



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 57 OF 2016

JUJA COFFEE EXPORTERS LIMITED.....1ST PLAINTIFF

TSS TRANSPORTERS LIMITED.....2ND PLAINTIFF

TSS INVESTMENT LIMITED.....3RD PLAINTIFF

TAHIR SHEIKH SAID AHMED.....4TH PLAINTIFF

VERSUS

BANK OF AFRICA LIMITED.....1ST DEFENDANT

KAAB INVESTMENTS LIMITED.....2ND DEFENDANT

RULING NO. 3

1. The 1st, 2nd and 3rd plaintiffs through an application dated 7th March, 2018 anchored on the provisions of Section 1A, 1B, 3, 3A and 63(e) of the Civil Procedure Act, Cap 21 and Order 40 rules 1 and 2 of the Civil Procedure Rules, 2010 seek the following orders:-

(i) Spent;

(ii) That there be a temporary injunction pending the inter-parties hearing and determination of this application, restraining the Defendant, its servants, agents or employees from further advertising for sale, selling by public auction or private treaty, leasing or in any other way disposing all those parcels of land known as;

- a. Plot No. 44 Section XXI Mombasa Island registered in the name of the 2nd plaintiff;
- b. Plot 147 Section XXI Mombasa island;
- c. Plot No. 1654 Section XXI Mombasa Island;
- d. Plot No. 526 and 527 Section XXI Mombasa Island;
- e. Plot No. 5866 Section XXI Mombasa Island;
- f. Title No. Mombasa/Block XXVI/381; (b) to (f) all registered in the name of Tahir Sheikh Said Investments Limited.

(iii) That there be a temporary injunction pending the inter-parties hearing and determination of the suit, restraining the Defendant, its servants, agents or employees from further advertising for sale, selling by public auction or private treaty, leasing or in any other way disposing all those parcels of land known as;

- a. Plot No. 44 Section XXI Mombasa Island registered in the name of the 2nd plaintiff;
- b. Plot 147 Section XXI Mombasa island;

- c. Plot No. 1654 Section XXI Mombasa Island;
- d. Plot No. 526 and 527 Section XXI Mombasa Island;
- e. Plot No. 5866 Section XXI Mombasa Island;
- f. Title No. Mombasa/Block XXVI/381; (b) to (f) all registered in the name of Tahir Sheikh Said Investments Limited.

(iv) That the 1st Defendant be compelled to release to the plaintiffs and the court the documents listed in the Schedule of Documents filed herewith for purposes of ascertaining the borrowing by the 1st plaintiff and whether the money was actually disbursed to the 1st plaintiff; and

(v) That the costs of this application be awarded to the 1st, 2nd and 3rd plaintiffs.

2. On 15th March, 2018, the 1st defendant filed a Notice of preliminary objection in opposition to the application dated 7th March, 2018. In expounding on the same, Mr. Gichuhi, Learned Counsel for the applicant submitted that the Court of Appeal in Mombasa Civil Appeal Nos. 99 of 2016 consolidated with 109 of 2016 determined the issues that were raised before the said court. He stated that issues of fraud, pre-export finance and validity of legal charges were evaluated by the Court of Appeal and the only issue now raised in the application filed by the 1st, 2nd and 3rd plaintiffs is that criminal charges have been preferred against the 2nd defendant's Directors as set out in exhibit NS-6 of the 1st, 2nd and 3rd plaintiffs' deponent's affidavit. He asserted that the issue of the said people being charged has nothing to do with the bank (1st defendant).

3. The said Counsel further stated that issues of fraud were alive when they argued the injunction application before this court. He contended that the 1st, 2nd and 3rd plaintiffs are bringing in issues that were dealt with by the court. In addition, they are seeking orders against the 4th plaintiff in prayers (ii)(f) and (iii)(f) yet the said properties are registered in the names of the 4th plaintiff who is deceased.

4. Mr. Gichuhi relied on **Uhuru Highway Development Limited vs Central Bank of Kenya and 2 Others** [1996] eKLR and **Invesco Assurance Company Limited vs Mercy Nduta Mwangi** t/a Mwangi Keng'ara and Company Advocates [2017] eKLR to show that an injunction once litigated upon cannot be brought again as the same would be an abuse of the court process.

5. In reference to his application dated 27th February, 2018, Counsel for the 1st defendant sought orders for the release of Kshs. 2,000,000/= to its client as prayed in paragraph 4 thereof. He referred to the affidavit sworn by Mr. Ben Mwaura in support of the said application to show that various fee notes have not been paid by guarantors in this matter. He prayed that the amount of Kshs. 2,000,000/= be used to offset Auctioneers fees incurred in the past.

6. With regard to prayer No. 4 of the application dated 27th February, 2018, Mr. Kongere, Learned Counsel for the 1st, 2nd and 3rd plaintiffs stated that the sum of Kshs. 2,000,000/= was deposited as security pending the hearing and determination of the suit, which has not been concluded. He stated that releasing the money would lead to a presumption that the case is going to be dismissed. He submitted, that the Auctioneer's costs existed even before the making of the order for the money to be deposited in an interest earning joint bank account. He further argued that the sale of the suit premises is meant to defray all the costs of the suit. He prayed of the order not to be granted.

