REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE 173 OF 2004

BENJA PROPERTIES LIMITED……..…..……PLAINTIFF

VERSUS

SAVINGS AND LOANS KENYA LIMITED…….....……..….....…….DEFENDANT

R U L I N G

The Defendant has moved the court by way of Notice of Motion, which is expressed to have been instituted in accordance with the provisions of ORDER 6 RULE 13 (1) (b) (c) & (d) and Rule 16; ORDER 50 RULE 1 of the Civil Procedure Rules, as well as Sections 3A and 6 of the Civil Procedure Act.

It is the Defendant's prayer that the Plaintiff's suit be struck out, or alternatively that it be stayed pending the hearing and determination of **HCCC NO. 790 of 2003, BENJA PROPERTIES LTD V. SAVINGS AND LOAN KENYA LIMITED AND THIBA HOLDINGS LIMITED.**

The application is founded on seven grounds, which were set out on the face of it. As I understand it, the seven grounds can actually be summarised into four, as follows:-

(a) The suit is frivolous and vexatious.

(b) The suit is an abuse of the court process.

(c) The suit is subjudice, as the matters in it are also directly and substantially in issue in another suit, which was filed before it, and which is still pending.

(d) The suit is res judicata.

Even before delving into the application itself, I feel that it is proper for me, at the outset, to put on record my appreciation to both Ms Kamau and Mr. Owang, for the tremendous industry they have shown in the course of the hearing of this application. Both advocates conducted a lot of research into the law, and then ably set out their arguments. Their effort, enthusiasm and orderly presentation of their respective clients' cases made the court's task easier. Therefore, whichever way this Ruling goes, the two advocates should still feel like winners.

The background to this matter goes back to 1998, when the Plaintiff herein first sued the Defendant and Thiba Holdings Limited. That suit was originally Milimani HCCC No. 588 of 1998. At some point in time the case number changed to HCCC No. 968 of 2000, before assuming its current identity as

Milimani HCCC No. 790 of 2003. It is common ground, between the parties, that the said suit is still pending before this court. And, it is that fact that has given rise to most of the issues raised in this application.

It is the Defendant's contention that the matters directly and substantially in issue in this suit are the same as those in the suit filed earlier. For that reason, the Defendant submits that this suit is sub judice, and thus an abuse of court process. It is further submitted that by filing this suit, the Plaintiff was vexing the Defendant.

In an endeavour to elaborate on the foregoing, the Defendant pointed out that the relationship between the parties herein arose out of the financial transaction. In that regard, it is clear that the Plaintiff had borrowed some money from the Defendant. The said borrowings were in two separate dealings. The first loan of Kshs. 14,000,000/= was secured by a Mortgage over L.R. No. 209/477/24 (original No. 477/31), hereinafter referred to as the suit property. Thereafter, the Defendant granted a further facility to the Plaintiff, in the sum of Kshs. 21,000,000/=. This second facility was secured by a Further Mortgage over the suit property.

In due course, the Plaintiff is said to have defaulted in its loan repayments. The continued default resulted in the Defendant taking steps to realise the security. And, it is that action which prompted the first suit. In that suit, the Plaintiff sought and obtained a temporary injunction to restrain the Defendant from realising the security. The said injunction was granted by Kasanga Mulwa J., in a well-reasoned Ruling dated 20th May 2002. The order so granted served to restrain the Defendant from selling, offering for sale, advertising, threatening to sell or in any other way dealing with the suit property until the suit was heard and determined.

In effect, the said injunction remains in force todate, as the earlier suit is still pending.

Having been granted the interim injunction, the Plaintiff then applied to the court for leave to amend the Plaint. However, the court declined to grant leave to the Plaintiff to amend the Plaint. Yet, at the same time, the Plaintiff felt, strongly, that it needed to make further claims against the Defendant, in the light of new facts which had come to light., Therefore, the Plaintiff felt constrained to institute this case, so as to incorporate the new claims which it had failed to incorporate into the earlier suit, following the court's decision that denied it leave to amend the Plaint.

As far as the Defendant is concerned, the Plaintiff was wrong to have filed this suit. The Defendant believes that the Plaintiff should have appealed against the decision to deny it leave to amend the plaint.

In this case, the Plaintiff's claims are for, inter alia, Kshs. 29 billion, as damages for loss of expected and anticipated rental income, at the rate of Kshs. 2,000,000/= per month, for 50 years ending 31st September 2048, when the extended Grant of the lease would expire. That claim is over and above the claim for the value of the completed building, which is said to be Kshs. 150,000,000/=, or the market value.

