City Chemists (Nairobi) Limited v M Oriental Bank Limited & another (Civil Case E096 of 2023) [2023] KEHC 19234 (KLR) (Commercial and Tax) (19 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19234 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E096 OF 2023

FG MUGAMBI, J

JUNE 19, 2023

BETWEEN

CITY CHEMISTS (NAIROBI) LIMITED ..... PLAINTIFF

AND

M ORIENTAL BANK LIMITED ..... 1ST DEFENDANT

JULIUS AGUNJA ONYANGO T/A AGUNJA AUCTIONEERS 2ND DEFENDANT

RULING

Brief Facts

1. Before the court are two applications; the application dated March 8, 2023 filed by the plaintiff seeking injunctive reliefs and the application dated March 13, 2023 filed by the defendant seeking to strike out the suit.

Application dated March 8, 2023

2. The application is brought under Sections 1A, 1B & 3A of the *Civil Procedure Act* (CAP 21 laws of Kenya), Order 40 rules 1,4 & 10 and Order 51 Rules 1,3,4 of the *Civil Procedure rules 2010*, Sections 90,96 and 97 of the *Land Act* and all other enabling provisions of the Law.

3. It seeks the following orders:

    i. Spent

    ii. Spent

    iii. Spent

iv. Spent

v. That pending the hearing and determination of the Suit herein inter-partes, this Honourable Court be pleased to grant an order of temporary injunction restraining 1st and 2nd respondents either by themselves, their servants. employees and/or agents from advertising, offering for sale. selling, alienating, transferring or in any other way disposing of the parcel of land known as Land Reference No 2/280 Kilimani Estate Nairobi.

vi. That this Honourable Court be pleased to grant an order of permanent injunction restraining 1st and 2nd respondents either by themselves, their servants, employees and/or agents from advertising, offering for sale, selling, alienating. transferring or in any other way disposing of the parcel of land known as Land Reference No 2/280 Kilimani Estate Nairobi.

vii. That this Honourable Court be pleased to make a declaration that the loan or banking facilities extended to the applicant by the 1st respondent and secured by Land Reference No 2/280 Kilimani Estate Nairobi were and have been fully paid or settled and that the suit property stands fully discharged from any liability whatsoever as between the parties.

viii. That this Honourable Court be pleased to order the 1st respondent to immediately and unconditionally discharge the charge, if any. made in its favour over Land Reference No 2/280 Kilimani Estate Nairobi and release the title to the Chargor forthwith.

ix. That the cost of this Application be provided for.

4. The application is premised on the grounds on the face of it, supported by the affidavit sworn by Mohamed Kisabuli and buttressed by the submissions dated March 22, 2023. The plaintiff's case was that on or about 1987 the then Bank of Credit and Commerce International (BCCI) extended to the plaintiff, an overdraft facility capped at Kshs 350,000/=. The facility was secured by a charge over the property known as Land reference Number 2/280 Kilimani Estate Nairobi registered in the name of Halimah Wamukoya Kisabulu(deceased, herein the suit property).

5. In 1991 the bank ceased its operations in Kenya and its business was transferred to Delphis Bank Limited (DLB), which move the plaintiff submits was null and void and in breach of the law. This was because it was effected at a time when a winding up order had been issued against BCCI in the Cayman Island. For this reason, the plaintiff states that even the charge executed over the suit property was null and void and as such no statutory power of sale can emanate from the said charge.

6. It was further contended that the plaintiff had negotiated the debt and paid the agreed sum of Kshs 2,136,224.90 in full and final settlement and the same was received and acknowledged by the bank. The payments were made in the year 2003. The plaintiff submits that it was shocked to receive a Notification of Sale stating that it was indebted to the defendant in the sum of Kshs 37,500,000/=. This is because the bank had at no time prior to the notice informed the plaintiff of the outstanding debt.

7. The respondent opposed the application by a replying affidavit sworn by Wilfred K Machini on March 15, 2023 and submissions dated 22nd March 2023. It was the respondent's case that the applicant, which was not even the registered proprietor of the suit property, had previously instituted three suits against the 1st applicant. These were HCCC 646 of 2007, HCCC 3609 of 1995 and HCCC 370 of 2003 all of which had been dismissed.

8. The respondents' position was therefore that the suit was res judicata as previous applications seeking the same orders had been dismissed. Further the respondents stated that only the registered owner of the suit property could institute the proceedings. In any case, the respondents argued that the chargor in a letter dated 26th July 2022 had made an offer to pay Kshs 16,000,000/= in full and final settlement and the 1st respondent made a counter offer of Kshs 18,000,000/=.

Application dated March 13, 2023

9. The application was brought under section 3A and 7 of the *Civil Procedure Act*, Order 2 rule 15(1)(b) and(d), Order 51 rule 1 of the *Civil Procedure Rules 2010* and all other enabling provisions of the law.

