REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 555 OF 2001

MUSA HASSAN BULHAN & ANOTHER ..... PLAINTIFF

VERSUS

EASTERN AND SOUTHERN AFRICAN

TRADE AND DEVELOPMENT BANK ..... DEFENDANT

RULING

This is an application by the defendant, Eastern and Southern African Trade and Development Bank (hereinafter called "PTA Bank") by way of a Notice of Motion under sections 6,7, and 3A of the Civil Procedure Act, cap 21 Laws of Kenya, order VI rule 13 (1) (b) and (d) and order L rule 1 of the Civil Procedure Rules. It is dated 7th March 2003 and is supported by an affidavit sworn by one Mr Premchand Mungar, the defendant's senior legal counsel sworn on 10th March, 2003.The application seeks 2 orders; namely, that:-

1. The plaintiff's suit be struck out and / or stayed.

2. The costs of this application be provided for

The defendant gives 4 grounds for the application and which are that:-

1. The issues herein are directly and substantially the same issues raised in HCCC No 1361 of 1999; *African Airlines International Limited vs Eastern & Southern Trade and Development Bank* (The PTA Bank).

2. The issues raised are *res judicata* as the same have been canvassed and determined in HCCC No 1361 of 1999 – *African Airline International Limited vs Eastern & Southern Trade and Development Bank* (the PTA Bank).

3. The issues in dispute in this suit are matters which ought to have been raised in HCCC No 1361 of 1999 and it is not open to the plaintiff/respondent to raise them again by way of a fresh suit.

4. The suit herein is, therefore, vexatious, misconceived and a gross abuse of the process of the court.

The plaintiffs are Mr Musa Hassan Bulhan and his company African Express Airways (K) Limited who strongly oppose the application.

The history of this matter is that sometime in 1998 the defendant, PTA Bank, and a company called African Airlines International Limited entered into what is referred to as Facility Agreement in which the Bank agreed to provide a loan to the said company in sum of US$ 2,500,000 to finance the said company's working capital requirements for fuel, spares accessories, ground handling charges and other operational expenses. A copy of the said Agreement (hereinafter called the Loan Agreement) was exhibited in the supporting affidavit. It was undated but its existence is not in dispute. The said company African Airlines International Limited (hereinafter called African Airlines) is not a party in this suit. It is however common ground that the 1st defendant herein was at all material times a principal shareholder and director in the said company and the 2nd plaintiff herein African Express Airways (Kenya) Limited (hereinafter called "African Express").

Apart from the said Loan Agreement the PTA Bank and African Airlines International also executed other security documents in relation to the Facility Agreement. These are:

i) A Deed of Variation dated 4th August 1998

ii) Collection Account Agreement dated 7th August, 1998

iii) Debenture dated 7th July, 1988

iv) The 1st defendant herein and another director executed a Deed of Guarantee in favour of the Bank on 7th July, 1988.

As a result of alleged defaults and breaches on the part of African Airlines in the performance of its obligations under the loan agreement, the PTA Bank appointed receivers and managers under its powers in the debenture over the assets of African Airlines International. This was about 29th July, 1999. The said Africa Airlines International Limited shortly thereafter filed High Court Civil Case No 1361 of 1999 in which it sought to stop the said receivership. In the said suit the African Airlines denied that it was in breach or default of the terms of the Loan Agreement and claimed that the appointment of the receivers by the PTA Bank was illegal, improper and totally unjustified. It also contended that the relationship between it and the Bank under the terms of the Agreement was governed by and construed in accordance with the Laws of England and any dispute or differences should be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

The said plaintiff in HCCC No 1361 of 1999 sought the following reliefs:-

1. A declaration that the appointment of the receivers by the defendant is unlawful, illegal, improper and totally unjustified.

2. An injunction to restrain the defendant from recalling, taking possession, selling or otherwise realizing the plaintiff's property.

3. Injunctions both prohibitory and mandatory to eject the receivers and managers and to prevent the defendant from appointing any or any other receivers whatsoever.

4. A declaration that the dispute herein be governed by and construed in accordance with the Laws of England and that the dispute be settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

5. Damages

6. Costs

7. Interest

8. Further and other relief

On the same day that the said African Airlines filed the suit, 24th September, 1998, it filed a summons in chambers in which it asked this Court to grant various injunctive orders against the receivership and sale of its property in Embakasi, Nairobi which was charged to the Bank as security for the loan. The application was heard by the late Justice Hewett who dismissed it but reserved his reasons. The judge gave his reasons in a ruling delivered on 20th April, 2000.

