



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

Civil Case 688 of 2005

SEED & GENERAL LIMITED.....1ST
PLAINTIFF

NAPHTALI JOSEPH MUNGAI MUREITHI.....2ND
PLAINTIFF

VERSUS

CO-OPERATIVE BANK OF KENYA LTD.....1ST
DEFENDANT

RICHARD N. NYARIKI t/a BASELINE AUCTIONEERS.....2ND
DEFENDANT

R U L I N G

The Plaintiffs filed the present action seeking amongst other prayers for a temporary injunction to restrain the Defendants from selling their property known as L.R. No. Machakos 12610/16,14816/3 and 14816/11. the Plaintiffs simultaneously filed a chamber summons seeking those temporary orders. When the matter came up for hearing the defence raised preliminary objection and preceded to argue the same. From the outset I wish to do away with objection No. 3 and 4 by stating that the same is not properly taken under preliminary objection for to some extent this objections seek the court to exercise its discretion which would not be proper under a preliminary objection. That leaves two objections which the court would need to deal with. These objections are as follows:-

(1) By a consent order recorded in HCCC No. 2300 of 1999 at Milimani Commercial Courts on 25th January, 2000 (before the Honourable Mr. Justice Mbaluto), the Plaintiffs were ordered to repay the loan amount owing to the 1st Defendant within a period of 21 days from the said date and in default, the 1st Defendant was at liberty to realize the securities charged in its favour, namely L.R. No. Machakos/12610/16,14816/3 and 14816/11 which are the subject matter in this suit.

(2) The injunction application filed in the said HCCC No. 2300 of 1999 having been settled on the terms of the consent order of 25th January, 2000 aforesaid, the present application herein offends the provisions of section 7 of the Civil Procedure Act and therefore this Court shall not entertain the same.

It shall be seen from the objection raised the Plaintiffs had entered into a consent with the Defendants whereby the Plaintiffs undertook to repay the loan it was owed to the Defendants within 21 days and in

default the Defendant was at liberty to sale the charged properties which are the same properties the subject of this present suit. Defence counsel submitted that for the Plaintiff to again file the present suit it was an abuse of the court process and it also fell foul of the rule of *res judicata* particularly section 7 explanation 4 of the Civil Procedure Act. As a result of that breach defence said that the court had no jurisdiction to entertain not only the injunction application but also the suit. He argued that the issues raised in the present suit related to the Plaintiffs debt owed to the Defendant and also related to Defendants securities. He said that those matters were also in the previous suit where the consent was recorded. Even if there were other matters which the Plaintiff had not raised in the previous suit defence counsel was of the view that they are caught by section 7 explanation 4 of the Civil Procedure Act. Defence counsel said that the Plaintiff had not sought to review the previous consent nor had they sought to appeal against that consent. In that view the defence counsel was of the view that the Plaintiff was abusing the court process. Defence counsel relied on the case **HCCC No. 1111 of 2002 Susan Jane Shah & Another vs Co-operative Merchant Bank Ltd & Another** where Justice Ringera had an opportunity to decide on similar issues facing the court in this matter. Defence counsel relied on the following portion of the ruling:-

“raised in that suit or which could have been raised but were not were superceded by the consent order and the present suit cannot lie as long as that consent order remains in force.”

Defence counsel therefore sought that the court would uphold the preliminary objection.

The Plaintiff opposed the preliminary objection and submitted that it is improper because it ought to have been brought by way of an application. Counsel for the Plaintiff said that what is brought out by the preliminary objection related to matters of fact. That accordingly it was contrary to the holding of the case **Mukisa Biscuit Manufacturing Company Limited vs West end Distributors Limited (1969) EA 696**. Plaintiff relied on a quote from the ruling of Law JA as follows:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

The Plaintiff argued that if the Defendant was to seek the finding of the court that the Plaintiff is abusing the court process the Defendant could only do that by moving the court under Order 6 rule 13 (1) (d) of the Civil Procedure Rules. Plaintiffs counsel said that the Defendant did not dispute that there was a previous suit wherein the parties had entered into a consent but he stated that that consent did not give the Defendant the right to move arbitrary without following due process of the law. He said that the Plaintiff was contending amongst other illegalities that the Defendant had not issued statutory notice of sale. He said that the requirement regarding statutory notice was explicit and ought to have been followed failure to follow that requirement gave the Plaintiff the right to file the present suit. Plaintiff counsel further stated that the previous suit had not been concluded because costs had not been paid and he later stated that that suit was withdrawn. He was however careful to state that those are issues relating to facts which cannot be canvassed without evidence. He concluded by saying that this court has jurisdiction to entertain the present suit and the application for injunction. He said that the present suit does not fall within the habits of section 7 explanation 4 of the Civil Procedure Act. It is necessary as I begin to consider this ruling to give a definition of *res judicata* as found in the Blacks Law Dictionary. It is defined as **“an issue that has been definitively settled by judicial decision.”** I would also wish to rely on a decision of the **Court of Appeal No. 243 of 2001 Ukay Estate Ltd & Nakumatt Holdings Ltd vs Shah Hirji Manek Ltd, Ramesh Premchand Shah and Sunny Style Manufacturers Ltd** and I would quote from the judgment of Deverell JA as follows:-

“I consider that what the court hearing the subsequent suit has to decide is whether the matter directly and substantially in issue in the former suit is the same as the matter directly and substantially in issue in the subsequent suit.”

Section 7 explanation 4 of the Civil Procedure Act provides as follows:-

“Explanation. (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

The Defendants argument that the issues that were brought up or ought to have been brought up in the previous suit where a consent was entered were caught up by the rule of ***res judicata*** is indeed correct. However, any other issues that would have arisen subsequently to that consent cannot be caught by that rule. Having perused the plaint and the application I do find that a majority of the issues raised for example the issue relating to the lose of the title, the issue relating to illegal interest charges are caught by the rule. However on a close scrutiny of the pleadings I find that there are two issues which might not be caught by the rule. These are issues relating to statutory notice and relating to an allegation of substantial payment being made to the Defendant. These issues seem to have arisen after the consent was entered into and therefore to use the words of Justice Ringera cannot be said to have been super ceded by the consent order. These issue are intertwined with the other issues I previously alluded to which to my view are caught by the rule of ***res judicata***. It will not be possible to strike them out and leave the ones that are not caught up by the rule. This might have been possible if the court had been moved by way of an application but since the Defendant moved the court by way of a preliminary objection the court will not strike them out. The court is of the view that the preliminary objection raised by the Defendant was not without merit but for the fact that two issues as stated herein before were issues that occurred after the consent. The end result is that the court will strike out the preliminary objection, with leave being granted to the Defendant to raise the said issues in the main application. The costs of the preliminary objection shall abide with the injunction application dated 14th December, 2005. Orders accordingly.

MARY KASANGO

JUDGE

Dated and delivered this 18th day of October 2006.

MARY KASANGO

JUDGE