



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT
MILIMANI COMMERCIAL COURTS

CIVIL CASE NO.167 OF 2004

SANDE INVESTMENTS LIMITED

T/a WESTLANDS COTTAGE HOSPITAL1ST PLAINTIFF

SAMSON OMOLLO RADING2ND PLAINTIFF

JARED OMOLLO RADING3RD PLAINTIFF

MIRIAM MUKWANA4TH PLAINTIFF

V E R S U S

KENYA COMMERCIAL BANK LIMITED

(Sued In its capacity and as the purported successor and/or assigns of

KENYA COMMERCIAL FINANCE CORPORATION1ST DEFENDANT

PRICE WATERHOUSE COOPERS LTD2ND DEFENDANT

GRAHAM JAMES GREER SILCOCK3RD DEFENDANT

P. H. SHAH4TH DEFENDANT

ADRIAN SPENCER DEARING5TH DEFENDANT

JOSEPH NJOKA6TH DEFENDANT

R U L I N G

The 1st and 2nd defendants have moved this court by an application dated 15th April 2004. The same is brought under Order VI Rule 13(1) (b) and (d) Order XXXIX Rule 4 of the Civil Procedure Rules, Sections 6, 7 and 3A of the Civil Procedure Act.

The particular order sought by that application is :-

"That the plaintiff's suit herein and the application dated 29th March 2004 filed thereunder be dismissed with costs to the defendants".

The grounds of that application are as follows:-

- a) The suit herein is res - judicata and is otherwise an abuse of the court's process;**
- b) That the court was not seized of the material facts prior to granting the ex parte orders on 30th March 2004; c) That the plaintiffs deliberately withheld material facts in order to mislead the court and which facts include:-**
 - i) that the 1st defendant has appointed receivers to manage the 1st plaintiff's assets pursuant to a debenture instrument;**
 - ii) that there is a duly registered deed of assignment.**
- (d) The 2nd, 3rd and 4th plaintiffs have no locus standi to commence any legal proceedings against the defendants in respect of the suit property or at all.**
- (e) That the second defendant has been wrongfully sued.**

At the beginning of the hearing of this application the plaintiff's counsel withdrew the application dated 29th March 2004 and on that withdrawal the interim injunction granted to the plaintiffs was discharged.

The 1st and 2nd defendant's counsel sought to proceed with the application for the dismissal of the suit.

The application was supported by the affidavit of Lynette Dawa whose content was also captured by counsel's argument. She deponed that the plaintiffs had filed 4 other similar suits against the first defendant in respect of the charged suit property. She cited the cases as follows:-

(a) HCCC No.653 of 1997, the parties thereof were SANDE INVESTMENT LTD -V- KENYA COMMERCIAL FINANCE CO. LTD.

This case was withdrawn in 1999.

(b) HCCC NO.1491 of 1999, the parties were SANDE INVESTMENT LTD -V- KENYA COMMERCIAL FINANCE CO. LTD.

This case was dismissed for want of prosecution.

(c) HCCC NO.378 of 2000 (Kisumu) where the parties are SANDE INVESTMENT LTD, SAMSON OMOLLO RADING, JARED ODHIAMBO OMOLLO, A. W. RADING OMOLLO AND MIRRIAM MUKHWANA -V- KENYA COMMERCIAL FINANCE CO. LTD.

On making my own inquiry I found that this suit is still subsisting and the last order recorded on 20th December 2000 was,

"Defendant restrained from selling the suit premises situated within Nairobi municipality Plot No.L.R.1870/V/53" Birech C.A.

(d) HCCC.330 of 2002. The parties thereof were SANDE INVESTMENT LIMITED -V- KENYA COMMERCIAL BANK OF KENYA LTD & DILIGENT AUCTIONEERS LTD.

This suit was dismissed on 29th July 2002 on the basis that it was res-judicata.

Counsel in support of the application contended that the plaintiff's present suit is res judicata, an abuse of the court's process, the plaintiffs had failed to make material disclosure when they obtained an injunction, and that the 2nd, 3rd and 4th plaintiffs have no locus standi.

Counsel said that the plaintiff was conducting litigation by instalments.

For example, he said, the plaintiff ought to have pleaded the issue of discharge of property in 1997 or subsequent suits.

This manner of litigation by the plaintiff, defence counsel said, offended Order 2 Rule 1 (1) (2) and (3) of the Civil Procedure Rules. This order, he argued expressly forbids a plaintiff who fails to sue on an issue from suing thereafter and in such a case the plaintiff is taken to have relinquished that portion of his claim.

Defence argued that Section 7 Civil Procedure Act, bars the filing of this present suit and that section is wide enough to encompass parties who ought to have been brought in the previous suit but the plaintiff elected not to so bring.

Section 7, it was further argued included any ground of attack which ought to have been a ground which the plaintiff would have brought.

Counsel presented a list of authorities which I have had the opportunity to read.

In the case POP-IN (KENYA) LTD & OTHERS -AND- HABIB BANK A..G. ZURICH CIV. APP.NO.80 OF 1988 counsel relied on the following quote:-

"The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of facts;

.....parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present as to what should be proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end,It is a principle of law that this cannot be permitted." HOLYSTEAD AND OTHERS -VTAXATION COMMISSIONER (1952) ALL E.R. Rep. 56 at p.62.

In YAT TUNG INVESTMENT Co. ltd. -V- DAO HENG BANK Ltd. & ANOTHER 1975 A.C. 581 it was stated:-

"Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward,

The plea of res - judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounced judgment but to every point which properly belonged to the subject of litigation"

Counsel sought by oral application to amend the application dated 15th April 2004 to read in prayer 3 as follows:-

"That the plaintiff's suit and the application dated 7.5.2004 filed thereunder be dismissed with costs to the defendant."

