REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 299 of 2006

HOME SAVINGS & MORTGAGES LIMITED …….....…….
…..PLAINTIFF

VERSUS

JOSEPH MUIGAI WANENE ……..…….....……..…1ST DEFENDANT

EDWIN WANENE MUIGAI ……..…….....…2ND DEFENDANT

HOUSING FINANCE COMPANY OF KENYA LTD…….....…..3RD DEFENDANT

COMMISSIONER OF LANDS …….....…..……4TH DEFENDANT

CHIEF LAND REGISTRAR …….....…..…….5TH DEFENDANT

DIRECTOR OF SURVEYS …….…….....…….6TH DEFENDANT

CLERK OLKEJUADO COUNTY COUNCIL …….....…..….7TH DEFENDANT

THE ATTORNEY GENERAL …….....……8TH DEFENDANT

RULING

The Plaintiff on filing this suit simultaneously filed a Chamber Summons dated 18th April, 2006 seeking temporary injunction against the Defendants. The Plaintiff without the leave of the court subsequently amended the Chamber Summons and that amended Chamber Summons is dated 20th June, 2006. Both the Defendants in opposing the Plaintiff's application for injunction raised an objection to amended Chamber Summons on the basis that the Plaintiff amended the same without the leave of the court and yet a Chamber summons is not a pleading as defined by the Civil Procedure Act. In considering my ruling I wish to start by saying that that position of the Defendants is the correct position in law and was indeed upheld by the Court of Appeal in the case of **Civil Appeal No. 61 Of 1999 Between Board of Governors, Nairobi School and Jackson Ireri Geta.** The Court of Appeal had the following to say in respect of such an argument that a Chamber Summons can be amended without leave of the court before close of pleadings because a Chamber Summons is a pleading**.**

"**However, before we conclude this judgment, we consider it pertinent to consider the issue which**

the appellant raised, namely, whether a chamber summons is a pleading within the meaning of the term as used in the civil procedure act and rules made there under. *"Pleadings"* is defined in section 2 of the Civil Procedure Act as follows:-

" ***.includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant****:*"

Mr. Amolo for the appellant urged the view that the general practice of the High Court and the working of the afore quoted definition suggests that the term "*pleadings*" **may be extended to cover a chamber summons and other proceedings commenced otherwise than by plaint, petition or originating summons. He cannot be right. The definition, above, is couched in such a way as to accord with Order IV rule 1, which prescribes the manner of commencing suits, which rule provides that:**

"***Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed."***

Chamber summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the Civil Procedure Act and rules made there under. The use of the term "*summons*" **in the definition of the term "pleading' must be read to mean '***Originating summons'* **as that is "**a manner …..prescribed" **for instituting suits"**.

The court finding therefore, and in reliance of the above authority of the Court of Appeal is that the Plaintiff was not entitled to amend its Chamber Summons dated 18th April, 2006 without the leave of the court. The amended Chamber Summons dated 20th June, 2006 is hereby struck out and the court in considering its ruling will rely on the Chamber Summons dated 18th April, 2006. In that Chamber Summons the Plaintiff has moved under Order XXXIX Rules 1, 2, 2(a) and 3 of the Civil Procedure Rules. The Plaintiff seeks temporary injunction against all the Defendants from dealing in any way interfering, transferring, alienating or selling property known as LR. NO.Ngong Township/BLOCK 2/118 Kajiado District. The evidence in support of that prayer in the Plaintiff's affidavit is as follows:-