7. On the issue of the preliminary objection, he submitted that it raised the issues of their application of 7th March, 2018 being *res judicata* and of this court sitting on Appeal on a Court of Appeal decision. He cited the case of **Silas Make Otuke vs Attorney General and 3 Others** [2014] eKLR where a 3 Judge Bench stated that fraud vitiates the previous court's finding on the point, notwithstanding the said court's determination on the point. It was submitted that the court stated that 2nd exception to the **Uhuru Highway Development** case (supra) is that where new facts exist which had not been availed to the court, then the issue ceases to be *res judicata*.

8. The court's attention was drawn to paragraph 34 of this court's ruling of 21st July, 2016 where the court noted that it was not informed of any charges based on fraud that were leveled against any party. Mr. Kongere stated that as at the time of hearing the preliminary objection herein, a criminal case had been filed in the Mombasa Chief Magistrate's court with charges having been brought against the Directors of the 2nd defendant who are being accused of fraud and forgery of securities. He stated that the said fact was not available then, but new facts now exist.

9. It was submitted that this court was not being asked to overturn the Court of Appeal decision as the said court dealt with the propriety of this court's decision in striking out the documents filed by the 1st defendant. He further indicated that the Court of Appeal interfered with the decision of this court as it had misdirected itself. Mr. Kongere stated that the Court of Appeal however said that it had considerable doubt that a prima facie case had been established. It faulted this court for not considering the 2nd principle of the **Giella vs Cassman Brown** case. Counsel contended that the Court of Appeal did not make a binding decision that would render the application dated 7th March, 2018 *res judicata*.

10. He further argued that the Court of Appeal was not privy to the new evidence that is now available. He urged this court to consider the new evidence and make a decision on it. Counsel submitted that a preliminary objection should be purely on points of law but if the new evidence that they wish to rely on is applicable to the fresh application for an injunction, that would be a matter of fact and not law. He prayed for the preliminary objection to be dismissed with costs.

11. Mr. Gichuhi's rejoinder to the foregoing submissions was that the Kshs. 2,000,000/= deposited was a condition for stay of execution pending appeal to the Court of Appeal. On whether a prima facie case had been established, Counsel invited this court to read paragraph 26 of the Court of Appeal's Judgment. He stated that issues of inaccuracy of accounts, securities and fraud were considered by this court. He

stated that Mr. Kongere was referring to criminal fraud and not civil fraud. He asserted that the allegations of criminal fraud do not concern the 1st defendant and the properties charged to it. He submitted that the plaint had not been amended to back the allegations of fraud. He relied on the case of **Henderson vs Henderson** 67 E.R. 313 to show that all the issues that were raised were dealt with.

ANALYSIS AND DETERMINATION

The issues for determination are:-

- (i) If the preliminary objection raised by the 1st defendant is meritorious; and
- (ii) If the deposit of Kshs. 2,000,000/= should be released to the 1st defendant.

12. On the issue of the application filed by the 1st, 2nd and 3rd plaintiffs being *res judicata*, the argument by Mr. Gichuhi is that all issues that were raised in the application dated 6th June, 2016 were addressed by this court and the Court of Appeal which set aside the interim injunction that had been granted by this court pending the hearing of the suit. Counsel for the 1st, 2nd and 3rd plaintiffs' contention is that since the decision of this court and the Court of Appeal was rendered, fresh evidence has come forth about fraudulent activities that were carried out by the Directors of the 2nd plaintiff which have an impact on the suit herein. That the said Directors have been charged in court vide Mombasa Chief Magistrate's Criminal case No. 220 of 2017, **Republic vs Aweys Mohamed and 2 Others**.

13. This court is very much alive to the fact that the allegation of fraud having been perpetrated by some of the plaintiffs' Directors and bank employees of the 1st defendant was argued at length by Mr. Mohamed Balala, Advocate who was representing the plaintiffs in the application dated 6th June, 2016. In the ruling dated 21st July, 2016, this court addressed itself fully on the issue of fraud at paragraph 34 thereof, based on the submissions tendered and the documentation availed before it. This court had the following to say:-

“Although this court noted some cash transfers from the 1st applicant’s bank account to that of the 2nd respondent from the bank statement marked as TSS 9, this court considers the documentation availed before it as being inadequate for this court to form an opinion on whether the said transfers were as a result of fraudulent activities or legitimate business transaction between the two parties. If indeed there was fraud that was perpetrated by the two, this court was not informed that the said matter was reported to the Banking Fraud Investigations Unit for investigations.”

