



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL
COURTS)**

Civil Case 773 of 2003

EQUIP AGENCIES LTD..... PLAINTIFF

VERSUS

CREDIT BANK KENYA LTD..... DEFENDANT

RULING

The plaintiff had filed an application for injunction in this matter but before the hearing thereof the defendant raised preliminary objection in the following terms :-

1. That the said application and the entire suit is misconceived, bad in law and an abuse of this Honourable court's process.
2. That the plaintiff/applicant is barred in law from instituting the present suit as the matters therein have been adjudicated upon and determined in HCCC No. 1265 of 2002 as between the same parties herein by a court of competent jurisdiction.
3. In the alternative but without prejudice to the foregoing, that this Honourable court is barred from entertaining this suit in view of the pending earlier suit aforesaid.
4. That the plaintiff/applicant is in breach of the applicable statutory provisions as it is not entitled to bring a separate suit at this or indeed any other stage and has further failed to serve the defendant/respondent with the ex parte interim order obtained herein within the stipulated time or at all.
5. That the present suit should in all fairness and in the circumstances be struck out.

Counsel for the defendant before embarking on the main grounds of objection stated that he wished to start with objection to annexures attached to the affidavit of DIVYESH I. PATERL sworn on 3rd December 2003.

Counsel Mr. Shitiva for the defendant said that annexure 'DIP' '6' of the aforesaid affidavit has not been signed by the commissioner of oaths.

The court looked at the said affidavit in the court file and confirmed that the aforesaid annexure thereof was signed by the commissioner for oaths.

Mr. Shitiva on being informed that the said annexure in the court file was commissioned, stated that the one served on him was not.

In the courts view the document which is material is the one placed before court and in the court file.

Accordingly since the court was able to confirm that the aforesaid annexure as seen in the court file is in conformity with Rule 10 of The Oaths And Statutory Declaration Rules, the objection raised by defence counsel therefore is defeated.

Counsel for the defendant raised a second issue with regards to service of the ex parte order.

Counsel stated that the ex parte order granted to the plaintiff was served upon the defendant outside the three days as per the Order XXXIX Rule 3(3).

It ought to be noted that counsel brought up this issue as a preliminary objection.

It is pertinent at this stage to quote the case:

MUKISA BISCUIT MANUFACTURING CO. LTD. VS WEST END DISTRIBUTORS LTD.

[1969] E.A. page 696.

There is a quotation in that case that will assist hereof as per law, J. A. *"So far as I am aware, a preliminary objection consist of a point of law and which if argued as a preliminary point may dispose of the suit Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."*

The quotation clearly shows that the objection raised by defence counsel that the plaintiff failed, contrary to Order XXXIX Rule 3(3), to serve the ex parte order within three days has no semblance of a preliminary objection.

The reason why the court so finds is because the very objection would require the court to consider the evidence of service which would probably be contradictory and this obviously is not a pure point of law.

In regard to the first ground of objection counsel for the defence did not make any submission thereof and the court will not consider it in this ruling.

Mr. Shitava started his argument by saying that the plaintiff is barred in law from instituting the present suit because the matters pleaded in this suit were adjudicated upon in HCCC No. 1265 of 2002.

He said that the aforesaid case was with the same parties as in this present case and the issues were the same.

He further said that the said issues were determined in HCCC No. 1265 of 2002 by a competent court and the plaintiff therefore cannot be allowed to resurrect the action in this suit.

Mr. Shitava stated that the present suit and the applications ought to have brought in HCCC 1265 of 2002.

Ground 2 and 4(a) of the preliminary objection is essentially saying that the present suit is res judicata.

Section 7 of The Civil Procedure Act states as follows:-

"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 or 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's counsel submitted that the matters in this present suit and in HCCC 1265 of 2002 are

substantially the same and the defendant was seeking that this suit be struck off for being res judicata.

The book of MULLA "The Code of Civil Procedure" 16th edition states:-

".... the rule of res judicata the general doctrine is founded on consideration of high public policy to achieve two objectives, namely, that there must be finality to litigation and that the individual should not be harassed twice over the same account of litigation."

The court notes that the parties in these two suits are the same.

The court has had the opportunity to look at the file of HCCC 1265 of 2002.

The court has found that the plaintiff has raised the same issues on the whole relating to the defendant's right to sell the charged property namely ELDORET MUNICIPALITY BOCK 10/34.

The court notes the parties on 22nd June 2003 entered consent in HCCC No. 1265 of 2002 which consent indeed concluded that suit thereof. There is indeed no issue that is yet to be decided.

The principle of res judicata is an inhibition against the court from hearing a matter twice and it is a question of mixed fact and law.

The court finds that the only new issue raised by the plaintiff in this present suit is that the defendant intends to sell the charged property together with a funeral manufacturing plant which is on the charged property.

The court finds that even in the earlier advertisement for sale by public auction of the charge property, that is in January 2003 the defendant included the funeral manufacturing plant in the description of the property.

The plaintiff even though that description was there, failed when filing HCCC No. 1265 of 2002, to include this issue thereof.

The plaintiff therefore can be said to have omitted to sue or relinquished that portion of its claim and in regard to Order II Rule 1 (2) the plaintiff is precluded from raising this issue in fresh suit. The particular order states that:-

"Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion omitted or relinquished."

The operative word in that order is "shall not afterward sue".

This would mean that the plaintiff cannot sue a fresh in regard to the funeral manufacturing plant because it omitted to do so in the first suit HCCC 1265 of 2002.

Mr. Kingara, advocate for the plaintiff argued that this suit is not res judicata because the issue hereof had not been raised in the previous suit.

In view of the court's findings herein above the court rejects Mr. Kingara's argument.

The court holds in regard to the prayers in the present plaint that prayer (a) be struck out for being in contravention of Order II Rule 1(1) in that the plaintiff omitted or relinquished this claim when it excluded it in HCCC 1265 of 2002.

In regard to prayer (b) (c) and (d) the court is of the view that it is caught by the rule of res judicata and accordingly the court has no jurisdiction to hear the same. Those prayers accordingly are hereby struck out.

On behalf of the plaintiff the court was referred to the case of GEORGE W. W. OMONDI & ANOTHER - VERSUS - NATIONAL BANK OF KENYA

OTHERS, (unreported) HCCC No.958 of 2001.

The court finds that, that case is distinguishable to the present because in that case one of the previous suits had been withdrawn, another involved a different matter from what was at stake. Those two issues removed the case from the ambit of res judicata.

In this present case a decree was issued following a judgment by consent in HCCC 1265 of 2002.

In the final analysis the court finds that the present suit and the application filed by the plaintiff thereof are caught by the rule of res judicata and Order II Rule 1 (2) and this suit is therefore struck out with costs to the defendant.

It is so ordered.

Dated and delivered this 2nd March 2004.

MARY KASANGO

JUDGE