That the 1st Defendant on 24th March, 1983 applied for a loan of Kshs.500,000/= from the Plaintiff. As security for that loan the 1st Defendant charged his property in favour of the Plaintiff namely LR. NO.4480/135 in Ngong Township Kajiado. The 1st Defendant by his letter dated 21st April, 1992, acknowledged receipt of the aforesaid loan from the Plaintiff. On 13th February,1997 the Plaintiff's advocate issued a statutory notice which was sent to the 1st Defendant. Subsequent to that statutory notice the Plaintiff's advocate found that the Commissioner of Lands file in respect of the NO.4480/135 in Ngong Township Kajiado missing and the Plaintiff's attempt to have a provisional certificate of title issued had not been successful to date. On the 3rd of April, 2006 the Plaintiff noticed in the Daily Nation Newspaper a property advertised for sale whose description fitted the property charged to the Plaintiff namely NO.4480/135 in Ngong Township Kajiado. The Plaintiff contacted the auctioneer who had advertised the property and confirmed that the sale was on behalf of the 3rd Defendant. Because of the similarities between the charged property and the property which was being sold the Plaintiff initiated an investigation which was carried out by a Lands surveyor to confirm the position in regard of the two properties.

The said investigation found out that property NO.4480/135 in Ngong Township and the property being offered for sale namely Ngong Township/Block 2/118 Kajiado District were the same property. That the layout of the plot was identical in both plots. That the original survey in the area for LR. No. NO.4480/135 in Ngong Township were carried out under the Government Lands Act but the area was later converted to RLA. That under the current R.I.M. plot 118 is missing but can be found in the previous survey map which means that something was done that was not right and that the director from the Lands office would need to explain the anomaly. That under the survey plan folio No.119 register No.85 the plot is clearly shown as being in the same location as in the other documents but missing in the

current R.I.M.

The Plaintiff concluded that it believed the 1st and 2nd Defendant working together or separately with connivance of officers of the Lands office and survey offices had the new title issued which failed to endorse the Plaintiff's charge. The Plaintiff carried out further investigation and found that the subject property when it was changed to be registered under RLA was transferred to the name of the 2nd Defendant who is a son of the 1st Defendant. The Plaintiff found out from the Clerk of Olkejuado County Council that on 14th February, 1997 wrote to the Commissioner of Lands seeking consent to transfer the subject property to the 2nd Defendant. It is pertinent to quote from the said letter for better understanding of this matter:-

"**The Commissioner of Lands,**

P. O. Box 30089,

NAIROBI.

RE: CONSENT TO TRANSFER PLOT NO.4480/135 – NGONG TOWN.

Joseph Mungai Wanene, the registered owner of the above-referred property has sought consent (which we duly give) to transfer the said plot to Mr. Edwin Wanene Mungai of P. O. Box 28745, Nairobi.

Please accord him the necessary help."

It is pertinent to note that the consent sought in the aforesaid letter related to property NO.4480/135 in Ngong Township. Further the Plaintiff found on the same day that is 14th February, 1997 the Clerk to the said County Council wrote to the 2nd Defendant to the effect that the Council had given consent to the 2nd Defendant to charge his property to the 3rd Defendant. That letter was in the following terms:-

"**Mr. Edwin Wanene Muigai,**

P. O. Box 28745,

NAIROBI.

Dear Sir,

RE: CONSENT TO CHARGE – PLOT NO.4480/135:

We have for reference your letter dated 14th instant under which cover you sought the Council's consent, which we duly give, to charge the plot under reference to M/S Housing finance Company of Kenya (HFCK).

You may, therefore, proceed with the registration of the charge accordingly."

It is also important to note that the consent to charge the property to the 3rd Defendant related to property NO.4480/135 in Ngong Township. The Plaintiff stated that it is clear that the property which the County Council consented to charge by the 3rd Defendant was the same property that the Plaintiff had charged in 1981. The Plaintiff therefore concluded that the consent to charge to the 3rd Defendant was illegal and unlawful since the 1st Defendant had never discharged the earlier charge to the Plaintiff. The investigation of the Plaintiff further found that the County council received an application for extension of the lease over the property NO.4480/135 in Ngong Township dated 20th February, 1997. The clerk to the

Council wrote back on 24th February, 1997 recommending the extension of the lease. The letter recommending that extension is in the following terms:-

"**The Commissioner of Lands,**

P. O. Box 30089,

NAIROBI.

RE: EXTENSION OF LEASE LR. NO.4480/135-NGONG TOWNSHIP:

Please refer to your letter Ref. No.854/33 of 20th instant.

