



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

Civil Suit 246 of 2006

**DR PEREZ MALANDE OLINDO1ST
PLAINTIFF**

**CATHERINE KILIMA OLINDO2ND
PLAINTIFF**

VERSUS

**DR JOHN KARUNGAI NYAMU.....1ST
DEFENDANT**

**ELIZABETH WANGUI KARUNGAI.....2ND
DEFENDANT**

**STANDARD CHARTERED BANK KENYA LTD.....3RD
DEFENDANT**

DIAMOND TRUST BANK KENYA LIMITED

**formely DIAMOND TRUST BANK OF KENYA LIMITED.....4TH
DEFENDANT**

**THE REGISTRAR OF TITLES.....5TH
DEFENDANT**

RULING

When the plaintiffs filed this suit they pleaded thereof as follows: -

“The plaintiffs aver that there is no any other suit pending and that there has been no previous suit between the plaintiffs and the defendants over the same subject matter and/or cause of action save for HCCC No. 459 of 2006 and HCCC No. 498 of 2006 between the first plaintiff and the first defendant and HCCC No. 1230 of 1999 between the first plaintiff and the fourth defendant which relates to different causes of action and subject matter. Proceedings to cite the defendants for contempt of court in HCCC No. 459 of 2006 and HCCC No. 498 of 2006 with regards to orders arising therefrom, are still pending before the court.”

The plaintiff’s counsel in submission accepted that the aforesaid suits are still subsisting.

The 4th defendant raised preliminary objections in the following terms: -

“TAKE NOTICE that the 4th defendant/respondent shall at the hearing of the plaintiff’s application dated 2nd June 2006 raise inter alia the following preliminary objection:

- 1. That the issues raised therein are res judicata.**
- 2. That the entire proceedings offend the mandatory provisions of Order 1 Rule 12 of the Civil Procedure Rules.”**

4th defendant submitted that the plaintiffs suit and injunction application are res judicata because of the previous suit filed by the plaintiffs, namely HCCC No. 1230 of 1999, wherein the plaintiffs also filed an injunction application to stop sale of three of their properties by the 4th defendant. Those properties that the plaintiffs seek injunction in this suit, are the same properties in HCCC 1230 of 1999. The properties in question are L.R. No. 7792/3 L.R No. 9177/11 and L.R. No. 9177/12. The plaintiffs by their application dated 2nd June 2006, seek to restrain the defendant’s by an injunction from selling, advertising, transferring, charging, leasing and or disposing off or parting with possession of those parcels of land.

Plaintiff’s counsel submitted that the plaintiffs injunction was not res judicata because the same was prompted by different issues that were there when HCCC 1230 of 1999 was filed, namely the sale of plaintiff’s property LR.. No. 7792/3 to the 1st and 2nd defendant on or about May 2005 and the transfer registered on 4th January 2006. That since the sale and transfer to the 1st and 2nd defendant, was as a consequence of sale by private treaty, of the plaintiff’s aforesaid property, the plaintiffs were not in breach of the doctrine of res judicata.

The 4th defendant’s other objection is that the plaintiffs’ proceedings hereof offend the provisions of order 1 Rule 12 of the Civil Procedure Rules. This is a rule which requires, where one of several plaintiffs or one of several defendant who appears, pleads or acts for others, that the other parties ought to give a written authority to so plead act or appear.

Plaintiffs counsel submitted that the present suit is not caught by the requirements of Order 1 Rule 12, because both plaintiffs have sued jointly and severally.

Counsel for 1st and 2nd defendants argued that the plaintiffs’ suit cannot lie because the verifying affidavit is only sworn by the 1st plaintiff, who swore it on the authority of 2nd plaintiff and also on his own behalf. Counsel relied on the authority of HCCC No. 973 of 2001 PETER NJUNGE NGANGA & KEZIAH WANJIKU NGANGA (THE JOINT ADMINISTRATORS OF THE ESTATE OF GEORGE M K NGANGA (DECEASED) – V – THE ESTATE OF ALIM OMAR (DECEASED) (U.R.). The court held in that case that each plaintiff had to swear a verifying affidavit in a claim where there are other plaintiffs.

I have considered counsels submissions and the objections raised.