During the hearing of this application, it became evident that when this application was filed, African Airlines having given notice of its intention to appeal had not filed any Record of Appeal. Mr Salim Dhanji for the applicant confirmed that a Record of Appeal and the hearing of the appeal is still pending. The respondent's counsel, Mr Ngatia is neither involved in HCCC No 1361 of 1999 nor the appeal. African Airlines is represented by another law firm or advocate. Mr Salim Dhanji is on record of the company in the said suit and appeal. This should suffice as a background to HCCC No 1361 and the issues involved therein.

This brings me to the subject matter of the present suit and the issues or questions involved in it, namely HCCC No 555 of 2001. In the plaint dated 12th April, 2001, the 1st plaintiff claims that on 1st December, 1999, the defendant and himself entered into an agreement called Agreement to Restructure the Trade Finance Facility (hereinafter called "Agreement to Restructure"). The 1st plaintiff contends that the defendant Bank represented that it would restructure a trade finance facility entered between the defendant and African Airlines International Limited. That the defendant represented, *inter alia*, it would do the following acts:-

(a) Restructure the outstanding trade finance facility so that the receivership over African Airlines International Limited would be reviewed.

(b) Pay Kenya Airports Authority an outstanding debt of US$ 231,000 on behalf of African Airlines International Limited once the 1st plaintiff performed all the terms specified in the Agreement.

(c) To be responsible to appoint a general sales agent for African Airlines International Limited and the 2nd plaintiff.

The 1st plaintiff sets out many other alleged representations which he claims the defendant knew to be false and untrue, or made them recklessly not caring whether they were true or false. That the representation were deceitful and solely intended to procure various listed advantages to the defendant. I have gone through the Agreement to Restructure. It is made between the 1st plaintiff, African Airlines and the PTA Bank. While African Express was not a signatory to the said Agreement t 1st plaintiff as principal shareholder /director was to procure the involvement of the 2nd plaintiff which was required to execute various other documents eg an agreement between PTA and the 2nd plaintiff, a guaratee, and Collection Account Agreement. These would in effect make African Express a party in the Restructing Agreement and Programme for African Airines.

The plaintiffs claims in the suit that the defendant Bank was in breach thereof leading to a failure of the Restructuring Agreement. That as a consequence they suffered special and general damages. The remedies sought in the plaint are judgement for:-

a) US$ 4,065,600 (equivalent to Kshs 317,116,800/- at the exchange rate of 1 US$ to shs 78/-) or such other rate as this honourable court may determine.

b) Interest thereon until payment in full.

c) Damages repudiation of the Agreement

d) Rescission of the Agreement

e) Costs of and incidental to this suit

Having set out the necessary particulars of the 2 suits, should this Court strike out or stay the plaintiff's suit on the grounds given herein above? I will deal with the ground 1-4 in *seriatim*.

Ground 1 founded on section 6 of the Civil Procedure Act. Are the issues herein directly and substantially the same issues raised in HCCC 1361 of 1999- *African Airlines International Limited vs Eastern & Southern Trade and Development bank* (the PTA Bank)? It is important to note that the Agreement to Restructure which forms the basis of HCCC No 555 of 2001 was entered into on 1st December, 1999 well after HCCC No 1361 was filed in Court. Section 6 provides as follows:-

"No Court shall proceed with the trial of any suit or proceeding 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, litigation under the same title, where such suit or proceedings is pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed".

The 2 initial necessary ingredients are similar issues and same parties. Logic demands we look at the parties first before the issues. In HCCC 1361 of 1999 the plaintiff is African Airlines International, a limited company and the defendant is PTA Bank. In the present suit the plaintiffs are Mr Musa Hassan Bulhan, an individual and another limited liability company, African Express Airways (K) Limited. From the foregoing, it is absolutely certain that the plaintiff in HCCC 1361 of 1999 is not one of the plaintiffs in HCCC 555 of 2001 although the defendant is the same PTA Bank. I hold that the parties in the 2 suits are not the same parties as contemplated by section 6 of the Civil Procedure Act, common defendant, yes but not same parties. The plaintiffs are different persons in the 2 suits.

Do the plaintiff in HCCC No 555 or any of them claim under African Airlines in the present suit, litigating under the same title as that of African Airlines in HCCC 1361?

I have carefully perused the plaint in the present suit. The plaintiff cause of action is based on alleged inducements which made them agree to enter into the Agreement to Restructure. While African Airlines is a party to the said Agreement, the plaintiff plead alleged losses that they as parties to the said Agreements and the restructuring programme allegedly incurred and suffered. They claim compensation for themselves. They do not aver anywhere in the plaint that they make the claims as agents of African Airlines. They claim the value of lost aircrafts, loss of profits, revenue and cost incurred in grounding one boeing aircraft.