The Council recommends extension of the lease for the above-referred plot."

The Plaintiff's advocate found that the Commissioner of Lands wrote to the 1st Defendant and confirmed that the lease over property NO.4480/135 in Ngong Township had been extended for 99 years from 1st July, 1992. The Plaintiff applied for an official search over property Ngong Township/Block 2/118 and that search revealed that the property is registered in the name of the 2nd Defendant and the same had been charged to the 3rd Defendant. The Plaintiff said that the dealings in the property which is now known as Ngong Township/Block 2/118 took place without the Plaintiff's knowledge and without the charge registered in favour of the Plaintiff on 31st August, 1981 being discharged.

The 3rd Defendant in reply to the Plaintiff's application stated in its replying affidavit that the Plaintiff's suit does not disclose a cause of action against the 3rd Defendant. That the 3rd Defendant had advanced the 2nd Defendant Kshs. 3 million which amount was secured by a charge dated 16th April, 1997. That charge was annexed to the affidavit in reply and it shows that it was in respect of the property Ngong Township/Block 2/118. It was further deponed that the 3rd Defendant was not a party nor was he aware of the prior dealings with the suit property. That accordingly its security is unimpeachable. That the plaintiff remedy lies in damages against the other Defendants.

The 1st and 2nd Defendant filed their affidavits in reply to the Plaintiff's application. The 1st Defendant in his affidavit stated that he was unable to confirm some aspects of the plaintiff's averments since the matters related to a long gone period. He did, however, confirmed that he did from time to time receive small loans from the Plaintiff. He denied receiving the statutory notice from the Plaintiff's advocate. He further stated that the original title LR. NO.4480/135 was surrendered to him in the late 1980s after he cleared his indebtedness with the Plaintiff. On receipt of that title he forwarded the same to the County council of Olkejuado for the extension of the lease. The 1st Defendant then deponed that the Land Registrar advised him to register the suit property under RLA. He concluded by saying that he is not indebted to the Plaintiff for the sum claimed by the Plaintiff. That the transaction that was related to the change of registration of the suit property was done lawfully and was not intended to defraud the Plaintiff. The 2nd Plaintiff in his replying affidavit stated that it was true he had charged the suit property to the 3rd Defendant but denied any illegality in that regard. He denied that the transfer of the suit property by the 1st defendant to his name was in any way tainted with fraud or illegality.

In oral submissions the Plaintiff's counsel repeated the averments contained in the Plaintiff's affidavit. The 1st and 2nd Defendant's counsel in submission stated that the Plaintiff's claim is caught by limitation by virtue of Section 19 of the Limitation of Actions Act. That if the Plaintiff had wanted to rely on the charge document in its claim for alleged monies owed by the 1st Defendant the Plaintiff ought to have sought leave to bring the action out of time as provided in Section 22 of the Limitation of Actions Act. Similarly the advocate submitted that the Plaintiff's right to realize the security was limited by the 12 year limitation period and accordingly the period within which the Plaintiff ought to have realized its security was the year 2002. The advocate faulted the Plaintiff's amendment of the Plaint on the basis that it

breached Order VIA Rule 7 of the Civil Procedure Rules for failing to state the date of amendment or the rule relied upon. He, therefore, argued that the two amendments of the Plaint were invalid. The 3rd Defendant's counsel argued that the Plaintiff's amended plaint were properly before court because the Plaintiff is only entitled under Order VIA Rule 1(1) to amend a Plaint once before close of pleadings without necessary seeking the leave of the court. The advocate therefore sought that the Plaint amended on the 4th July, 2006 be struck out. In regard to the injunction application counsel drew the attention of the court to the fact that the Plaint does not seek a permanent injunction but rather seeks a temporary injunction which is also what it sought in the Chamber Summons. He was of the view that Plaintiff's application ought to fail for that reason. Counsel relied on the case of **Kihara v Barclays Bank (K) Ltd [2001] 1 EA 420 (CCK)** and in particular the following passage:-