The plaintiff when they filed HCCC 1230 of 1999 also simultaneously filed an injunction application to restrain their banker, the 4th defendant, from selling their afore mentioned properties, which properties had been charged to the said bank.

That application for injunction was heard and a ruling was delivered by Justice Onyango Otieno (as he then was) on 10th December 1999. The judge declined the orders sought in that injunction application and dismissed the application. The grounds upon which that dismissed application was based were; that the bank was charging punitive interest; that the principal amount borrowed from the bank had been repaid and indeed was over paid; and that L.R. No. 7792/3 Kisembe Estate Langata is the only property in Nairobi owned by the plaintiffs and their whole family.

By the present application dated 2nd June 2006, in their suit, where the plaintiffs seek injunction against all the defendants the plaintiffs rely on the grounds that they have over paid the 4th defendant bank; that the 1st and 2nd defendant have charged property L.R. No. 7792/3 to the 3rd defendant as security of kshs 8 million; that the sale by private treaty to the 1st and 2nd defendant was fraudulent, null and void because sale was conducted when the plaintiffs did not owe the 4th defendant money; that the plaintiffs had not been served with a statutory notice for sale; that the property was sold at grossly under value; and that the sale was conducted on collusion of the 1st, end, 3rd and 4th defendant.

As it will be seen from the above brief summary of the two applications. One immediately notes that there are some similar issues in both applications but with some ingenuous drafting the plaintiffs have camouflaged the issue to seem as though they are new; that as it may be, I am of the view that the plaintiffs, suit falls fowl of section 6 of the Civil Procedure Act. This section provides:

“No court shall proceed with the trial of any suit or proceedings 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 proceedings is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

It is obvious that HCCC 1230 OF 1999 related to the three properties mentioned herein before, belonging to the plaintiff's which seeks injunction, on the basis that there is application of illegal interest by the 4th defendant bank; a declaration that the 4th defendant could not rely on the charge instrument; an order for taking accounts and refund of monies unlawfully paid by the plaintiffs to the 4th defendant bank. That suit was filed by the same plaintiffs as we have in this suit against only one defendant Diamond Trust Bank Kenya Limited.

In this present suit the plaintiffs joined the purchasers of their property, 1st and 2nd defendant; standard chartered Bank of Kenya Ltd and The Registrar of Titles. Having looked at this suit there is no good reason, which can be put forward, why the plaintiffs left the other subsisting suit HCCC 1230 of 1999, and filed this present suit, which suit is based on issues relating to the plaintiffs three, aforesaid, properties and to matters relating to the loan granted by the 4th defendant to the plaintiff which loan resulted in the sale of one property to the 1st and 2nd defendants. It was open after all, for the plaintiff to seek to appropriately amend the previous suit, HCCC 1230 of 1999, so as to accommodate the new issues that arose and the new parties. The filing of this suit is in blatant disregard of section 6 of the Civil Procedure Act; which prohibits the filing a fresh suit where the issues are substantially in issue in the previous suit. The present suit is an abuse of the court process. To allow it to continue subsisting could possibly lead the courts to reach two different decisions, on the same matters, in different suits. The court cannot allow that to be.

I reject the defendants argument that the 2nd plaintiff required to give written authority to the 1st plaintiff to file this suit. The plaintiff have both appeared and pleaded in this suit in person and accordingly there is no requirement for written authority. Written authority is only necessary where a party, plaintiff or defendant, pleads or appears, in an action for others not before court.

The argument raised by 1st and 2nd defendant, that a verifying affidavit ought to be sworn by each plaintiff who appears or pleads is correct. Order 7 Rule 1 (2) of the Civil Procedure Rules provides that: -

“The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in the plaint.”

The upshot of all this is that it is the court's finding that the plaintiffs' suit, hereof is an abuse of the court process, of it may lead different decisions being reached by different courts in this suit and in HCCC 1230 OF 1999 appropriately, for indeed joinder of causes of actions is permitted by Order 2 Rule 2 (1) of the Civil Procedure Rules.

In the end the court upholds the 4th defendants objection and does hereby stay the plaintiff's suit, until further orders of this court. The 4th defendant is awarded costs of the objection.

MARY
JUDGE

KASANGO

Dated and delivered this 31st July 2006.

MARY KASANGO

JUDGE