



REPUBLIC OF KENYA

IN THE HIGH COURT

AT KISII

CIVIL CASE NO. 6 OF 2019

BANK OF AFRICA LIMITED.....APPLICANT

VERSUS

ZABLON MOGAMBI MOGAKA.....1ST RESPONDENT

ESTHER KEMUMA MOGAKA.....2ND RESPONDENT

RULING

1. A brief background of this matter is that; the applicant was sued in **Civil Suit 2 of 2018 (Formerly Kisii ELC No. 106 of 2017)** by the respondents. In the said suit the respondents (the plaintiffs in Civil case no 2 of 2018) sought the following orders: *a declaration that the continued withholding and/or retention of the titles, over and in respect of LR NO. S KAJIADO/ KAPUTEI/10874 & LR 127115/8249 was irregular, illegal and unlawfully. A declaration that the Simple Deposit and/or surrender of titles in respect of LR NO. S KAJIADO/ KAPUTEI/10874 & LR 127115/8249 was to subsist pending execution and/or perfection of securities in terms of the Review, which was dully complied with pursuant to and in line with the Banking Facility Letter, dated 18th November 2014. A mandatory injunction directed to and/or against the defendant, to forthwith release and/or surrender the title deeds over and in respect of LR NO. S KAJIADO/ KAPUTEI/10874 & LR 127115/8249. A permanent injunction restraining and/or prohibiting the defendant either by herself, agents, servants and/or anyone acting under the instructions of the defendant, from alienating, selling, charging, mortgaging, encumbering, restricting and/or in any way and/or manner dealing with the titles over and in respect of LR NO. S KAJIADO/ KAPUTEI/10874 & LR 127115/8249 adverse to the interests and/or rights of the plaintiffs. General damages and interest and costs of the suit.* The respondents case was dismissed by Justice Majanja.

2. The applicant (the defendant in Civil Suit No. 2 of 2018) had a counter claim. The applicant's counter claim succeeded and judgment was entered for the applicant's as follows: *judgment for the defendant against the 1st and 2nd plaintiff's jointly and severally for Kshs. 22,958,884.42 due and owing to the defendant as at 31st March 2017 together with interest at 16% per annum from the 1st April 2017 until payment in full. Judgment for the defendant against the 3rd plaintiff for Kshs. 210,199,888.14 as at 31st March 2017 with interest therein at 16% per annum from 1st April 2017 until payment. The applicant was awarded costs against the respondents.* (The 3rd plaintiff was Ouru Power Limited).

3. On the 22nd August 2019 the applicant's filed an Originating Summons ('the OS') dated 18th July 2019 against the respondents seeking the following orders;

i. That this Honorable Court do order that the properties known as Title number Kajiado / Kaputei North/ 10874 and LR No. 12715/8249 (the Properties) charged to the applicant by the respondents by way of simple deposit be sold so as to recover the sum of Kshs. 22,958,884.42 together with interest at 16% per annum from 1st April 2017. The applicant also sought costs of the suit.

4. On the 12th January 2021 the Respondents filed a Notice of Preliminary Objection raising the following points of law:

i. That the Honorable Court is Devoid and/ or divested of Jurisdiction to entertain and/or adjudicate upon the subject dispute, which essentially is an execution proceedings and thus falls within the purview of the Honorable Court that dealt with and/or handed over the judgment.

ii. In any event, the Jurisdiction of the Honorable Court is barred and/or prohibited by dint of Section 34 of the Civil Procedure Act ("the CPA"), Chapter 21, Laws of Kenya.

iii. The issue pertaining to and/or concerning, alienation and/or otherwise of the suit Titles, was the subject of the previous suit namely **KISII HCC No. 2 OF 2018**. Consequently, the instant suit is Res-Judicata and thus barred by the provisions of **Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya**.

iv. On the other hand, the instant matter, does not Disclose and/or raise a reasonable cause of action, whatsoever and howsoever on account of *non-joinder* of the current owners/Title Holders in respect of the suit properties.

v In any event, the Instant suit and/or proceedings are not only scandalous, but frivolous and vexatious. Consequently, the suit herein constitutes an abuse of the due process of the Court.

