



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MISC.CIVIL APPLICATION NO. 362 OF 2014

NAVEEN PRAKASH SHARMA.....1ST PLAINTIFF
JITENDRA CHOTABHAI PATEL.....2ND PLAINTIFF
REX DEVELOPERS LIMITED.....3RD PLAINTIFF
AVIASPEN KENYA LIMITED.....4TH PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT
SPENCON KENYA LIMITED.....2ND DEFENDANT

RULING

1. For determination by this court are two applications. The First in time is the Notice of Motion dated 18th August, 2014 by the Plaintiffs seeking the following orders;

- a. Spent*
- b. Spent*
- c. Spent*
- d. Spent*
- e. Spent*

f. THAT pending the hearing and final determination of this suit, the 1st Defendant be restrained by an injunction whether by itself or through its directors, employees, servants or agents or otherwise howsoever from alienating, selling, transferring or advertising or otherwise offering to alienate, sell or transfer the 1st and 2nd Plaintiffs' property known as land reference No. 7785/280 (Original No. 7785/10/278) and to exercise any other remedies of a chargee in relation thereto.

g. THAT pending the hearing and final determination of this suit, the 1st Defendant be restrained by an injunction whether by itself or through its directors, employees, servants or agents or otherwise howsoever from alienating, selling, transferring or advertising or otherwise offering to alienate, sell or transfer the 1st and 2nd Plaintiffs' property known as land reference No.9042/155 and 9042/156 respectively and to exercise any other remedies of a chargee in relation thereto.

h. That pending the hearing and final determination of this suit, the 1st Defendant be restrained by an injunction whether by itself or through its directors, employees, servants or agents or otherwise howsoever from alienating, selling, transferring or advertising or otherwise offering to alienate, sell or transfer the 1st and 2nd Plaintiffs' property known as land reference Nos. 17/198 (Original No. 17/47/3) and 17/201 (original No. 17/47/6) respectively and to exercise any other remedies of a chargee in relation thereto.

i. THAT this Honourable Court does give such consequential, further or other order(s) as it may deem just.

j. THAT the costs of this application be provided for.

2. The grounds of the application were contained in the application and supported by the affidavit of Ashutosh Sharma, a director of the 3rd and 4th Plaintiff Company, sworn on 18th August, 2014. It was deponed that in 2008, the 2nd Defendant company approached the 1st Defendant to provide banking facilities. A loan of Kshs. 802,563,905 was extended to the 2nd Defendant on 21 August, 2008 vide a facility letter of the same date.

3. To secure the loan amount, a debenture over the 2nd Defendant's assets was created together with personal guarantees of Kshs.802,563,905 of the 2nd Defendant's directors. Legal charges were also created on LR No. 3734/979, LR No. 9042/155, LR. No.9042/156, LR No. 17/201, LR No.17/198 and LR No. 7785/280 (hereinafter known as the suit properties).

4. That thereafter the 1st Defendant subsequently provided further facilities to the 2nd Defendant. It was contended that the 2nd Defendant performed its obligations and paid the loan sums due and owing to the 1st Defendant. However, it was deponed that the 1st Defendant on 23rd May, 2014, wrongly issued a statutory notice under section 90 of the Land Act 2012 to the Plaintiffs and the 2nd Defendant demanding for the immediate payment of the outstanding sum of Kshs. 871,270,225.73/= jointly and severally.

5. That if default was not remedied within three months from the date of service of the loan, the 1st defendant would exercise its statutory power of sale and dispose of the suit properties to recover the outstanding amounts. The Plaintiffs were of the view that by the issuance of the statutory notice, the 1st Defendant purported to convert the alleged debt of Kshs. 871,270,225.73/= secured by personal and corporate guarantees into a charge debt recoverable by exercise of power of sale, which is contrary to the law. The Plaintiff' also asserted that the second facility of Kshs.2,122,563,905 extended to 2nd Defendant by the 1st Defendant on 6th September, 2013 was unsecured and therefore the 1st Defendant could not purport to recover the same from selling the suit properties.

6. The Plaintiffs were also of the opinion that the Statutory Notice of sale was itself defective as the same did not state what respect the debt of Kshs. 871,270,225.73/= embodied. That essentially, the statutory notice was in itself defective, null and void with no legal effect.

7. The deponent also went ahead to state that in addition to the statutory notice, the 1st Defendant went on to issue a notice to the himself, two other directors calling up the guarantees and indemnity offered by themselves to secure the loans advanced to the 2nd Defendant.

8. That this was unnecessary since, in the assessment of the Plaintiffs any amounts owing to the 1st Defendant had been fully paid. The Plaintiffs stated that in the foregoing, it is clear that the threshold for the grant of an injunction has been met given the circumstances of the case.

9. In reply to the application, the 1st and 2nd Defendant filed grounds of opposition dated 27th August, 2014 and 29th January respectively. The 1st Defendant also filed the Replying affidavit of Bernard Okello sworn on 12th November, 2014. It was averred the application before the court was ill conceived and an abuse of the court process.

