



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

Civil Case 262 of 2005

REV. MADARA EVANS OKANGA DONDOPLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA.....DEFENDANT

RULING

On the 25th of October 2005, the plaintiff herein filed this suit seeking permanent orders to restrain the defendant from selling his parcel of land registered as *Nakuru/Langalanga/330*. He further prayed for orders of this court to compel the defendant to give accounts for the mortgage which the plaintiff claimed had interfered with his equity of redemption. In paragraph 15 of the plaint, the plaintiff made the following averment;

“There has been no previous proceeding or any proceedings pending between the plaintiff and the defendant over this subject matter.”

The plaintiff swore a verifying affidavit. In paragraph 3 of the said verifying affidavit the plaintiff deponed as follows;

“THAT there have been no other proceedings nor any proceedings pending in any other court between the plaintiff and the defendant in respect of the subject matter herein.”

Contemporaneous with filing the suit, the plaintiff made an application under certificate of urgency seeking interlocutory injunction to restrain the defendant or its agents from selling or dealing with parcel number *Nakuru/Langalanga/330*. The application was supported by the annexed affidavit of the plaintiff. The application was placed before this court. After considering the plaintiff’s application, this court issued *exparte* temporary orders restraining the defendant by means of interlocutory injunction from interfering with the suit property pending the hearing of the application *interpartes*. This court ordered the plaintiff to serve the defendant.

On the day fixed for the hearing of the application, the defendant served a notice of preliminary objection to the plaintiff to have entire suit struck out for being *res judicata*. The defendant in the said notice stated that the plaintiff had filed a similar suit on the same facts and sought the same orders in **Kisii HCCC No. 31 of 2001**, which suit was dismissed on the 10th of June 2002. The defendant further stated that the plaintiff had filed a similar application for injunction which had been considered by the court and

dismissed by the High Court sitting at Kisii. It was contended by the defendant that the fact that the plaintiff had failed to disclose the existence of the previous suit which had been dismissed, made the plaintiff guilty of failing to make material disclosure to this court. The defendant argued that the plaintiff had perjured himself when he swore the verifying affidavit that no suit had been heard and determined over the subject matter of the suit. The defendant urged this court to strike out the entire suit filed by the plaintiff.

I heard the rival submission made by Mr Issa, learned Counsel for the defendant and Mr Rakoro, learned Counsel for the plaintiff on the preliminary objection raised. After considering the said submissions made and after carefully reading the pleading filed by the parties to this suit, the issue for determination by this court is whether this court ought to uphold the preliminary objection raised by the defendant. When the plaintiff was confronted with the preliminary objection raised, he admitted that indeed a suit had been filed by the plaintiff before the High Court sitting at Kisii. He admitted that the said suit was dismissed for want of prosecution. He also admitted that he had unsuccessfully made an application to set aside the said dismissal. He further submitted that after the dismissal of the application to set aside the dismissal order, he appealed to the Court of Appeal. The said appeal was yet to be heard and determined.

From the submissions made therefore me, it is clear that the plaintiff was very much aware that a suit between himself and the defendant had been dismissed yet the plaintiff made an averment and further swore a verifying affidavit that there existed no suit between the plaintiff and the defendant. He further swore that there existed no previous suit between the plaintiff and the defendant. The plaintiff made the averment and further swore the verifying affidavit knowing very well that he was not telling the truth. Indeed the plaintiff succeeded in duping this court into granting him temporary orders of injunction whereas had this court been aware of the existence of the previous suit, most probable it would not have made such interim orders. As submitted by the defendant, the plaintiff failed to make material disclosure to this court when he sought the said interim orders. The plaintiff was prepared to conceal crucial facts from this court to achieve his objective of obtaining interim orders of injunction. The plaintiff's conduct is, to say the least, dishonest. The said conduct amounts to an abuse of the due process of the court. It should attract immediate sanction of this court.

The Court of Appeal in **Uhuru Highway Development Ltd – Vs – Central Bank of Kenya & 2 others CA Civil Application No. NAI 140 of 1995 (65/95 UR)** had the opportunity to comment on a similar situation where a litigant failed to disclose material facts to the court. Omolo J.A. stated at page 2 of his ruling;

“Once the learned Judge was satisfied, as he was, that the applicant had obtained the order by concealing other relevant material, he was entitled not to consider the applicants application any further for the courts must be able to protect themselves from parties who are prepared to deceive, whatever their motive for doing so may be and whatever the merits of the case might be. A man who is prepared to deceive a court into granting (him) an order cannot validly claim that he has a meritorious case and would have been entitled to the order anyway. If the case is meritorious, there can be no reason for concealing some parts of it from the court.”

It is note worthy that the said decision of the Court of Appeal was made before the **Civil Procedure Rules** were amended by **Legal Notice number 128 Of 2001** which requires that the plaintiff swears an affidavit verifying the correctness of the averments made in the plaint. Before the said amendments of the **Civil Procedure Rules**, the courts hands were tied. The court could refuse to hear the application filed by such a plaintiff. In the instance case, apart from concealing material facts from this court in order to obtain interim orders of injunction from this court, the plaintiff made false averments in his plaint to the effect that no suit existed or ever existed between the plaintiff and the defendant over the same subject matter of the suit. The plaintiff swore a false verifying affidavit that the averments made in the plaint was true and correct.

The replying affidavit sworn by Joseph Kania, the Legal services manager of the defendant clearly show that the plaintiff sought to have issues which had been heard and concluded by a court of

competent jurisdiction, re-litigated. That cannot be allowed by this court. This suit is obviously *res judicata*. The plaintiff concealed the existence of the previously determined suit from this court. This court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. As was stated by the Authors of **Halbury's Laws of England, 4th Edition Volume 37 Para 14** under the heading "**Inherent Jurisdiction of the Court**" at Page 23;

"The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise (i) control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

In the instant case, it is clearly evident that the plaintiff did not file this suit with the object of seeking justice from this court. The plaintiff filed this suit purposely to secure the interim orders of injunction and thereby frustrate the defendant from realising the security duly charged. The plaintiff knew that the defendant would expose his duplicity; by that time the plaintiff would have succeeded anyway in postponing the sale. Unfortunately for the plaintiff, his conduct was in abuse of the due process of the court. He dishonestly obtained interim orders of injunction by misleading this court. This court would not allow the plaintiff to get away with his nefarious conduct. Having found that the plaintiff's suit is *res judicata*, and further having found that the plaintiff concealed material facts from this court and further having found that the plaintiff made false averments and swore a false affidavit, this court invokes its inherent jurisdiction and order the plaintiff's application together with the entire suit be struck out with costs to the defendant.

As already ordered, the sum of Kshs.100,000/- which this court ordered the plaintiff to be deposited in court shall be paid to the defendant to defray part of its costs that it incurred in the sale that was that was aborted by the interim order of injunction issued by this court.

It is so ordered.

DATED at NAKURU this 25th day of November 2005.

L. KIMARU

JUDGE