



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

Civil Case No. 1151 Of 2000.

Guardian Bank Limited APPELLANTS

VERSUS

Kenya Matches Limited (In Receivership) & 3 others..... RESPONDENT

JUDGMENT.

Decemberr 15, 2000 T Mbaluto, Judge delivered the following judgment.

On June 29, 2000, Guardian Bank Limited (herein referred to as the bank) filed this suit against 4 defendants, the applicant being one of them. The prayers sought in the suit are:-

- (a) Kshs 20 million with interest thereon at 40% per annum with effect from July 28, 1997.
- (b) An order compelling the defendants jointly and severally to specifically perform and perfect the security in favour of the plaintiff as regards Kisumu Municipality Block 10/559, Block 10/660 and Block 10/661.

The applicant which is sued as the 4th defendant filled its defence on August 29, 2000. In paragraph 4 thereof, it states that the claim filed by the plaintiff is:-

“the same subject matter in Kisumu High Court Civil Case No. 269 of 1999 between the 4th defendant as the plaintiff and the plaintiff as the defendant namely the alleged charge over the 4th defendant properties, Kisumu Municipality Block X/559, Block X/660 and Block X/661 in which case the court (in Kisumu) has already ruled that the purported charge is null and void.”

The applicant further avers that the bank is not entitled to the equitable remedy of specific performance because it was found to have committed a fraud in respect of the charge over the properties aforesaid which said fraud the court decided rendered the charge null and void.

It is on the basis of the above circumstances that the applicant filed this application under Order VI Rule 13(1) (d), O. VII Rules 1 (4), 2 and 3 of the Civil Procedure Rules. The application is supported by an affidavit sworn on October 26, 2000 by Mitesh Fulchand Shah and raises three points which were also covered by its learned counsel during submissions before me. These are:-

1. That there is pending in the High Court in Kisumu the suit referred to above which was filed by the applicant against the bank and in which the bank filed a counter-claim for the same sum of money and in respect of the same transactions in respect of which the instant suit is based.
2. That contrary to the requirements of Order VII rule 1(e), the bank has failed to disclose the pendency of HCCC No. 269 of 1999.
3. That the bank has failed to disclose the pendency of its counterclaim in HCCC No. 269 of 1999.

Copies of the pleadings in Kisumu HCCC No. 269 of 1999 and the ruling of the Learned Judge (Hon. Justice Wambilyangah) on the validity of the charge over the applicant's properties are annexed to Mr. Shah's affidavit. It is to be observed that the documents reveal that the ruling of the Learned Judge did not deal with the bank's counter-claim.

Given that position, the counter claim still subsists and clearly the suggestion made by learned counsel for the respondent (Mr. Odek) during his submissions that the counter-claim was disposed of, lacks substance.

Section 6 of the Civil Procedure Act provides:-

“No court shall proceed with the trial of any suit or proceedings 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, 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 trite law that a counter-claim is a suit whereby the defendant so to speak becomes the plaintiff with the plaintiff becoming the defendant. The counter-claim that still subsists in Kisumu HCCC No. 269 of 1999 seeks to recover the sum of Kshs 21,391,338 being the sum advanced by the bank to Kenya Matches Limited in respect of which borrowing the applicant is alleged to have agreed to and did execute a charge over the three properties mentioned above to service the sum of Kshs 20 million. In the instance suit, the bank seeks what it calls specific performance to perfect the security in favour of the bank as regards the three properties owned by the applicant. What in effect the bank seeks without saying so in so many words is the reimposition of the charge which the High Court at Kisumu declared null and void.

It is plain from a careful reading of the pleadings in the two cases that the matter in issue in this case is the same as that in issue in the pending suit in Kisumu High Court namely the loan advanced by the bank to Kenya Matches Limited, the security for which was the applicant's three properties. In the suit at Kisumu the bank seeks recovery of the sum outstanding while in the instant suit it seeks to reimpose the charge declared null and void.

Mr. Odek also argued that the matter in issue in both cases was not the same because in the Kisumu case, bank did not in the case pray for specific performance. He also made the unusual submission that the cause of action in this matter only arose when the court at Kisumu made its ruling. In my view, the latter submission does not, with all due respect to Mr. Odek, make any sense since court decisions do not give rise to causes of action. As to the claim that the bank did not pray for specific performance, O. II Rule 1 (2) and (3) provides:-

“(2) 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.

(3) A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the court, to sue for all such reliefs he shall not afterwards sue for any relief so omitted.”

Accordingly any reliefs which the bank could have sought in its counterclaim against the applicant but

omitted to raise in the Kisumu case cannot now be raised in this suit.

With regard to the complaint that the bank failed to disclose the pendency of the suit in Kisumu HCCC No. 269 of 1999, I agree with the applicant that the contents of paragraph 29 of the plaint are misleading and do not comply with the requirements of O. VII rule 1(e) in that there is no averment that no other suit is pending; moreover there is no averment as to the status or outcome of Kisumu HCCC No. 269 of 1999 and plainly there is an attempt to mislead this court as to the true position of the litigation in Kisumu between the parties.

For all the above reasons, I agree with the applicant's contention that this suit is an abuse of the process of this court. Accordingly, the plaint is struck out and the suit dismissed with costs.