A number of issues arise from these figures. First, the Defendant contends that the claim of Kshs. 29 billion is wholly without foundation. It is described as an absolute falsehood, because it is predicated upon the premise that the head-lease had expired due to the Defendant's failure to extend it. Yet, the Plaintiff itself is said to have acknowledged that the head-lease had indeed been extended for a period of 50 years, commencing from the year 2002. The said acknowledgement is said to have been made at paragraph 16 of the Plaint. The said paragraph reads as follows:-

"**In part performance of the implied term that the Plaintiff would surrender or otherwise release the original title documents to the Commissioner of Lands in exchange with a title and would co-operate with the Defendant in extending the Grant Leasehold interest, the Plaintiff did apply for a fresh extension of Lease to the Commissioner of Lands, which was granted for 50 years with effect from 1st October 1997, a fact which was and is expressly and/or constructively within the knowledge of the Defendant only subject to payment of revised annual rent of Kshs. 100,020/= p.a.**

which the Plaintiff paid vide its cheque No. 2000508 on 16th October 1997, and payment of Kshs. 32,805/= which the Plaintiff paid in full on 21st October 1997 vide Banker's cheque No. 017903 of the Commissioner of Lands on 16th day of November 1997. In further part performance by the Plaintiff later, the Plaintiff had the Grant Lease extended by 50 years w.e.f. 1st day of October, 1997."

It is clear that within the foregoing pleading, the Plaintiff stated, in two places, that the Lease was extended for 50 years, with effect from 1st October 1997. Therefore, the Defendant takes the point that the Plaintiff's claim has no factual foundation, as it had been made on the basis that the Grant had expired.

I am afraid that in that regard, the Defendant appears to have got the wrong end of the stick. I say so because a reading of paragraphs 17, 18 and 19 of the Plaint reveals that the original title documents were to have been surrendered to the Commissioner of Lands, who would then issue a replacement. The Plaintiff's complaint is that the Defendant declined to surrender the old Grant, resulting in the lapse thereof.

In the light of those assertions, I hold that the extension of the Grant, which was cited by the Plaintiff was not an acknowledgement that the Plaintiff had had the new Grant issued. Therefore, paragraph 16 of the Plaint could not form the basis for holding that the Plaintiff's claim was without foundation. To my mind, if the Defendant had failed to surrender the original grant, so that the Commissioner of Lands could give effect to the extension of the Grant, the Plaintiff may well be in a position to make out a sustainable claim against the Defendant.

But, at the same time, the Defendant has now adduced evidence to show that on 23rd June 2004, the Department of Lands issued a formal Notification of the extension of the Lease of the suit property. The said Notification states, inter alia, that the extension was for a period of fifty (50) years, with effect from 1st September 1997.

To my mind, the issuance of that Notification cannot be deemed to imply that the Plaintiff's claim is lacking foundation. It must be borne in mind that the Plaint herein was filed in court on 31st March 2004. That was before the Department of Lands issued the Notification of the extension of the Lease. Therefore, provided that the Plaintiff can show that as at the date when he filed the Plaint, the Lease had not been extended, the Plaintiff may well justify its action of instituting these proceedings.

But, if it is true that the Lease was subsequently extended, should the suit be deemed to be irretrievably bad? I do not think so. I believe that if the Defendant is able to prove that the Lease was extended, that would provide the Defendant with a solid Defence to the Plaintiff's claims which were pegged to the notion that the Plaintiff's title to the suit property had lapsed by effluxion of time. It must, nonetheless, be remembered that the existence of a solid defence to a claim, did not necessarily warrant the striking out of the Plaint, through a summary procedure, such as the one which the Defendant has invoked herein.

The learned authors of "**HALSBURY's Laws of England**" fourth Edition, Vol. 37 had the following to say about the instances in which a court ought to stay proceedings, on the grounds that the same were an abuse of court process.

"**The most important ground on which the court exercises its inherent jurisdiction to stay proceedings is that of abuse of process. This is a power which, it has been emphasized, ought to be exercised sparingly and only in exceptional cases**.

……

The application for a stay on this ground must show not merely that the Plaintiff might not, or probably would not, succeed, but that he cannot possibly succeed on the basis of the pleadings and

the facts of the case."

The standard of proof imposed on an applicant is an onerous one. And the said standard is the same whether the applicant wishes to have the proceedings stayed or struck out.

In the well-known case of D**.T. DOBIE & COMPANY (KENYA) LTD V. MUCHINA [1982] KLR 1 at 9,** the Court of Appeal held as follows:-

"**The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is the function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "*without discovery, without oral evidence tested by cross-examination in the ordinary way.*" Seller LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.**

If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it."

