



Moracha v Cooperative Bank of Kenya Limited; Jipa Oil Company Limited (Interested Party) (Civil Suit E008 of 2023) [2023] KEELC 19885 (KLR) (19 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19885 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL SUIT E008 OF 2023
M SILA, J
SEPTEMBER 19, 2023**

BETWEEN

JOSEPHAT MWANGI MORACHA PLAINTIFF

AND

THE COOPERATIVE BANK OF KENYA LIMITED DEFENDANT

AND

JIPA OIL COMPANY LIMITED INTERESTED PARTY

(Application for injunction; plaintiff having guaranteed financial facilities given to the interested party by the defendant and charging the suit land; plaintiff filing suit claiming that the defendant is wrongly exercising his statutory power of sale and that the land ought not to be sold as it is land held in trust; together with the suit, applicant filing an application for injunction and obtaining interim orders in the first instance; defendant raising objection that the plaintiff has a parallel suit and application pending before the High Court and filed prior to this suit; court of opinion that the plaintiff is engaging in an abuse of the court process by maintaining two parallel proceedings at the same time; court of opinion that when faced with such instance, it has discretion to strike out suit; consequently both application and suit struck out with costs)

RULING

1. The plaintiff/applicant guaranteed financial facilities accorded to the interested party by the defendant/respondent (Cooperative Bank of Kenya Limited), and offered the property Wanjare/Bogiakumu/2636 (the suit property) as security. The facility was a loan of Kshs. 98,000,000/=. The facility became non-performing and the respondent moved to exercise her chargee's statutory power of sale. It is that action which prompted the applicant to file this suit on 5 June 2023 seeking orders for a declaration that the defendant's exercise of its statutory power of sale over the suit property is



unlawful, null and void; and a permanent injunction to restrain the defendant from selling the suit property by public auction. Together with the plaint, the plaintiff filed an application dated 31 May 2023 seeking an interlocutory injunction to restrain the defendant from disposing of the suit property pending hearing and determination of the suit. It is that application for injunction which is the subject of this ruling.

2. The application is supported by the affidavit of the plaintiff. In it he avers that he is a director of the interested party; that the suit property is matrimonial property; that statutory notices as required by law have not been served upon his wife; that he has been holding the suit property under a customary trust to his family, both immediate and extended; that if the defendant is allowed to exercise her statutory power of sale as opposed to other available remedies, his family will be rendered homeless; that he has no alternative means to provide for himself and his family if the said matrimonial property is sold; that the court has power to offer him relief. To his supporting affidavit, he has attached the letter of offer from the respondent (the bank) offering financial accommodation to the interested party; a letter dated 6 August 2021 from the bank informing the interested party that its account is in arrears and demanding regularization within 14 days; a notification of sale from Nira Auctioneers which unfortunately is so faint that it is not legible.
3. The defendant/respondent has opposed the application by filing Grounds of Opposition and a Replying Affidavit sworn by Duncan Matisero, her Legal Manager. In the grounds of opposition, the respondent avers that this suit is sub judice as the applicant has a similar case pending before the High Court, being Kisii HCCC No. E003 of 2023, Josephat Mwangi Moracha vs Cooperative Bank of Kenya Limited & Jipa Oil Company Limited. In the replying affidavit, Mr. Matisero has deposed that the applicant and his brother are directors of the interested party, Jipa Oil Company Limited. He states that the Bank advanced credit facilities to the interested party, as borrower, and the applicant executed a charge over the suit property to secure the monies. He proceeds that the borrower made minimal payments leading to serious default on the interest and made no payment on the principal amount. It is averred that the applicant was notified of the default and there was no response, thus the respondent's power of sale crystallized. It is deposed that a 45 days notice was issued by Nira Auctioneers on the instructions of the respondent after which the applicant filed the suit Kisii HCCC No. E003 of 2023. He avers that the suit came up for hearing on 31 May 2023 before Gichohi J, when the court directed that a preliminary objection be heard first, and gave parties 7 days to file their submissions, with the matter being fixed for mention on 13 June 2023 for directions on a ruling date. It is said that the prayers sought in this application are a replica of an application dated 16 May 2023 filed in the High Court suit. It is pointed out that in the pleadings herein, there is no mention of the previous suit filed at the High Court, and that the applicant is pursuing the same matter in two courts. It is contended that the applicant obtained interim orders of injunction in this matter through concealment of material facts and is forum shopping. He has annexed the pleadings for the other suit.
4. The applicant filed a supplementary affidavit. He admitted having another suit at the High Court, Kisii, and deposed that it was filed simultaneously with this matter. He states that the High Court has jurisdiction to determine commercial matters, i.e dispute concerning interest rates, and the obligations of the guarantor in commercial transactions. He avers that in the instant suit, he is seeking reliefs that can be granted to a chargor, and at the same time challenging the statutory notices that were never issued to him and that a commercial court cannot deal with matters land. He contends that it is this court that has jurisdiction to hear and determine the issues that he has raised in the suit.
5. Both counsel for the applicant and respondent filed submissions in respect of the application and made brief oral submissions in court. I have taken note of these before arriving at my decision.



6. The main objection to the subject application is that the same is sub judice as there is a similar suit pending before the High Court and also a similar application for injunction. I have gone through the pleadings that have been attached by the respondent. I have gone through the plaint in Kisii HCCC No. E003 of 2023 and compared that plaint with the plaint filed herein. Other than a few differences in the drafting, the cause of action is the same, word for coma, and the prayers in the two suits are also the same, word for coma. It is not true, as claimed by the applicant, that he has lodged two different suits, one in this court in respect of what he considers to be a land claim, and another in the High Court for what he considers to be a commercial claim. What he has done is to file two suits, based on the same cause of action and with similar prayers, in two different courts.
7. When this application was filed, there was already pending a similar application in the suit Kisii HCCC No. E003 of 2023 which was also seeking orders of injunction just as sought in this application. The applicant did not disclose that he has a pending suit and a pending application for injunction when he filed this application. In my opinion, the applicant concealed the fact of the other pending case so that he may be able to obtain interim orders of stay, which he actually did when the application came before this court ex parte. It is my considered opinion that the applicant engaged in manifest abuse of the court process to obtain the ex parte orders.
8. In my opinion, even the existence of this suit is an abuse of the court process for one ought not be allowed to pursue two parallel suits at the same time, in two different courts, based on the same cause of action and seeking similar orders. If the applicant thought he had two separate issues, one a land claim, and another a commercial claim, he had the option of filing one suit to address all issues, or if he thought the issues may be severed, file two different plaints. But what he did was to file more or less the same plaint, meaning the same cause of action, in two different courts, and he is prosecuting the two suits simultaneously. That is an abuse of the court process.
9. I am persuaded that when a court is faced with such a scenario it has the discretion either to stay the latter suit or proceed to strike it out suo motu for no court ought to encourage a party to engage in the practice of filing a multiplicity of cases raising the same issues.
10. In the circumstances of this case, I am persuaded not to issue any order of injunction as sought by the applicant for the applicant is clearly abusing the process of court. As I have said, he has a pending application for injunction before the High Court, which is yet to be determined and which was filed earlier than the application before me, and which is similar to the application herein. I proceed to exercise my discretion to strike out this application for being an abuse of the court process. I am also persuaded to proceed to strike out the entire suit for similar reasons.
11. The result is that both the application and the suit are hereby struck out for being sub judice. The ex parte orders granted are consequently lapse and are hereby vacated. The costs of the application and of the suit will be to the defendant/ respondent.
12. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 19TH DAY OF SEPTEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

