



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
CIVIL SUIT NO.303 OF 2003

**BAHARI (T) COMPANY LIMITED ..... PLAINTIFF**

**VERSUS**

**BROOKE BOND KENYA LIMITED,**

**CARGILL KENYA LIMITED ..... DEFENDANT**

Coram  
Before  
Justice  
Mweru

Okonjo  
the Plaintiff

Regeru  
the  
Defendant

Court  
– Justice

**RULING**

The defendants in this suit have invoked SS.3A, 6 Civil Procedure Act seeking one main prayer:

1. That the hearing and determination of this suit be stayed pending the hearing and final determination of NRI H.C. Misc. Application No.1441/2003.

There are in all seven grounds on which this application is predicated. One Mr. Absaloms swore an affidavit in support which carried some annexures which will be referred to as and when deemed necessary.

During arguments the parties also referred to the affidavit and annexures which the plaintiff/respondent here filed in court along with its injunction application dated 8.12.03. While Mr. Regeru appeared and argued the application, Mr. Okongo opposed it.

Before going into what each said for or against the orders sought, it appears pertinent to outline the

background of the matter in general. The court heard that the 1st defendant (Brooke Bond (K) Ltd), hereinafter Brooke Bond, wanted to sell 3 parcels of land: Mombasa/Block 1/125, 350 and 449 to the plaintiff Bahari (T) Company Ltd, hereinafter Bahari. That the negotiations went on, back and forth in letters that all the time stated that all was “subject to a contract” or words to that effect. That by 2.10.2002 a sale agreement had been reached. It was reduced into writing and Bahari’s lawyers sent it in duplicate to Brooke Bonds lawyers, having signed their part. They expected Brooke Bond to execute its part. Five (5%) per cent purchase price amounting to Sh.3.5 m was also sent to Brooke Bond by cheque. However when dispatching the above, the said letter of 2.10.02 from Bahari’s lawyers did add:

*“The Agreement for sale is also forwarded to you subject to your confirming which of the documents listed in paragraph 10 of our faxed letter dated 20 th September 2002 would be provided to us confirming that BBKL has fully resolved to sell the properties to our client.” (underling supplied)*

The import of the above will be appreciated presently. The said letter of 20.9.2002 had in its paragraph 10 headed special condition D(X) said:

*“10. .... It was agreed that you would let us know whether an extract of the minutes would be provided to us or a confirmation letter signed by a director and the company secretary of BBKL or a letter from you confirming that BBKL has duly resolved to sell the properties to our client and that the terms of the Agreement of Sale have been approved by BBKL’s board of directors.”*

On 15.10.2002 Brooke Bond’s lawyers responded to the letter of 2.10.2002 (above), in essence saying that Brooke Bond was not inclined to provide the letters of confirmation or board resolutions that it would sell the properties to Bahari and therefore Brooke Bond (the seller) was not proceeding with the transaction any farther. It thus returned the sale agreement together with the cheque for Sh.3.52 m. To Brooke Bond that was the end of everything with Bahari. Consequently Brooke Bond concluded a sale agreement with Cargill Kenya Ltd (Cargill) on 17.10.02 in respect (of two?) of the said 3 properties.

The court was told that on 14.10.2002 even before Brooke Bond declined to go on with the sale followed by the return of the sale agreement and the cheque to Bahari, Bahari registered cautions against the subject properties, quite probably citing the sale contract. That Brooke Bond protested to the local land registrar about the course of things and they were directed to formally petition/apply to him (one KENNETH GITHII) so that both sides would be heard before he ruled for or against the registration of the cautions. That was done, both sides were heard (by way of submissions) but before Githii rendered a ruling he was transferred to Nakuru. One MARY KAI became the Mombasa District Land Registrar. She found the application and the submissions on record. She proceeded to write a ruling which she delivered on 31.7.03 – with notice to both parties. But that Bahari protested and brought to the fore Githii’s ruling dated 8.4.03 – which seemingly Brooke Bond was not aware of. From the postal and telephone addresses on this ruling it seems to have been written by Githii from Nakuru. With the 2 rulings Githii favouring Bahari while Mary Kai found in favour of Brooke Bond, and due to the fact that Kai had in fact removed the cautions on the very 31.7.04, Brooke Bond saw the obvious conflict and so approached the Chief Land Registrar to resolve it. That instead the Chief Land Registrar ordered a fresh hearing of the petition to remove the cautions and another registrar was appointed to do that. But before the second hearing Kai had on her own registered restrictions on the subject properties. Both the issue of ordering a rehearing and Kai registering restrictions all on her own irked Brooke Bond so much that it registered the Nairobi H.C.C. Misc. Application No.1451/03 on 25.11.03 seeking judicial review orders of mandamus, certiorari and prohibition. That the orders sought against the land registrars include one, if granted, to get them to register the transfer of the subject properties to Cargill (the 2nd defendant). That in that cause which is due for hearing on 30.3.04, Bahari is an interested party.