14. One and a half years after the delivery of the said ruling, the 2nd application seeking an injunction pending the hearing of the suit herein, has been filed. Mr. Kongere relied on several authorities that address the issue of fraud. In the case of **Irene Chepkoech Chumo vs David Kipleting Rugut and Another** [2009] eKLR, Mwilu J (as she then was) had the following to say:-

“If there was fraud and forgery as alleged, then to my mind those are matters to be investigated by way of evidence at the trial. The allegations of fraud set out in paragraph fifteen (15) of the plaint cannot be taken lightly. They must be investigated. The only way to do that is by adducing evidence and subjecting it cross-examination.”

15. In **Elijah Kipng’eno Arap Bii vs Peter Kipyegon Rotich and Another** [2015] eKLR the Court of Appeal cited with approval the ratio *decidendi* in **Elijah Kipngeno Arap Bii vs Samuel Mwehia Gitau and Kenya Commercial Bank** Nairobi Civil Appeal No. 155 of 2006, the court stated thus:-

“A general principle of law emanating from the above decision is that whenever fraud is pleaded, the issue should not be determined summarily but upon consideration of evidence. In the instant case, the Learned Judge erred in summarily dismissing the issue of fraud and did not give an opportunity for the matter to be canvassed in a hearing.”

16. The above 2 decisions indicate that where fraud is pleaded, an opportunity should be given to the party who alleges fraud to canvass the same and as was stated by Mwilu J, now Deputy Chief Justice. Such a party should then be given an opportunity to cross-examine on the said allegations of fraud. The issue of fraud herein was considered at the stage when this court granted an injunction..

17. The Court of Appeal did consider the Judgment emanating from this court and stated as follows:-

“On our evaluation, after considering the affidavit in reply together with other documents on record, there is considerable doubt that the applicants had established a prima facie case with a probability of success. Even if they had, as the trial court found, it was necessary to consider whether the injury they would suffer if the injunction is not granted, will be irreparable. The law is that if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicants claim may appear at that stage” (emphasis added).

18. In light of the submissions made and authorities relied upon by Counsel for the parties herein, I am persuaded by Mr. Gichuhis argument that the application dated 7th March, 2018 is *res judicata* as it seeks determination of matters that were canvassed and determined in the application dated 6th June, 2016. The decision in **Uhuru Highway Development Limited vs Central Bank of Kenya and 2 Others** [1996] eKLR (supra) and more so, the case cited therein of **Lali Swaleh and Others vs Stephen Mathenge Wachira and Others**, Civil Application Nairobi No. 257 of 1994 (unreported), applies to the circumstances of this case

19. In **Henderson vs Henderson** (supra), Wigram V.C. had the following to say on *res judicata*;

“In trying this question I believe I state the rule of the court correctly when I say that where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of the matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence inadvertence, or even accident omitted part of their case. The plea of res judicata applies except in special cases, not only to points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

20. It is my finding that the issue of fraud was deliberated on at an interim stage. It will be deliberated upon again at the main hearing. The doors on the said issue have therefore not been slammed shut on the faces of the 1st, 2nd and 3rd plaintiffs. They will have an opportunity to cross-examine the 1st defendant on the same.

21. My understanding of the Court of Appeal Judgment in Mombasa Civil Appeal No. 99 of 2016 consolidated with 109 of 2016 is that the 1st defendant would be in a position to pay damages to the 1st, 2nd and 3rd plaintiffs, if their case before this court succeeds. If this court then was to consider a fresh application for an interim injunction, it would be as Mr. Gichuhi stated, be sitting on appeal of the Court of Appeal decision, which jurisdiction I decline to usurp.

22. It is my finding that the issues raised in the preliminary objection are purely on points of law. The preliminary objection therefore falls within the four corners of **Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Company Ltd** [1969] EA 696.

23. I hereby sustain the preliminary objection raised by the Counsel for the 1st defendant through the Notice dated 13th March, 2018. In essence, the application dated 7th March, 2018 in so far as the prayer for an injunction is concerned, amounts to an abuse of the court process for being *res judicata*. I grant costs of the preliminary objection to the 1st defendant.

24. On the release of the Kshs. 2,000,000/= that was deposited in an interest earning bank account in the joint names of the advocates on record. The ruling of 14th October, 2016 was clear that it was so deposited as security upon the grant of the orders for stay of execution pending appeal. The 1st defendant succeeded in Civil Appeal No. 99 of 2016 Civil Appeal No. 109 of 2016 which had been filed by the 1st to 4th plaintiffs was dismissed.

25. In the said circumstances I do allow the prayer sought in paragraph 4 of the 1st defendant's application dated 27th February, 2018 for the sum of Kshs. 2,000,000/= to be released to the 1st defendant through the law firm of Wamae and Allen Advocates, with a view of offsetting Auctioneers costs incurred. The said costs must however be drawn to scale of Auctioneers charges. Costs of the application dated 27th February, 2018 is awarded to the 1st defendant.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 5th day of April, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Kongere for the 1st, 2nd and 3rd plaintiffs

Mr. Nyabena holding brief for Mr. Waiyaki Gichuhi for the 1st defendant and Ms Moka for the 2nd defendant.

Mr. Oliver Musundi - Court Assistant