5. This court directed parties to file written submission on the preliminary objection.

SUBMISSIONS

6. The respondents submitted as follows in summary; that there are 4 issues for determination;

i. Whether the issue of the alienation and/or sale of the suit properties herein which was the subject of the previous suit namely **KISII HCC No. 2 of 2018** and which is the subject of a pending appeal can be addressed by this court.

ii. Whether the issue raised vide the subject suit touches on and/or concerns Execution proceedings and if so, whether the subject suit is barred by the provisions of **Section 34 of the Civil Procedure Act, Chapter 21 Laws of Kenya**

iii. Whether the subject suit is Res Judicata and thus barred by the provisions of **Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya**

iv. Whether the Honorable Court can grant liberty and/or orders touching on the property of a third party who has not been impleaded and whether such a claim against a third party who has not been impleaded discloses a reasonable cause of action.

7. On the 1st issue the respondents argue that after the judgment was read on the 20th May 2019 the respondents lodged a Notice of Appeal. That in the said decision the court declined the prayer to release and /or reversion of the titles which had been released to the applicant on account of the Simple Deposits. It was argued that the Appeal in terms of the Notice remains pending and the outcome thereof and therefore this court is devoid of jurisdiction on the issue of release of titles.

8. On issue no. 2 the respondents contend that the 2 titles which were deposited by the respondents were the subject of Civil Suit No. 2 of 2018. That in its judgment the court awarded the applicants Kshs. 22,958,884.42. That the next step would be the execution process towards the realization of the decretal sum. That the issue of execution cannot be the subject of another suit or proceedings. The respondents have requested this court to take cognizance of the provisions of Section 34 of the CPA and to find that if the applicant seeks to execute the judgment in KISII HCC No. 2 of 2018 it must comply with and/or adhere to the set procedures for execution and/or realization of decrees. The respondents relied on the decision in the case of John Gathogo Ndegwa vs Kenya Commercial Bank Limited [2012] where the court held that;

“... the provisions of section 34 (1) and (2) of the Civil Procedure Act bar the plaintiff from filing a different suit seeking to resolve any question arising from the decree that was passed in the Nyeri case, any such question must be determined by the court that is executing the decree”.

9. On the 3rd issue it has been submitted that the titles in respect of the suit properties which the applicant seeks to alienate was alive and directly at the foot of the previous suit and therefore the doctrine of res judicata applies. That the issue of alienation and/or sale of the two properties is an issue of execution towards the realization of the decretal sum granted in the judgment of KISII HCC No. 2 of 2018. Reliance was made on section 7 of the CPA and the case of *E.T vs AG (2012) eKLR* and the case of *Daniel Kirui & another vs Monicah W Macharia & another [2017]* .

10. On the 4th issue it was argued that though the Titles the subject of the suit properties were handed over to the applicant the said Titles are in the name of a different entity namely **Peachie Properties International Limited** which is a separate and distinct legal entity from the respondents. That the said entity has not been joined to this suit. The respondent sought to have the Originating Summons dated the 18th July 2019 struck out with costs for being premature and misconceived.

11. The applicant in its submissions dated the 26th April 2021 raised the following issues;

i. Whether the Court is divested of jurisdiction by dint of section 34 of the CPA, Cap 21.

ii. Whether the OS is res judicata and thus barred by the provisions of section 7 of the CPA, Cap 21.

iii. Whether the OS fails to disclose and/or raise a reasonable cause of action an account of non-joinder of the current owners'/ Titles holders in respect of the Properties.

iv. Whether the OS is an abuse of the court process.