As those words of the Court of Appeal are binding on this court, my decision on this application will be informed by it.

It is for that reason that I already indicated that even if there should be a weakness in the Plaintiff's suit, in view of the evidence which tends to show that the Lease was formally extended on the 23rd June, 2004, that alone would not be reason enough to strike out a Plaint. I am fortified in my said decision by the following words of Fletcher-Moulton L.J. in **DYSON V. A.G. [1911] 1 K.B. 410 at 418 – 419,** which were cited with approval by A. Visram J. in **SIGMALAND LTD V. SUSAN WAIRIMU KINYANJUI, HCCC NO. 1281 of 1998, at page 4;**

"**Now, it is unquestionable that, both under the inherent power of the court, and also under a specific rule to that effect made under the Judicature Act the court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the Defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the Judge in Chambers does not think they will be successful in the end lies a wide region, and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of the legal procedure……..**

To my mind it is evident that our judicial system would never permit a Plaintiff to be "*driven from the judgement seat*" in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad."

That being the case, I must ask myself if the Plaintiff's claim herein is incontestably bad. It raises, **inter alia**, the following issues;

(a) Is the Defendant liable to indemnify the Plaintiff against claims which the guarantors may legally claim against the Plaintiffs?

(b) Is the First Mortgage dated 23rd April, 1993, and the Further Mortgage dated 18th March 1998, null and void; and thus remain discharged?

(c) Is the Defendant liable to the Plaintiff for compensation arising out of the detinue to the title, wrongful interference with the reversionary interest of the said title; and slander?

(d) Does the Duplum Rule apply to this case?

To my mind those issues are serious, and deserve due consideration by the court. The suit within which the said issues have been raised cannot therefore be deemed as one that was "**wantonly brought without a shadow of excuse."**

As cautioned by the Court in **DAYSON V. A.G.** (supra), I should not at this stage express my view as to whether or not the case was likely to ultimately be successful. I therefore decline the Defendant's invitation to hold that the Plaintiff's claim for Kshs. 29 billion was baseless. Of course, I am also not saying that the said claim will probably be successful. I am simply avoiding assessing the strengths or weaknesses in the Plaintiff's case as that may otherwise make awkward the position of the judge who may end up hearing the suit.

But, on the other hand, the Defendant emphasises that the issues above were already the subject matter of consideration and adjudication by the High Court, in the suit filed earlier. And, where the said issues had not yet been determined, the Defendant contends that the determination thereof cannot be carried out in two suits, such as is the case currently. Therefore, the Defendant feels that if the suit is not struck out, it should, at least, be stayed.

On the Plaintiff's part, it thinks that it is the present application which ought to be struck out, as opposed to the suit. The Plaintiff contends that the application is defective, as it was brought by way of a Motion, instead of a Chamber Summons.

Insofar as this application expresses itself as having been brought pursuant to the provisions of Order 6 rule 13, it should have been brought by way of a Chamber Summons, as is stipulated by Order 6 rule 16 of the Civil Procedure Rules.

In **GEORGE KIGOYA V. ATTORNEY-GENERAL OF UGANDA [1966] EA 463,** Sir Udo Udoma C.J. struck out an application which was not properly before the court. In doing so, the Honourable Chief Justice expressed himself thus, at page 465:-

"**Since this application is not properly before the court and no application for amending it has been made, there is nothing upon which this court can base the exercise of its discretion, which discretion, in any event, must be judicially exercised.**

The objection raised is a fundamental one. It is in substance that the Defendant has failed to comply with the Rules of the Court designed to facilitate the work of the court by instituting this application under an irregular procedure specifically excluded by the Rules of the Court. It is the duty of every counsel to comply with the Rules of this Court."

I must say that I am in agreement with the foregoing views. It would make nonsense of the Civil Procedure Rules if parties were allowed to flout them with impunity . Therefore, when Rules were clearly spelt out, parties should strive to adhere to them, or otherwise risk having their application struck out.

A similar view was expressed in **SALUME NAMUKASA V. YOZEFU BUKYA [1966] EA 433 at 435,** wherein the Court held as follows:-

"**Counsel must understand that the Rules of this Court were not made in vain. They are intended to regulate the practice of the court. Of late a practice seems to have developed of counsel instituting proceedings in this court without paying due regard to the Rules. Such a practice must be discouraged. In a matter of this kind, might the needs of justice not be better served by this, defective, disorderly and incompetent application being struck out?"**

In that case, the application was brought by way of a Chamber Summons, instead of a Notice of Motion. The court held that the defect was a serious one, which went to the very root of the application; and that therefore there was no competent application before the court. The offending application was thus struck out.

