



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAKURU**

**Civil Case 111 of 2006**

**MAJANI MINGI SISAL ESTATES LIMITED ..... PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**DANIEL MUTISYA NDONYE ..... 2<sup>ND</sup> DEFENDANT**

**HARVEEN GADHOKE ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

On 29<sup>th</sup> May 2006, the plaintiff/applicant **MAJANI MINGI SISAL ESTATE LTD** filed a suit seeking for certain declaratory orders, discharge of the plaintiffs' security held by the 1st defendant and orders of injunction restraining the defendants from taking over the plaintiffs' estate.

Simultaneously with the filing of the suit, the applicant also filed an application by way of Chamber Summons which is expressed to be filed under Order **39** and **Section 3A** of the **Civil Procedure Rule** and **Act** respectively.

This application was filed under certificate of urgency and when the matter came up in court *ex parte* on 29<sup>th</sup> May 2006, the application for injunction was certified as urgent and set for hearing on 12<sup>th</sup> June 2006 and an interim order of injunction restraining the defendants, their servants and or agents from exercising the rights of receivership over the plaintiffs/applicants estate was issued until the inter partes hearing.

The application was served upon the respondents/defendants who filed an application dated 2<sup>nd</sup> June 2006 seeking to strike out the entire plaintiffs' suit on the grounds that the suit is scandalous, frivolous, vexatious and an abuse of the process of this court. Both Counsels for the plaintiff and defendant appeared in court on 12<sup>th</sup> June 2006 and fixed the application dated 2<sup>nd</sup> June 2006 for hearing on 28<sup>th</sup> June 2006 at 2.30 p.m.

On the 28<sup>th</sup> June 2006, Counsel for the plaintiff applied for an adjournment which was refused and thus the defendants' Counsel proceeded to argue their application dated 2<sup>nd</sup> June 2006 seeking to strike out the suit filed herein by the plaintiff on the grounds that the plaintiff has filed a previous case against the first defendant, torching on the same subject matter.

Secondly, the *ex parte* order of injunction that was issued on 29<sup>th</sup> May, 2006 was obtained by

concealment of material facts which the plaintiff was under an obligation to disclose to court.

Counsel for the defendant submitted that on 6<sup>th</sup> December 1995 the plaintiff filed civil suit number 727 of 1995 before the High Court at Nakuru against the 1<sup>st</sup> defendant over the same subject matter. In a similar manner like the present suit the plaintiff simultaneously with the filing of the suit filed an application for injunction to restrain the defendant from appointing the receivers. That application was heard and by a ruling of Rimita J dated 23<sup>rd</sup> April 1998. The application for injunction was dismissed and upon that dismissal, the plaintiff filed a notice of appeal and an application for stay of execution pending the appeal which was granted by the ruling delivered on 18<sup>th</sup> June 1998.

Having obtained the order of stay of execution, the plaintiff did not move to prosecute the appeal and thus the defendants moved the Court of Appeal to strike the Notice of Appeal which the Court of Appeal did on 24<sup>th</sup> February 1999. The parties came back to the civil suit number 727 of 1995 filed in Nakuru High Court and the case commenced before Hon. Rimita J but before it was complete the plaintiff approached the defendant with a settlement proposal to pay a sum of Kshs.180,000,000. A consent letter to that effect was forwarded to the plaintiff's Advocate but the same was never executed by the plaintiff's Advocate and the last correspondence from the plaintiff's Advocates was a letter dated 4<sup>th</sup> July 2000 where they indicated that the plaintiff was negotiating for finances. The plaintiff did not pay the agreed amount and thus the defendant moved under the power of debenture and appointed the receivers. That is when the plaintiff moved to court in the present case once again *ex parte* and without disclosing the existence of the other suit which is still pending before this court and applied for *ex parte* orders of injunction.

It is against this background that Counsel for the defendant urged this court to strike off the present suit as being an abuse of the court process.

In considering the application, I have taken into account the provisions of **Section 3A of the Civil Procedure Act** which gives this court inherent powers to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court.

The issues in the present application were adjudicated upon in a parallel suit being Nakuru High Court Civil case number 727 of 1995 whereby an order of injunction was declined but the plaintiff enjoyed the interim order of injunction and the stay of execution which remained in force from December 1995 to February 1999.

The orders sought by the applicant in the present application are not only an abuse of the court process but from the averments contained in the applicant's supporting affidavit are barred by the doctrine of estoppel and to some extent the principle of *res-judicata*. The Court of Appeal in the case of **Pop in (Kenya) Ltd and 3 others –Vs- Habib Bank A.G Zurich C.A No. 80 of 1988** had occasion to determine a similar issue abt the suit had been withdrawn. In the present case the suit is still pending and thus if I were only to comment on the present application for injunction, I would reiterate the holding in the case of **Yat Tung Investment Co. Ltd –Vs- Dao Heng Bank Ltd [1975] AC 581** which was adopted by the Court of Appeal where it was held:

***“Where a given matter becomes the subject of litigation in, and of 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 the same subject of litigation in respect of matters which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of res-judicata applies, except in special cases, not only to point upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation and which the parties exercising reasonable diligence might have brought forward.”***

I find nothing new that was not raised in the previous application which could have been raised in this

application and suit.

On the issue of the suit being an abuse of the court process, I similarly find nothing new in the present suit which could not be agitated in the pending suit being Nakuru HCCC No.727 of 1995.

Under the inherent powers vested upon this court, pleadings can be struck out if they are an abuse of the court process, that is, if the suit is not filed in good faith and for proper purpose but as a means of vexation or oppression or the process of the court is misused. (See **Halsbury's Law of England 4<sup>th</sup> Edition Vol. 37**). The facts of this case, the existence of a parallel suit on the same subject matter and failure by the plaintiff to disclose this material information clearly renders this suit an abuse of the court and accordingly, I hereby allow the application dated 2<sup>nd</sup> June 2006. I hereby strike the suit filed herein with costs to the defendants.

It is so ordered.

**Ruling read and signed on 7<sup>th</sup> July 2006.**

**MARTHA KOOME**

JUDGE