the judgment of Wigram V.C. in HENDERSON vs HENERSON (1843) HARE 100, 115 where the judge says:*

"Where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open same subject of litigation in respect of a matter which might have been brought forward, only because they have, from negligence inadvertetence, or even accident omitted part of their case. The plea of res-judicata applies except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which belonged to the subject of litigation and which the parties exercising reasonable diligence, might have brought forward at the time".

On the basis of the *YAT TUNG INVESTMENT* authority I am inclined to find and hold that the cause of action in BUSIA SRM CC 642/1996 is similar to the current cause of action. The matter directly and substantially in issue in the present suit and the application has been directly and substantially in issue in the former suit (BUSIA SRM CC 642/1996). The parties in both suits are litigating under the same title. The application and the suit is bad in law on account of estopell. The applicant/plaintiff filed BUSIA SRM CC. 642/1996, BUNGOMA H.C. MISC. CIVIL APPL. NO.123/1998 and the present suit and application. While the Bungoma suit was dismissed, the Busia SRM CC 642/1996 is still pending. Accordingly, I find and hold that the applicant/plaintiff is estoped by record from bringing the current suit and the application.

The fourth issue which falls to be decided is whether the current suit offend the clear provisions of section 6 of the Civil Procedure Act. Once it is admitted that the Busia SRM CC 642/1996 is still pending, then the current suit attracts the wrath of section 6 of the Civil Procedure Act.

The fifth issue which falls to be decided is whether the current application and the suit is an abuse of the process of the court. Filing another suit during the pendency of a similar suit is clearly an abuse of the process of the court.

In the result, I find that all the 5 limbs of the preliminary objection are well founded in law.

The up-shot is that the application and the suit herein are dismissed with costs to the respondent/defendant.

DATED and DELIVERED at BUSIA this 31st day of July 2006.

N.R.O. OMBIJA

JUDGE

Mr. Balongo for

Mr. Manwari for Owiti for the defendant.