In the light of those two authorities, should the application before me be struck out?

There is no doubt in my mind that had the application been brought only pursuant to the provisions of Order 6 rule 13, it would have been an appropriate candidate for striking out. However, it is noted that the application herein is also expressed as having been filed pursuant to the provisions of Order 50 rule 1, as well as Sections 3A and 6 of the Civil Procedure Act.

Section 6 of the Civil Procedure Act provides as follows:-

"**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 proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where the suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."**

Insofar as the Defendant is seeking to stay this suit, on the grounds that the issues herein are directly and substantially in issue in Milimani HCCC No. 790 of 2003, it was entitled to invoke the provisions of Section 6, above. Yet, there is no Rule which expressly provides the procedure to be applied when a party was invoking the provisions of the said statutory provision. Therefore, in my considered opinion, the Defendant was entitled to rely on the provisions of Order 50 rule 1, which provides as follows:-

"**All applications to the court, save where otherwise expressly provided for under these Rules, shall be by motion and shall be heard in open court."**

Furthermore, the Defendant has sought two prayers, in the alternative. First, it seeks to strike out the suit. Secondly, it seeks to stay this suit pending the hearing and determination of Milimani HCCC No. 790 of 2003. As far as I am aware, there is no rule which expressly provides for the procedure to be adopted when an applicant is seeking two such prayers, in the same application. Therefore, in the absence of such an express provision, I hold the considered view that the Defendant was right to call to its aid, the provisions of Order 50 rule 1.

In effect, I find that the application before me is neither disorderly, nor incompetent, nor defective, as was contended by the Plaintiff. I therefore decline to strike it out. But whilst still on this subject, I wish to emphasize the fact that when any party wishes to invoke the court's discretion to strike out an application on the basis that it has been brought under the wrong legal provision, or by use of the wrong procedure, such an issue ought to normally be brought by way of a Preliminary Objection. I say so, not because there is a hard and first rule about it, but because such matters ought to be dealt with at the outset, when the parties would not also have made their substantive submissions on the merits and demerits of the application. As far as I am concerned, if an application is deemed to be defective, the court ought not to be taken through the substance thereof. It would be best that the parties should only delve into the substance of the application if the court were to overrule the Preliminary Objection to strike out the application.

I note that in both the cases of **GEORGE KIGOYA V. ATTORNEY GENERAL OF UGANDA [1966] EA 463, and SALUME NAMUKASA V. YOZEFU BUKYA [1966] EA 433,** the issue regarding the defective procedure was dealt with as a Preliminary Objection. It is best that way.

The Plaintiff also submitted that the court should not act on the affidavit of JAMES E.O. ODWAKO, which was filed in support of this application. The said affidavit is said to be wholly defective, as it does not comply with the provisions of Order 18 rule 3 (1) of the Civil Procedure Rules.

The main defect is said to lie in the fact that Mr. Odwako deposed to facts whose sources he failed to disclose. In particular, the Plaintiff faults the following paragraphs of the said affidavit; 2, 6, 9, 11, 12, 15, 16, 20, 22, 27, 28, 31, 33, 34, and 35.

As far as the Plaintiff is concerned, the deponent ought to have disclosed if the matters which he was talking about had been derived by him from the Defendant's files, records, books or other sources. The Plaintiff did not, however, go into any details, as to what exactly was wrong with each of the fifteen paragraphs whose numbers are set out above.

However, having perused each of the said paragraphs, I am satisfied that the deponent did say that the matters in the following paragraphs of the affidavit were within his knowledge, and there is no reason to doubt his said source of knowledge – 2, 6, 9, 15, 16, 20, 22, 27, 28, 31, 34 and 35.

As regards paragraphs 11 and 12, the deponent says that he was advised by the court. The Plaintiff says that it is inconceivable that the court did advise the deponent. That may well be the case, however, even if the Plaintiff was right in that regard, that would not change the fact that the deponent disclosed his source of information. Therefore, the basis of the Plaintiff's criticism of the affidavit falls through, because its position was not whether the deponent should or should not be believed. That would be a totally different thing from criticising the deponent for failing to disclose the source of his information.

Then, as regards paragraph 4 of the affidavit, Mr. Odwako deposed that Mr. Geoffrey Chege Kirundi had used his influence, as a director of the Kenya Commercial Bank Limited, to pressure the Defendant to execute a Further Mortgage for a further lending of Kshs. 21,000,000/=. The reason for asking that that paragraph be struck out are that in his capacity as the Defendant's Mortgage Administration Manager, the deponent could not have become aware of what had transpired at the Board of Directors of Kenya Commercial Bank Limited.

