



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
MILIMANI COMMERCIAL & DIVISION
CIVIL SUIT NO. 438 OF 2016

DINESH KUMAR ZAVERCHAND JETHA.....PLAINTIFF/APPLICANT

VERSUS

GUARANTY TRUST BANK (KENYA) LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The plaintiff applied for the proceedings herein to be stayed on the ground that there is another suit namely; HCCC No. 379 of 2005 Fina Bank vs Maizena Millers & Others heard and pending judgment on 19th December 2019 before Hon. Lady Justice R. Ngetich. The Respondent opposed the application arguing that the two suits are distinct and do not raise similar issues whereby the court directed the parties to file brief submissions analyzing the pleadings in both matters.

2. The Plaintiff's submissions dated 29th November 2019 were filed on 4th December 2019 while the Respondent's submissions dated 17th December 2019 were filed on 18th December 2019. I have considered the submissions and it is apparent that the parties have been embroiled in legal tussle and/or dispute for a long time. Apparently the suit HCCC 379 of 2005, commenced as far back as the year 2005 whereas the matter herein was filed in 2016.

3. The parties herein have also been involved in another matter HCCC 138 of 2005 (OS) Fina Bank vs Dinesh Kumar Zaverchand Jetha which is said to have been heard and dismissed. They have also been involved in HCCC 643 of 2005 Fina Bank vs Dinesh Kumar Jetha in which it is alleged that, the bank was allowed to register a charge over the subject suit property being L.R. Flat No. 1 Block C situate on L.R. 991/13 NBI. There is also a Civil Appeal No. 26 of 2013 – ur 16/2013) Dinesh Kumar Zaverchand Jetha vs Fina Bank Limited which is still pending. The plaintiff avers that despite all these suits pending, the defendant moved the court and advertised the property for sale on 31st October 2016 necessitating the filing of this suit seeking for an injunction.

4. According to the plaintiff these two matters are similar on the following grounds:-

(a) HCCC No. 438 of 2016 Dinesh Kumar Zaverchand Jetha vs Guaranty Trust Bank stems from HCCC No. 379 of 2005, Fina Bank Limited vs Maizena Maize Millers Limited which involves the same parties;

(b) The issue in question in HCC No. 379 of 2005, Fina bank Limited vs Maizena Maize Millers Limited is whether the debt of Kshs. 45,163,373 sought by the Bank was secured by the suit property seeking to be preserved in HCCC No. 438 of 2016 Dinesh Kumar Zaverchand Jetha vs Guaranty Trust Bank;

(c) In the event that the judgment to be delivered on 17th December 2019 in HCC No. 379 of 2005, Fina Bank Limited vs Maizena Maize Millers Limited comes to a conclusion that there are no monies due and owing to the Bank, then HCC No. 438 of 2016 Dinesh Kumar Zaverchand Jetha vs Guaranty Trust Bank would be rendered unnecessary.

5. The Respondents argue that, the application for stay of the proceedings herein is res judicata in the sense that this court has already delivered a ruling dated 30th October 2017, in which it determined inter alia the legal effect of HCC 379 of 2005 in this matter. Reference was made to paragraphs 48, 49 and 56 of the said ruling. It was argued that, there has been no stay review and/or setting aside of that ruling.

6. Finally the Respondents argued that there is no common thread in the two matters in the following grounds:-

(i) The parties in HCCC No. 379 of 2005 are different from the parties in this particular matter;

(ii) The nature of the relationships between HCCC No. 379 of 2005 and this matter are different as this particular matter is anchored on the law of guarantees whilst the matter in HCC No. 379 of 2005 is anchored on a principal debtor's contract for the debt; and

(iii) The prayers sought in HCC No. 379 of 2005 are distinct from this particular matter noting that these proceedings were commenced by the plaintiff/applicant in his capacity as guarantor whilst in HCCC No. 379 of 2005, the defendant/respondent in its capacity as lender is seeking to recover a sum of Kshs. 45,165,373 together with interest thereto, being the sum advanced to Maizena Millers as borrower.

7. Having considered the arguments and the ruling referred to herein, I find that, the issue of stay of these proceedings was dealt with extensively in that ruling therefore it is res judicata. In particular, under paragraph 47, the court observed that the parties to suit No. 379 of 2005 are different, but even more so, if Judgment in the other matter is pending and this suit has not commenced hearing it is unlikely that the judgment herein will be delivered in priority to the other suit. In that regard, there is no good ground to stay the proceedings herein. Even then, when the judgment is delivered in the other suit; the Applicant is at liberty to bring it to the knowledge of the court. I therefore order that the parties herein should prepare this matter for full hearing.

8. Those then are the orders of the court.

Dated, delivered and signed in an open court this 13th day of February 2020.

G.L. NZIOKA

JUDGE

In the presence of:

Ms. Njoki for Steve Kimathi for the plaintiff/applicant

Ms. Omamo for Mr. Karugu for the defendant/respondent

Dennis -----court Assistant