"**The Plaintiff's application for interlocutory relief did not sound under rules 1(a) or 1(b) at all (though both rules had been invoked) but fell squarely under rule 2. Though this had been mentioned by counsel the plaint had not been amended, and the application for an interim injunction was incompetent as the Plaintiff did not seek any relief in the form of a permanent injunction in the plaint".**

The counsel also relied on the case of **Morris and Co. Ltd v Kenya Commercial Bank Ltd and others [2003] 2 EA 605 (CCK)** . He quoted from the holding of that case as follows:-

"**The plaint did not disclose any dispute relating to property but a relationship between the plaintiff and first defendant arising from contract. Therefore even though the plaintiff's application for injunction was expressed to be grounded under rules 1(a) and 2 it fell under rule 2 only. That being so and being no prayer for a permanent injunction appearing in the plaint, the plaintiff's application for interlocutory injunction was incompetent and was to be struck out".**

The 3rd Defendant's counsel further submitted that the registration of the suit property under RLA in the name of 2nd Defendant was a first registration and accordingly the court could not rectify that registration as provided by Section 143 RLA. Counsel said that even if there was fraud the court's hands were tied by that section and the only remedy available to the plaintiff was in damages. In this regard, counsel relied on two cases. In the case of **Mugogo v Sihowa [1988] KLR 256** he quoted the holding as follows:-

"**1. Under the registered Land Act (cap 300) section 143, the court may order rectification of the register by directing that registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.**

2. There was no evidence of fraud or mistake in this case and even if fraud were established, the respondent's title could not be defeated inasmuch as it was acquired by a first registration".

In the case of **Ambrose Amino Oguta & Others v Michael Oguta Owaga & another Kisumu Civil Appeal No. 22 of 1990 [unreported]** he relied on the following passage:-

"**in terms of section 143(1) of the Registered Land Act his title cannot be defeated particularly as no customary trust has been alleged in favour of the appellants".**

The court in hearing submissions by counsels and even in the affidavits sworn in this matter finds that there is no denial by any party that the property which the 3rd Defendant was intending to sell in exercise of its statutory power of sale, was the same self property that was charged to the Plaintiff in 1991 although in the case of the first charge in favour of the Plaintiff the property was registered under Government lands Act. The investigation carried out by the Plaintiff at the Olkejuado County Council is very telling in regard to what was going on with the suit property. It is clear that in February, 1997 when the 1st Defendant sought consent to transfer the property to the 2nd Defendant the property was registered under Government Lands Act being LR. NO.4480/135 Ngong Town. The said County council gave its consent on the same day that consent was sought for the 1st Defendant to transfer the property to 2nd

Defendant. Again up to that time the property was still registered under the Government Lands Act. In February, 1997 after the consent had been given to transfer the property as aforestated, the Ministry of Lands and Settlement sought consent of the County Council to extend the lease over the suit property. At the time of requesting that consent the Ministry of Lands & Settlement was referring to the property registered under Government Lands Act as LR. 4480/135. Within 4 days of that request being made the County council gave its recommendation for the extension of the lease. By a letter written on 4th March, 1997 by Ministry of Lands & Settlement addressed to the 1st Defendant the extension of the lease of the property was granted for 99 years with effect from 1st July, 1992. Again the property whose lease was extended is the property LR.4480/135. Having examined the findings of the Plaintiff in their investigations, I find that the court at the conclusion of this suit will have to decide whether the property registered under the Government Lands Act namely LR. 4480/135 is still subsisting since no evidence has been brought before court to show its cancellation. That I see as the principal issue to be decided by the court. I am aware of the arguments presented by the Defendant that on first registration under RLA the court cannot set aside such registration even if there is fraud. But I am of the view however, that the court will have to make a decision whether the first registration under Government Lands Act was ever cancelled for indeed if it was never cancelled, then the registration under RLA may very well be not only be a nullity but in law may not exist. For I am of the view that it is absolutely necessary that one registration is cancelled before another registration can take effect over a property. In the absence of such cancellation, since in law you cannot have two registrations, the first registration would have to take effect over the suit property. That point of view makes the Plaintiff's case a strong one with high probability of success thereby assisting the Plaintiff in succeeding in the prayers that it seeks from this court. The court is of the view that the double registration is worthy of further investigation by this court. This investigation obviously can only be undertaken when the court receives oral evidence at the final hearing of this suit.