To my mind, that criticism is well merited. For, if the deponent had read the minutes of the Board meeting, or had talked to a director who attended the meeting at which Mr. Kirundi had exerted pressure, which resulted in the execution of the Further Mortgage, the said source of information should have been disclosed. But as the deponent did not disclose his source of information, I hold that the deposition in paragraph 4 of Mr. Odwako's affidavit is inadmissible in evidence. It is therefore struck off.

My decision to strike out the said paragraph is informed by the following words of Sir Raymond Evershed M.R. in **RE: COHEN (A BANKRUPT) V. INLAND REVENUE COMMISSIONER & ANOTHER [1950] 2 ALL E.R. 36 at 37:**

"**One can see that there is a temptation to save trouble or voluminous documentation, to use a form which the rules of evidence do not justify, but I think it is desirable that the court should state quite plainly that the rules of evidence must be properly observed. To depart from them may result in a serious thing being done to some individual who might suffer adjudication, or the making of a receiving order, on material which turns out afterwards to be quite incorrect, and which should never have been accepted in the first instance. I venture to add this. It is suggested that insistence on oral evidence is, in fact, sometimes a troublesome matter which adds to the burden of costs of litigation, and that there should be much greater facilities for proving the facts in a case by affidavit evidence – the existing rules permit it to a degree which is not, I think always appreciated – but, unless the rules of evidence are properly adhered to, the whole justification for the use of affidavit evidence, instead of oral evidence, is destroyed at a blow. Affidavit evidence can only be entitled to the same weight as oral evidence if those who swear the affidavits realise that the obligation of the oath is as serious when making an affidavit as it is when making statements in the witness box."**

Yet another issue raised by the Plaintiff was in relation to the timing of this application. It was contended that applications to strike out a pleading should be made promptly, and before the Defence is filed. In **SABAYAGA FARMERS CO-OPERATIVE SOCIETY LTD V MWITA [1969] EA 38 at p. 40**, it was held as follows:-

"**The application to strike out a pleading under this rule should be made with reasonable promptitude, and as a rule before the close of the pleadings."**

That decision was cited by the Plaintiff as an authority for the preposition that this application should be struck out as it was filed some eight months after the Defendant had filed a detailed Defence.

In my understanding of the provisions of Order 6 rule 13 of the Civil Procedure Rules, there is no specific requirement that an application to strike out pleadings be filed before a Defence is filed to the claim. Sub-rule (1) actually stipulates that the court may, at any stage of the proceedings order to be struck out or amended any pleading. Therefore, I hold that the Defendant cannot be faulted for filing this application after it had filed its Defence. I am fortified in my said decision by the decision of the Court of Appeal in **MERU FARMERS CO-OPERATIVE UNION V. ABDUL AZIZ SULEIMAN [1966] E.A. 436 at 440**, wherein Sir Charles Newbold P., held as follows:-

"**I think that it would normally be preferable to make the application to strike out a plaint on the ground that it discloses no reasonable cause of action promptly and, if possible, prior to filing any defence (see *Empire Investments V. Madalali E.A.C.A. Civil Appeal No. 20 of 1965).* I do not, however, consider that failure to adopt this course will necessarily result in the application being rejected and the court has a discretion to examine the application in the light of the circumstances."**

It is in the light of the circumstances prevailing in this case that I began this Ruling by giving consideration to the merits of the application. In that regard, I did come to the conclusion that this suit is not baseless nor hopeless. But, I do also recognize that there is an overlap between this suit and Milimani HCCC No. 790 of 2003. I believe that the Plaintiff is also fully aware of the said overlap, hence the attempt to merely amend the suit which had been filed earlier. However, following the decision by the court to reject the application for leave to amend the Plaint, so as to incorporate the Plaintiff's new claims he opted to file a new suit. That action may not totally escape criticism, as the Plaintiff could have appealed against the decision. But, then again, the process of appeal may well have taken a long time to complete. In those circumstances, I think that the Plaintiff was entitled to take the step which it took, by filing this suit.

However, as the issues in this suit overlap with those in Milimani HCCC No. 790 of 2003, I hold the considered view that the two suits cannot be allowed to proceed concurrently. Therefore, I do hereby order that this suit shall be stayed pending the hearing and determination of Milimani HCCC No. 790 of 2003. I also order the Plaintiff to pay the costs of this application.

Dated and Delivered at Nairobi this 27th day of September 2005.

FRED A. OCHIENG

JUDGE