12. On issue no. 1 it was argued that section 34 of the CPA is couched in mandatory terms imploring the court in which a decree was passed to determine all questions arising between the parties to the suit or their representatives, and relating to the execution, discharge or satisfaction of the decree and not by a separate suit. That the applicant has not invoked the provisions of Order 21 rule 2 of the Civil Procedure Rules (“**the CPR**”), that there is no decree on record that has been extracted and as such the applicant cannot proceed to execute without a formal decree. That section 34 of the CPA is inapplicable to the facts of this case. That the applicant wishes to sell the Properties to recover the monies owed to it by the respondents and that in order for the applicant to sell the said Properties section 79 (7) of the Land Act No. 6 of 2012 [the Land Act] has to be compiled with, that an order of the Court must first be obtained regarding the sale and/or the taking possession of the Properties. That the OS is seeking a vesting order pursuant to section 79 (7) of the Land Act. That the applicant cannot exercise its statutory power of sale on its own motion, that the applicant requires the consent of the Court so that it can exercise the remedies envisaged under section 90 of the Land Act.

13. The applicant sought to qualify why it filed an OS under Order 37 of the CPR. It argued that the framework in Order 37 rule 4 of the CPR is that the instrument of an OS is available to a charge who has a valid charge whether legal or equitable against the Title. That in the present suit the title to the Properties is in the applicant’s possession and that therefore the applicant is required to take out the OS under Order 37 rule 4 of the CPR

14. On issue no. 2, on whether the OS is res judicata and barred by the provisions of order 7 it was submitted that respondents’ submission on the same is misplaced as the cause of action in the suit and the OS are different. It was argued that the OS is seeking a vesting order that it can realize the securities and that the Land Act as read together with Order 37 rule 4 is prescriptive on the manner an application of this nature should be lodged.

15. On issue no 3, it was submitted that a matter ceases to be a preliminary point of law if any fact has to be ascertained or if what is ought is the exercise of judicial discretion. That the court will have to interrogate the facts to determine if indeed it is accurate that the respondents are the correct owners or title holders of the Properties. That the issue of non-joinder of the Properties current owners or title holders fails to meet the threshold for a preliminary objection

16. On issue no. 4, it was submitted that the OS is not an abuse of the court process that the OS is anchored under substantive provisions of the Land Act and Order 37 rule 4 of the CPR. That section 79 of the Land Act directs that an applicant to first seek leave of the court before selling the Properties, that the said section does not prescribe the manner the applicant is to approach the court for leave. That Order 37 rule 4 sets out the procedure to approach the court by way of an OS. That a litigant can use any prescribed rules for instituting a suit and that section 19 of the CPA provides that suits may be instituted in a manner prescribed by the rules.

ANALYSIS AND DETERMINATION

17. An objection to the court’s jurisdiction may be raised as a preliminary objection as it is a pure point of law and may arise by clear implication out of pleadings. It is also an elementary principle in law that a court cannot adjudicate on matters in which it lacks jurisdiction. I have considered the preliminary objection raised, the parties raised similar issues as follows;

- i. Whether the Court is divested of jurisdiction by dint of section 34 of the CPA, Cap 21.
- ii. Whether the OS is res judicata and thus barred by the provisions of section 7 of the CPA, Cap 21.
- iii. Whether the OS fails to disclose and/or raise a reasonable cause of action an account of non-joinder of the current owners’/ Titles holders in respect of the Properties.
- iv. Whether the OS is an abuse of the court process