The defendant contended that the 1st plaitniff in this suit is the principal shareholder and director of African Airlines the plaintiff in HCCC No 1361. That he swore affidavits in the earlier suit and he is the link and nexus in both suits. That he is the dominant figure in both suits and transactions that he is in effect having a second bite at the cherry. That having failed to achieve his objectives in HCCC No 1361 he now brings the present suit. The defendant also asserts that African Airlines and African Express are sister companies.

It is my view that the question of issues and parties can substantially be discerned from the pleadings in a suit. The 1st plaintiff has not pleaded that he has instituted this suit as an agent of African Airlines or on its behalf in any other capacity. He pleads the inducements and representations made to him as a party in the Agreement to Restruture. He claims compensation for himself. I have been referred to the Restructurig Agreement, paragraph 2.14. It is clear that the aircrafts mentioned therein do not belong to African Airlines. The 1st plaintiff was required to procure the acquisition of the said aircrafts by the borrower, African Airlines. His claim and that of of African Express relate to these aircrafts.

With regard to 2nd defendant it is not necessary to go outside the principles of *Salomon vs Salomon.* African Express is a distinct and separate legal entity from its shareholders and any link or nexus created by the 1st plaintiff by being a shareholder in both companies or his conduct, does not make the 2 companies the same parties or ones litigation under each other's title. I do not see how they are privies to each other as alleged. In the premises, I hold that the parties in the suit are not the same parties or parties making claims under each other's title. This finding in respect of section 6 of the Civil Procedure Act

will, needless to say, apply to the same issue in section 7 of the said Act raised in grounds 2 and 3 of the application.

In HCCC 555 of 2001 the dispute revolves around performance, implementation of and obligations under the Agreement to Restructure and the alleged defaults and consequences thereof. It is true that the intended restructuring was in connection with the Trade Facility of African Airlines, its borrowing and the receivership placed by the Bank. During any proceeding in this suit it would be necessary to discuss or refer to the original Loan Agreement, its performance by the parties, the circumstances leading to the receivership and the litigation arising therefrom.

In the present suit the plaintiffs alleged inducement and representations which were allegedly false and which made them enter into the Agreement to Restructure. They claim the defendant did not honour its obligations and / or keep it promise thereunder. They claim specific loss and damages.

They seek damages for repudiation and also rescission of the agreement.

To me, the issues raised in the earlier suit HCCC No 1361 of 1999 relate to and concern the legality of the appointment of receivers over the assets of African Airlines, injunctions to prohibit and eject the receivers, and to stop sale of an immoveable property and lastly whether the dispute should be resolved under the Rules of Conciliation and Arbitration of the International Chamber of Commerce. The dispute is between the plaintiff as a borrower and PTA Bank as a lender. The determining contractual documents will be the Loan Agreement, the Debenture, Guarantee and Deed of Variation, all between the plaintiff therein African Airlines and the Bank. Two of the significant questions to be answered by the Court are whether the plaintiff was in default of the Loan Agreement and connected to that whether it owed any monies to the bank. Secondly, whether the bank properly, lawfully and legally appointed the receiver and/or whether they were entitled to do so.

If there is a trial, the Restructuring Agreement will most likely be referred to but I doubt whether the Court would determine the rights of the parties thereunder and give any remedies unless the plaintiff and/or defendant in HCCC No 1361 of 1999 amend their respective pleadings to include the application of the Restructuring Agreement.

In the light of the foregoing, I am of the view that aside from the question of parties which could possibly have determined this application, the causes of action in the two suits herein are different and poles apart. HCCC No 555 of 2001 is one for compensation or damages for repudiation and rescission of the Agreement to Restructure by Mr Bulhan and African Express. On the other hand, HCCC 1361 of 1999 relates to receivership of African Airlines and whether the dispute should be referred to arbitration. The issues if follows are distinctly separate and different.

In the case of *Jadva Karsan vs Harnam Singh Bhogal* (1952) EACA 74 Sir Newnham Worley (Vice President) in a decision dealing with section 6 said at P 76:-

"…….. Moreover, he does not appear to have taken into consideration the facts that the cause of action were separate and different in the two suits – that the amount claimed was different, being for the whole sum alleged due in the present suit, and that at least one new issue namely, illegality, was raised on the pleadings in the suit.

The authorities are clear-that 'matter in issue' in section 6 of the Ordinance (which corresponds to section 10 of the Civil Procedure Code) does not mean any matter in issue in the suit but has reference to the entire subject in controversy: it is not sufficient that one or some issues are in common. The subject matter of the subsequent suit must be covered by the previously instituted suit and not vice versa ……. These conditions, are not met in the instant case and, in my view section 6 was wrongly applied".