Turning to this suit in Mombasa filed on 8/12/03 by way of plaint, Bahari agitates that it had a valid contract of sale between itself and Brooke Bond. That Brooke Bond ought to be ordered to specifically perform its part of that sale by transferring the subject plots to Bahari. Of course both in the Nairobi cause and this suit there are other reliefs sought.

Mr. Regeu's position is that his clients' judicial review application filed at Nairobi before this suit here be heard and determined first before the suit. That the parties involved are the same even if the respondents in Nairobi are land registrars but that the final outcome will impact on the litigants here. The suit properties are the same and that even if all reliefs/issues put forth are not similar they do not have to so long as even one falls to be common in the two causes. That for the sake of consistency and orderly litigation may this suit come on board after the outcome of the Nairobi application. That it is probable that an awkward situation could arise if both causes are allowed to go on at the same time but with different final determinations especially regarding ordering the land registrar to register the transfers to Cargill at Nairobi while at Mombasa it is decided that Brooke Bond do convey the same plots to Bahari.

Mr. Okongo, had a contrary view. He held the view that the judicial review application was not a suit in terms of S.6 Civil Procedure Act and that reliefs if granted in Nairobi could not be directed to Bahari, his client. That the parties were not the same and that while the applicants in Nairobi sought orders of mandamus, certiorari and prohibition here Bahari sought mainly specific performance which reliefs cannot be said to be the same. The counsel did not see any common matter in issue directly and substantially between the parties in the two causes. In fact to Mr. Okongo the nature and character of the two causes were totally different. And so he saw no point of convergence in decisions therein which should cause this court to order a stay. The provision of law in issue, S.6 Civil Procedure Act reads:

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

It is not in dispute that the defendants in this suit at Mombasa are the de facto applicants in the Nairobi judicial review application. Indeed at Nairobi, the plaintiff here (Bahari) is titled an “Interested Party” there. It is appearing in that capacity because the 3 plots of land over which the Chief Land Registrar and the Mombasa land registrar are put forth as respondents because of their decisions, regarding those lands, are the same parcels of land in this suit. The registrars are not parties in this suit because by nature of the claim here they cannot be. As regards reliefs, the plaint prays inter alia that this court issues:

***“(a) An order against the 1 st defendant for specific performance of the Agreement of Sale by transferring the suit premises to the plaintiff.”***

The suit premises are now well-known to us all as well as the sale agreement. They are the 3 plots Mombasa/Bloc 1/215, 350 and 449. If this plaintiff succeeds in its action the 1st defendant (Brooke Bond) will be ordered to transfer those plots to it (Bahari). In the Nairobi application, the applicants seek reliefs including:

***“70. An order of mandamus do issue compelling the land registrar Mombasa and the Chief Land Registrar to effect immediate and due registration of the Transfers of lease in favour of Cargill Kenya Ltd. in respect of the parcels of land known as Mombasa/Block 1/350 and Mombasa Bloc 1/215 respectively.”(Note: Apparently Cargill is interested only in those 2 plots and not No.449)***

From the foregoing and in the circumstances of this case it is fair, proper and orderly that the prayer sought be granted. S.6 Civil Procedure Act refers to “a suit or proceeding” and thus the judicial review application is covered. It was filed before the suit here at Mombasa and it has been seen that with the parties, subject matter and reliefs sought it can be said that much is directly and substantially in issue. That need not mean identical, same or similar. Indeed parties need not be the same in all respects. There is much in common, so substantial that having the two causes going on at the same time in two different venues with concurrent/competent jurisdiction is bound to be unacceptable. For instance if the Nairobi court orders the land registrar to register the transfer to Cargill, that decision will definitely impact on the suit here where Bahari seeks the transfer of those plots to itself. And on its part if it got specific

performance order against Brooke Bond, that is bound to embarrass the court at Nairobi if it came to the conclusion that the plots go to Cargill. That should not be allowed particularly as Bahari's position is already secure here by way of an injunction order and in any case this order of stay is not tantamount to dismissal of its case. Parties will come back to it whatever the outcome at Nairobi.

In sum the prayer in the present application is granted with costs.

**Delivered on 26th March 2004.**

**J.W. MWERA**

**JUDGE**