18. It is not in dispute that the parties in this suit are the same parties in HCC No. 2 of 2018 and that in the said suit there was another party who is not a party in this suit. It is also not in dispute that the applicants have a judgment in HCC No. 2 of 2018 against the respondents for the sum of Kshs. 22,958,884.42. The applicant in this OS argues that though they have the judgment they cannot proceed because they have to obtain a court order in line with the provisions of section 79 (7) of the Land Act. The respondents argue that the applicant cannot move the court by way of filing suit as they have failed to exhaust the proceed provided for in section 34 of the CPA. The procedure in any civil suit is that once a party is awarded judgment then if it a judgment that warrants execution, the execution proceedings take place in the suit in which the judgment was obtained. The suit that gave rise to the judgment for the sum of Kshs. 22,958, 8884.22 was a civil suit. Under section 34 of the CPA questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit. The applicant claims that there is no decree in HCC No. 2 of 2018. With due respect it’s the applicants’ duty to pursue the decree, as no execution can take place without a decree. It cannot file another suit on the basis that no decree has not been obtained. The provisions of section 34 (1) are very clear and the wording of the said section is that any questions arising from between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, to the suit shall be determined by the court executing.

19. The applicant relies on section 79 (7) of the Land Act. The said section provides that “*a chargee holding an informal charge may only take possession of or sell the land which is the subject of an informal charge, on obtaining an order of the court to that effect*”. My understanding of this section is that the order has to be obtained in the suit that is determining the informal charge and therefore the provisions of Order 37 Rule 4 do not apply in such a circumstances. There is already a suit relating to the suit property which is the High Court Suit No. 2 of 2018. In the said suit the banking facilities advanced to the respondents by the applicant was secured by a simple deposit of the properties. To sell the said properties the applicant must go back to the Civil Suit No. 2 of 2018 and obtain the relevant order. The applicant cannot argue that section 79 (7) gives it the right to seek a vesting order in another suit. The Black Law Dictionary 9th edition defines a vesting order as, “*A court order passing title in lieu of a legal conveyance.*”. In the OS the applicant seeks an order that the properties known as Title Number Kajiado/ Kapatiei north/10874 and Land Reference No. 12715/8249 charged to the applicant by the

respondents by way of simple deposit be sold as to recover the sum of Kshs. 22,958,884.42. The applicant is not seeking an order passing title to it in lieu of a legal conveyance, but the sale of the 2 properties. The right forum is Civil Suit No. 2 of 2018.

20. On the issue of the matter being res judicata, I agree with the submissions of the respondent that the issue of the titles was the subject of civil suit no. 2 of 2018. The respondents sought the release of the said titles. The issue the court determined was whether the 2 titles for the 2 properties Title Number Kajiado/ Kaputiei north/10874 and Land Reference No. 12715/8249, held by the bank should be released. The Court held as follows at paragraphs 33 ;

“I therefore find and hold that the titles Number Kajiado/ Kaputiei north/10874 and Land Reference No. 12715/8249 were deposited as securities under the letter of offer dated 24th September 2013 for facilities offered to the 1st and 2nd plaintiffs. I also find and hold that the conditions under which the titles were held were not varied by the letter of offer dated 18th November 2014 addressed to the 3rd plaintiff. Thus there is no basis for granting the declarations sought by the plaintiffs in prayers (a), (b), (c) and (d) of the plaint.”

21. To now come to seek a sale of the said properties after the judgment was in favor of the applicants in a separate suit is an abuse of the court process, as the issue of the titles was dealt with in Civil Case no 2 of 2018. Lastly it I note that in Civil Suit no 2 of 2018 there was a 3rd plaintiff Ouru Power Limited who is not a party in this suit. The applicant has been silent on why the said plaintiff is not a party in this suit. As held in the case of *Mbaki & Others vs Macharia & another (2005) 2 EA* the right to be heard is a valued right and that it would offend all notions of justice if the right of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.

22. I have read the cases relied on by the Respondent they relate to statutory notice which is not the case in this matter.

23. All in all, I find that there is merit in the preliminary objection raised and the OS filed on the 22nd August 2019 dated 18th July 2019 is struck out with costs to the respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 1ST DAY OF JULY 2021

R.E. OUGO

JUDGE

In the presence of;

Mr. Deya For the Applicant

Mr. Kipngetich For the Respondents

Ms. Rael Court Assistant