The said principles are equally applicable to the circumstances of this case. I therefore also hold that the

subject matter of the present suit are not covered by HCCC No 1361 of 1999 and determination thereof will not solve the matters in controversy in this suit.

I conclude on this point by stating that section 6 of the Civil Procedure Act does not and cannot come into play in the present suit and the suit cannot be stayed.

Grounds 2 and 3 raise the question of *Res Judicata.* Section 7 of the Civil Procedure Act provides:-

"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they are any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

The defendant invokes this provision which sets down the law of *res judicata* in the Civil Procedure Act. The defendant relies on the ruling of the late Justice Hewett which is now the subject – matter of the appeal pending in the Court of Appeal.

First and foremost with regard to the said grounds 2 and 3, I do hereby apply my finding in respect of the question of parties in ground 1 above. I hold the same reasons that the parties in this suit and those in HCCC No 1361 are not the same parties, neither are the plaintiffs herein claiming or litigating under the same title as African Airlines.

Did the ruling of Justice Hewett in HCCC 1361 of 2001 decide similar issues as the one as the ones in this suit? Were the issues in this suit directly and substantially in issue in HCCC No 1361 of 1999 through the ruling of Justice Hewett? Should the issues herein have been raised in HCCC No 1361 of 1991?

In explanation (1) of section 7 – the expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

It is my view that for the principle of *res judicata* to apply the issues alleged to be similar must have been raised in the earlier suit, heard and finally determined or decided by the Court. The application heard by Mr Justice Hewett was that dated 24th September, 1999 for temporary injunction to restrain the receivers appointed by PTA Bank from selling the plaintiffs' African Airlines property and for prohibiting and ejecting the receivers pending the hearing of the suit. The application was dismissed. Justice Hewett made several findings and held that in effect, the plaintiff did not have any *prima facie* case with a probability of success. A Court's decision on an application for temporary injunctions under order 39 does not decide the issues in question. The orders and views or basis thereof are not final. The suit must still go for trial and however emphatic and positive the statements or findings of the judge were they are not conclusive and final. The suit must still go for trial and however emphatic or positive the statements or findings of the judge were they are not conclusive and final. That's why the orders are called interim or temporary. The issues and matters raised in the application will be revisited and litigated again in a full trial. In the premises, it is my view that section 7 and the principles of *res judicata* does not apply here even if one goes in the premises that the issues in this suit are similar to those in HCCC No 1361 of 1999. The finding that the plaintiff in the said suit was in default and that the Restructuring Agreement amounted to an admission under seal of the debt, will be re-opened and finally decided by the Court.

Counsel for the defendant explained to the Court that at the time, he filed this application, the Record of Appeal had not been filed to challenge Justice Hewett's ruling. Leave to file the appeal out of time was granted subsequently and the record filed. This could have given the defendant conviction that Justice Hewett's ruling was final as without any interim orders the purpose of the suit was compromised. Despite the aforesaid I would still have held that with or without the existence of an appeal, as long as HCCC No 1361 of 1999 was pending, the ruling of Justice Hewett is not a "former suit" for purposes of section 7 of the Act.

Having found that the parties in the 2 suits are not the same and that none of the plaintiffs in this suit is

claiming or litigation under the titles of the African Airlines and having found that HCCC 1361 of 1999 is still pending and there is no "former suit", I think that it would be unnecessary and waste of judicial time for me to delve into the question – whether there are similar issues for purposes of section 7. I would say the same for ground 3 and it is rendered irrelevant for the reasons that HCCC 1361 of 1999 is till pending and Justice Hewett's ruling is not a final decision on any issue. I have strained myself from discussing the said ruling as the suit is under appeal in Court of Appeal. In the case of *Rashi Allarakha Janmohamed & Co vs Jethalal Vallabhdas & Co* (1956) EACA 255 Bacon JA said at P259:-

"Finally, there is the second limb of the question which we have to decide, namely, whether the issue raised in the second plaint was "heard and finally decided" at the first trial. By virtue of section 6 that issue must have been so decided, it matters not whether it was properly raised by the first plaint, if both parties chose to contest it at the trial……."

This reinforces my view that HCCC No 1361 has not been heard and finally decided that therefore the principle of *res judicata* does not apply.

I have looked at the plaint herein and the defence and I am of the view that on the face of them the pleadings raise serious questions which ought to be heard and decided on merits. In view of my finding above, I hold that the suit herein is not vexatious, misconceived or a gross abuse of the process of the court.

It follows that the defendant's application must be dismissed which I hereby do with costs to the plaintiffs.

Dated and Delivered at Nairobi this 17th day of February 2004.

M.K.IBRAHIM

JUDGE