The other issues that were raised by the Defendant are that the Plaintiff's case is caught by the limitation of time and that the Plaintiff's case therefore, must fail. I beg to differ with that. Section 26 of The Limitation of Actions Act provides that limitation will not run in case of fraud but much more than that limitation would only begin to run in case of mistake when the Plaintiff discovers that mistake and it is possible to argue that the registration of the suit property under RLA could very well have been by mistake. At this stage I reject that argument by the defence. In respect of objection to the further amendment of the Plaint by the Plaintiff, I am in agreement with the Defendants that Order VIA Rule 1(1) clearly provides that a party may amend its pleadings before the close of pleadings <u>once</u>. The Plaintiff therefore in amending its plaint, which was filed on 9th May, 2006 was within its rights to do so under the Civil Procedure Rules. However, the amendment effected on 4th July, 2006 was in contravention of the rules of amendment of Civil Procedure Rules stated herein before and that further amended plaint will be struck off for so being in breach of that rule. Similarly I find in favour of the argument of the 1st and 2nd Defendant that even the first amendment of the Plaint must be struck out for being in breach of Order VIA Rule 7 for failing to state the Rule under which the amendment was done or the date leave was granted by the court to amend the Plaint. What then is the consequence of that amended Plaint filed in court on 19th May, 2006? The same will be struck out.

Having found that the amended and the further amended Plaint is liable to be struck off, I am of the view that the pleadings left subsisting would support an order as prayed by the Plaintiff for those pleadings show clearly that the suit property charged to the Plaintiff was the same suit property under a different registration charged to the 3rd Defendant. On the basis of that Plaint filed in court and the basis of this suit, this court finds it is able to grant the orders as sought. On Defendant's objection to the Plaintiff's application for an injunction on the basis that the prayer for injunction in the Plaint was for temporary injunction I am of the view that that is not fatal to the Plaintiff's application. The Plaintiff does seem to say in the Plaint that it would want temporary injunction until the court does decide which registration will take effect over the suit property and a decision on which charge would take priority. I, therefore, do reject the defendant's argument in that regard. What is clear is that the Plaintiff by the present injunction application seeks to preserve the property to enable the court make a final decision. In that regard it will not have been fatal even if the Plaintiff had failed to pray for an injunction in the Plaint. Having considered the arguments placed before me I am of the view that the Plaintiff has successfully proved that

it is deserving of the prayer for injunction as prayed. It has shown a prima facie case with high probability of success and it is obvious that in view of the investigations carried out on the wealth of the 2nd Defendant, it is doubtful whether the said defendant would be able to pay damages if the court was to decline to grant orders to the Plaintiff. I find that I have no doubt in regard to that finding because the Plaintiff has shown a prima facie case with a probability of success and for that reason I do not have to consider where the balance of convenience lies. The orders of this court therefore are that:

1. A temporary injunction do issue restraining the 1st, 2nd and 3rd defendants, their servants or agents from selling, alienating or transferring in the property known as LR. NO. Ngong Township/Block 2/118 Kajiado District until the hearing and final determination of this case.

2. The Plaintiff's amended Plaint filed on 9th May, 2006 and the further amended Plaint filed in this court on 4th July, 2006 are hereby struck off for being in contravention with Civil Procedure Rules with costs being awarded to the 1st, 2nd and 3rd Defendants thereof.

3. The costs of the Chamber Summons dated 18th April, 2006 shall be in the cause.

MARY KASANGO

JUDGE

Dated and delivered this 3rd day of November, 2006.

MARY KASANGO

JUDGE