REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1576 OF 1999

BENJOH ALMAGAMATED LTD &

ANOTHER.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK.....DEFENDANT

R U L I N G

This is an application by way of Chamber summons brought by the defendant herein for orders that this suit be struck out as it is vexatious and an abuse of the process of this Honourable Court, that the costs of this application and the suit be awarded to the defendant.

The said application is brought under Order 6 Rule 13(1) (b) and (d) of the Civil Procedure Rules and sections 3A and 7 of the Civil Procedure act. It is supported by an affidavit sworn by the learned counsel for the defendant John Akello Ougo and on grounds that the plaintiffs have filed 5(five) previous suits against the defendant and the issues in this suit were directly and substantially in issue in the said suits all of which have been

determined. It is also stated that this suit is in any event time barred by the provisions of the limitation of Actions Act.

The plaintiffs filed grounds of opposition to the application and a replying affidavit sworn by one Kungu Muigai said to be a Director of the first plaintiff/applicant.

Both learned counsel appearing for the parties herein have very ably made their respective submissions which I have on record. The learned counsel for the defendant has taken the court through the sequence of suits alleged to have been filed by the plaintiffs, the orders of which were annexed to the application.

Section 7 of the Civil Procedure Act reads as follows:-

> "7. 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." (emphasis added).

Perhaps the most controvercial issue that has led to this protracted litigation is the consent order made

in H.C.C.C. No. 1219 of 1992 between the parties herein. I do not deem it necessary to repeat the order herein for reasons that shall become clear soon hereunder. The said consent order "settled" the dispute. The plaintiffs moved to set aside and/or review the said order. The High Court allowed them to do so but hte Court of appeal reinstated the said court order.

What the Court of Appeal did was to restate the established principles of setting aside consent orders. The same were non-existent in the application before the High Court hence the decision of the Court of appeal.

There is nothing in the judgment of the learned Judges of Appeal that addressed the impact of the contents of the said consent order. For the first time in as many years, the plaintiffs have challenged the order seeking a declaration that the said order is ambiguous and uneforceable in law. Another issue that has come up for the first time is general damages for breach of contract. The other prayers I believe may have been pleaded before but I am unable to conclusively so find because except for H.C.C.C. No. 24 of 1997 at Nyeri, no other pleadings have been annexed to the present application.

One may question the plaintiff's failure to file an application under H.C.C.C. no. 1219 of 1992 to raise the unenforceablility of the consent order. The election to present a separate action is however not precluded in law. (see Halsburys Laws of England 4th Edition. Vol. 26 para 556 of p. 280).

In applications of this nature, the court should be careful not to delve deeper than is necessary to resolve the issue because the suit may end up being tried without the benefit of listening to the parties.

The foregoing not withstanding, the plaintiffs have pointed out at least three conflicting figures of what the defendant says it is owed. The difference of those figures are so wide that the plaintiffs demand to be provided with a statement of account cannot be said to be a wild shot.

There is also the question of limitation. is this matter founded on contract or land. This question again cannot be determined at this stage. The order sought by the defendant is discretionary. It involves the exercise of a summary power which should be exercised only in plain and obvious cases. As was stated by Salmon L.J. in Nagle V. Feilden (1966) 1 ALL E.R. 689 at 697.

> " it is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable."

I have also taken time to go through the record before me. after service of summons to enter appearance and file defence the defendant complied as required. The statement of defence is quite lengthy and detailed. Significantly, the defendant submitted to the jurisdiction of this court to try the suit. I have seen the statement of issues drawn signed and filed by the learned counsel for the plaintiffs. When summons for Directions came up for hearing, both counsel were ordered to comply with order 10 Rule 11 A of the Civil procedure Rules. The plaintiffs have filed their list of documents. The order on the summons for directions was only deferred when the present application was field.

It is my view that, to strike out the suit at this stage, when the plaintiffs have taken all the necessary steps to facilitate the expeditious disposal of the suit, will most likely lead to miscarriage of justice. I hold that this suit should be sustained so that the plaintiffs may have their day in court as I believe they have shown there are weighty triable issues to be determined, and this is only possible by way of a full hearing or trial.

I am fortified in my holding by the provisions of section 7 of the Civil Procedure Act aforesaid which envisages the determination of a suit or issue by way of a trial. with respect, in all the suits that have been cited in these proceedings, not a single one went for a full trial.

Accordingly, I find that the defendant's application is misplaced. The same is hereby dismissed with costs.

Orders accordingly.

Dated and delivered at Nairobi this 25th day of February, 2000.

A. MBOGHOLI MSAGHA

JUDGE

Mutisya for Mutua for plaintiffs

Kimani for Ougo for defendant