10. That the facilities issued to the 2nd Defendant in terms set out in the letters of 21st August 2008, 16th August, 2010, 16th and 27 November 2012 and 9th September 2013, were all revolving facilities in the nature of overdrafts and therefore the claim that the same were loans was improper.

11. The Defendants further contended that there was no need for the 1st Defendant to register fresh charges against the 1st, 2nd, 3rd and 4th Plaintiffs properties as the existing charges and Mortgages were offered as continuing securities as expressly set out in the bodies of the said charges. It was also contended by the 1st Defendant that the 2nd Defendant defaulted in making payments of the facilities occasioning the 1st Defendant to issue a Statutory Notice of Sale dated 23rd May, 2014 demanding for the sum of Kshs. 871,270,225.73/=.

12. That the said amount reflected the amounts that were outstanding from the revolving facilities issued under the facility letters at 21st August, 2008, 16th and 27th August, 2010 as well as 6th September, 2013. Thus, according to the 1st Defendant, the said statutory notice was valid and proper in law. Further, the 1st Defendant averred that it called up the guarantees and indemnities issued by the 2nd and 3rd Plaintiffs vide a letter dated 30th May, 2014 demanding for the payment of Kshs. 871,270,225.73/= at 17.5% per annum until payment was made in full.

13. The Defendants also stated that the Plaintiffs did not stand to suffer any loss that is incapable of being compensated by way of damages; that the balance of convenience was against the grant of injunction and no prima facie case had been established. It was also the Defendants' position that the Plaintiffs were guilty of laches as the application was made close to 3 months after its issuance in May, 2014 and therefore the court should not aid this indolence. The Defendants therefore urged the court to dismiss the application with costs.

14. The application was dispensed by way of written submissions. The Plaintiffs filed their submissions on 16th February, 2015, while the 1st and 2nd Defendant filed submissions on 30th March, 2015 and 27th March respectively. I have considered the pleadings, depositions, rival submissions and the various cases cited by Learned Counsel to the respective parties. However, before considering the merits or otherwise of the same, I deem it necessary to look at the application by the 2nd Defendant.

15. The second application was the 2nd Defendant's Notice of Motion dated 13th October, 2014. The same seeks for a stay of proceedings in this suit pending the hearing and determination of **High Court Commercial Cause No. 260 of 2014 Naveen Prekash Sharma & 5 others –vs-Spencon Kenya Limited**. That further the cost of the application be in the cause. The application was supported by the grounds on the face of it and the supporting affidavit of Asha-Sabrina Ayub sworn on 13th October, 2014.

16. The deponent averred that this suit was instituted by way of a Plaint dated 18th August, 2014. However, the Plaintiffs had previously filed a suit against the 2nd Defendant by way of an originating summons dated 16th June 2014. That when the matter came up for hearing before **Kamau J**, the court ordered that the same was not suitable for an originating summons and directed that it be converted to a Plaint to which the Defendant was to file a Defence.

17. Subsequently, the 2nd Defendant proceeded to file its defence in that respect on 2nd October 2014. It

was contended that the instant case and **High Court Commercial Cause No. 260 of 2014** are fundamentally similar in both the issues raised and the reliefs sought by the Plaintiffs.

18. It was the opinion of the 2nd Defendant that the main averments in the subject suits are almost identical and so intertwined that in allowing the matters to proceed concurrently, the court creates the possibility of an absurdity in the holdings of different judges. That if the instant suit is not stayed, the defendant will suffer substantial prejudice. In sum, it was deponed that it would be in the interest of justice that the application be granted.

19. In reply to the application, the Plaintiffs filed the Replying Affidavit of Ashutosh Sharma sworn on 26th January, 2015. It was deponed that the reliefs sought in **High Court Commercial Cause No. 260 of 2014** are substantially different from the ones in the present suit. That the substratum of the prior suit is the interpretation and legal effect the guarantees issued by the six Plaintiffs at the request of the Applicant herein for full repayment of its debts owed to the 1st Defendant Bank.

20. The said Plaintiffs also seek a determination on whether the Applicant was under duty to pay and settle those debts, and whether in the circumstances, the said Plaintiffs were entitled to a discharge and exoneration from those debts. In the foregoing, it was the position of the Plaintiffs that in **High Court Commercial Cause No. 260 of 2014** was instituted solely for the interpretation of the terms of guarantees issued to secure the loan facilities.

21. Further, it was pointed out that the instant suit has only three plaintiffs, while in High Court Commercial Cause No. 260 of 2014 there were six Plaintiffs some of whom are not enjoined in the instant matter. Moreover, it was the Plaintiffs assertion that the 1st Defendant was not enjoined to **High Court Commercial Cause No. 260 of 2014**. In addition, it was the Plaintiffs averment that the current suit questions the legality of the 1st Defendant's right to exercise its statutory power of sale and seeks accounts for the payments made.