10. It sought the following orders;

    i. Spent

    ii. That the plaintiff's application dated March 8, 2023 and the plaint dated March 8, 2023 be struck out

    iii. That the costs of the suit and application be awarded to the defendants.

11. The application was supported by the grounds on the face of it and the affidavit of Wilfred K Machini. The main grounds of the application were that the suit was res judicata as the plaintiff had previously and unsuccessfully instituted three other suits against the 1st defendant over the same matter. There was also no evidence presented by the plaintiff to demonstrate that Mohammed Kisabuli was authorized to institute this suit on behalf of the plaintiff.

    Further the 1st defendant averred that the plaintiff was not the registered owner of the suit property No LR 2/280.

12. The application was opposed. The 1st respondent filed a replying affidavit sworn by Mohammed Kisabuli on March 22, 2023. He observed that he was the Director of the plaintiff and his name did not appear in the Memorandum of Association since he was not a founding Director. He further stated that he was the administrator of the estate of Halima Wamukoya Kisabuli who was the registered owner of the suit property. The defendants' position was that the suit was not res judicata as the previous suits had not been heard and finally determined by the court and the present suit raised new and different issues that had never been litigated before.

13. It was stated that the reasons why the suit was not pursued to completion was that the parties had been negotiating an out of court settlement where the plaintiff paid the debt in full. That lack of service of a statutory notice upon the estate of the deceased chargor was a fundamental prerequisite to the exercise of the statutory power of sale.

14. The parties filed joint submissions with respect both applications which the court has considered.

Analysis

15. I have carefully considered the pleadings, evidence and rival submissions filed before this Court. There are two issues for determination. The first issue is whether the suit against the defendants should be struck out and if not, whether an injunctive relief should be granted.

16. The power of the Court to strike out pleadings is provided for under Order 2 rule 15 of the *Civil Procedure Rules*. Further, the doctrine of *res judicata* is provided for under section 7 of the *Civil Procedure Act*, which provides that:

> " 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."

17. This Court must test the application of this provision to the current dispute against the threshold provided by the Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR. The Court stated that;-

> For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. That former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.
>
> e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

18. I have perused the evidence presented before the Court. The plaintiff does not dispute having filed a suit in HCCC 646 of 2007, HCCC 3609 of 1995 and HCCC 370 of 2003 but maintains that the suits were not res judicata as they were dismissed before the court could delve into the merits of the case. I do note from the record that the substantive prayers sought in these suits is similar. The suits were dismissed for the plaintiff's failure to prosecute its claim.

19. As to whether such dismissal would amount to a suit being res judicata, sufficient guidance had been given by a binding decision of the Court of Appeal in *Njue Ngai v Ephantus Njiru Ngai & Another* [2016] eKLR. The Court held that; -

> " Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of Peter Ngome vs Plantex Company Limited [1983] eKLR. stating:
>
> "Rule 4(1) does not say "judgment shall be entered for the defendant or against the plaintiff." It uses the word "dismissed." The *Civil Procedure Act* does not define the word "judgment". According to Jowitt's Dictionary of English Law 2nd ed p 1025:
>
> "Judgment is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several."

> Mulla's Indian Civil Procedure Code, 13th Ed Vol 1 p 798 says: "Judgment" means the statement given by the judge on the grounds of a decree or order;" "Judgment - in England, the word judgment is generally used in the same sense as decree in this code."
>
> In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order IXB or under any other provision of law. A dismissal of a suit, under Rule 4(1), is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order IXB includes application to set aside a dismissal. This must be so because,
>
> when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order IXB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8."
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> Now, we have seen that a dismissal for want of prosecution was as good as a final judgment in the appeal unless a successful application for setting aside was filed. There can be no doubt therefore that Njue's appeal to the High Court was decided by a competent court. The dismissal also meant that the decision of the Appeals Committee stood unchallenged and final, warts and all.

20. My understanding of the pronouncement by the Court of Appeal is that HCCC 3609 of 1995 and HCCC 646 of 2007 having been dismissed for want of prosecution are considered to have been determined on merit, and rightly so because litigation must come to an end.

21. In the premises, if the suit cannot be sustained, it follows that the application dated March 13, 2023 cannot also succeed. In any case, there is on record a similar application filed on October 27, 2015, in HCCC 646 of 2007 seeking to restrain the defendants from disposing the property known as Lr No 2/280 Kilimani. The court on June 25, 2008 dismissed the application. Going by the same pronouncement of the Court of Appeal, this litigation too is deemed as having been heard and determined.

Determination and orders

22. I therefore have no hesitation to find that the court is barred by the doctrine of res judicata to entertain the application dated March 8, 2023.

23. The application dated March 8, 2023 is dismissed. The application dated March 13, 2023 on the other hand, succeeds. The 1st defendant shall have the costs of the applications.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 19th DAY OF JUNE 2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.