The plaintiff's counsel was not heard to oppose that application and in any case it was necessitated by the plaintiff's withdraw of the application dated 29th March 2004.

The court does hereby grant the 1st & 2nd defendant leave to amend the application dated 15th April

2004 as aforesaid.

Counsel for the 5th defendant fully associated himself with argument advanced by 1st & 2nd defendant's action was an abuse of the court's process and advocate should know that they cannot create miracles.

Plaintiff's counsel in opposition to the application said that the plaintiffs had made full disclosure of the previous suits in the present plaint paragraph 23.

Plaintiffs counsel then proceeded to analyse the different issues raised in the previous suits and the ones raised in the present suit arguing that the latter had not been raised before.

He argued that the receiver had been in control of the plaintiff's hospital for now 5 years and it was necessary for him to account for the actions undertaken by him; similarly he argued that the charged property had previously been valued at KShs.71 million and yet now it was being sold to the 5th defendant for KShs.22 million. Further counsel said that the chattels at the hospital has been removed from the hospital and it was necessary for the defendant to explain their whereabouts.

All this information counsel said, was not in the knowledge of the plaintiffs when the previous suits were filed. Counsel therefore said that this suit is not res - judicata but if there were offending prayers counsel said that only those that ought to be struck out.

Before the court deliver its ruling hereof, the plaintiffs filed an application dated 24th June 2004.

The 1st and 2nd defendant counsel asked the court to adopt the submission aforesaid made in respect of this application.

Plaintiff's counsel opposed that prayer and said that the doctrine of res - judicata does not apply even in respect of this suit because it only applies where there has been a determination which is not the case in this suit.

In this present case new issues had been raised and new parties had been sued.

The plaintiffs counsel requested the court to consider the authorities filed on their behalf.

The court will quote a few of those cases that relate to the plaintiffs' case. NGUYAI -V- NGUNAYU (1985) KLR page 606.

"The doctrine of res - judicata could not apply against the plaintiff and the 1st defendant as the 1st defendant had not been a party to the previous suit and therefore the issues between him and the plaintiff were neither investigated nor resolved in that suit."

The plaintiffs' counsel used this portion to support the argument that in the present case there are defendants who were not parties in the previous suits. KIBOGY -V- CHEMWENO C.A. NO.41 OF 1980.

"Whether a matter is directly and substantially in issue between the same parties, it is condition precedent to the application of the doctrine of res - judicata that the issue has been finally decided."

Plaintiff's counsel said that case supported his argument that the issues in this case have not been finally decided. KOBO SAFARIS -V- PETER GICHUKI KING'ARA HCCC NO.797 OF 1997:-

"The goods on the inventory of 14.3.95 were motor vehicles KAD 685A, KAS 327H and KAD 267F together with the movables of the plaintiff while those goods attached on the inventory of 2..4.96 were the photocopier mita, one toshiba computer, Lap desktop and mouse. In view of these different issues in the suits, the objection is dismissed with costs to the plaintiff."

The plaintiff's argument is that the present suit brings out issues not before litigated.

The court having considered the submissions by counsels and the authorities hereof is of the view that the present suit is not resjudicata.

Section 7 of the Civil Procedure Act provides that:-

"No court shall try any suit or issue 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 underline mine).

From that section it is clear that the former suit ought to have been finally decided. A close examination of the previous suits one finds that one was withdrawn, one was dismissed for want of prosecution and finally one was dismissed on the ground that it was res-judicata.

A quote from HALSBURY'S LAW OF ENGLAND is apt in relation to the doctrine of res judicata :-

".....it amounts to an allegation that the whole legal rights and obligations of the parties are concluded by the earlier judgment which may have involved the determination of questions fo law as well as findings of fact."

With regard to the applications dated 7th May 2004 and 24th June 2004 I am of the view that they are res-judicata in view of the order granted in HCCC No.378 of 2000 (Kisumu) whereby all the plaintiffs in this case obtained an injunction, injuncting the defendant from selling the charged property. Accordingly the applications dated 7th May 2004 and 24th June 2004 are dismissed with costs to the defendants.

The application dated 24th June 2004 applications is also, an abuse of the court's process because it is exactly the same as the one dated 7th May 2004 and it was filed whilst the one dated 7th May 2004 was still subsisting.

The present suit in my view cannot stand for the following reasons:-

(a) The plaintiffs should have applied to set aside or appeal against the dismissal of the HCCC. No.330 of 2000 and should not have filed this fresh suit.

(b) The plaintiffs have a subsisting suit in Kisumu HCCC.No.378 of 2000 and it was not open to the plaintiffs to file yet another case. Even if the argument is that there are additional defendants in the present suit that is not reason enough to justify this suit because the Kisumu High Court case could be amended to join the extra defendants.

(c) The present suit offends Order 2 Rule 1(2). Indeed without going through every issue pleaded therein I am of the firm view that the new issues that are pleaded in the present suit were omitted from the previous suits and hence offends Order 2 Rule 1(1); consequently the suit will be dismissed on this ground; and on the ground of being in abuse of court process in view of the Kisumu case.

The only issue that could be regarded as a new issue which occurred after the previous suits is the one relating to the sale of the charged property under value but the same ought to be litigated in case HCCC NO.378 of 2000 (Kisumu).

The court orders therefore are as follows:-

(a) That the applications dated 7th May 2004 and 24th June 2004 are dismissed with costs to the defendants for being res-judicata and an abuse of the court's process.

(b) That the suit herein is dismissed with costs to the defendants, for being in contravention of Order 2 Rule 1(2) and for being an abuse of the court's process.

Orders accordingly.

Dated and delivered this 19th day of July 2004

MARY KASANGO

AG. JUDGE