22. It was the Plaintiffs' claim that the present application was calculated to further delay the hearing and determination of the instant suit since no prejudice shall be occasioned to the Applicant if the suit herein were to proceed. The Plaintiffs further deponed that should the stay be granted, the same will occasion undue hardship on its part since the 1st Defendant may go ahead and auction the suit properties. In sum, the Plaintiffs urged the court to dismiss the application with costs.

23. The application was dispensed by way of written submissions. The 2nd Defendant filed its submissions on 13th February, 2015, while the Plaintiffs filed its submissions on 27th February, 2015. I have considered the pleadings, depositions and the rival submissions. Being an application for stay of proceedings, I propose to first consider the same before delving into the application by the Plaintiffs for injunction.

24. The application is brought under Section 6, 1A, 1B and 3A of the Civil Procedure Act. Section 6 of the Civil Procedure Act states as follows;

“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

25. From the passage above, it is clear that in determining whether or not to stay proceedings pursuant to the provisions of section 6 of the Civil Procedure Act, the test to be applied is primarily whether the disputes in question are substantially and directly the same. Section 6 of the Civil Procedure Act expressly bars a Court from proceeding with a matter which is caught up by the said section and in my view the Court has no discretion in the matter once it finds that the conditions under section 6 have been satisfied. In determining whether or not sub judice applies the purpose of the said doctrine is crucial.

26. It is not consequently the semantics involved or the names of the parties involved that is crucial, as argued by the Plaintiffs, but the effect of proceeding with the two causes hence the use of the phrases *“directly and substantially in issue”* and *“between the same parties, or between parties under whom they or any of them claim, litigating under the same title”*. See the case of **Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993**, where it was held;

“In the interest of parties and the system of administration of justice, multiplicity of suits between the same parties and over the same subject matter is to be avoided. It is in the interest of the parties because the parties are kept at a minimum both in terms of time and money spent on a matter that could be resolved in one suit. Secondly, a multiplicity of suits clogs the wheels of justice, holding up resources that would be available to fresh matters, and creating and or adding to the backlog of cases courts have to deal with. Parties would be well advised to avoid a multiplicity of suits.”

27. From the above case it is important for the Court to examine whether by entertaining the instant suit and **HCCC No. 260 of 2014** would amount to a duplication or multiplication of suits thus clogging the wheels of justice. I have taken liberty to ascertain the issue(s) in **HCCC No. 260 of 2014** and the issue(s) in the current suit. The parties in **HCCC No. 260 of 2014** are the same as those in this suit, except that the 1st Defendant Bank are not enjoined as a defendant.

28. Further, there are other two parties also enjoined in the same as Plaintiffs, namely Ashutosh Sharma and Pragnesh Jitendra Patel who going by the averments in the pleadings in both cases issued Personal Guarantees and Indemnity to the Kenya Commercial Bank to secure facilities extended to Spenco Kenya Limited.

29. Be that as it may, after examining the pleadings attached to the Notice of Motion and marked as **“ASA 1”** it is abundantly clear that issues in **HCCC. No. 260 of 2014** are substantially in issue as those in the instant suit. I say so because in the aforesaid case what is in question is mainly what the legal effect of the securities provided by the Plaintiffs in favour of the Kenya Commercial Bank.

30. The Plaintiffs in **HCCC. No, 260 of 2014** inter alia want a declaration to issue to the effect that they are discharged and exonerated from liability under the securities created by them on 9th December, 2008, 6th September, 2013 and 2nd October 2013. It is therefore clear, that though the 1st Defendant is not a party to the aforementioned suit, the orders sought by the Plaintiffs would undoubtedly affect its right under the said securities including the personal guarantees and indemnities issued.

31. Further, to assess whether the Plaintiffs should be exonerated from the debt, the court will have to consider and assess the evidence with regard to the terms of the securities and whether the same were paid. In my assessment of the proceedings, I find no justification in having the two cases being heard parallel to each other.

32. To do so would not only be an affront to the sub-judice rule but would also be in violation of the overriding objective of the Civil Procedure Act which require under Section 1B that there be an *“efficient use of the available judicial and administrative resources”*. Additionally, parties are required to bring before a Court their whole case.

33. A party is not permitted to litigate in installments or to bring his or her case before the Court in piece meal as the Plaintiffs herein purport to do with the subject suits. See the case of **Henderson - vs- Henderson (1843-60) ALL E.R. 378**.

34. The question that then follows after this analysis is whether the best course of action would be to stay the proceedings in the instant suit. The case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** proves instructive where **Ringera J** stated that;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the

interest of Justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases...the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis mine)

35. From the above, I minded that a stay of proceedings a matter of judicial discretion. I am contented that the plea of sub-judice has properly been invoked in this case. However, I am of the opinion that a stay of proceedings is not the appropriate measure as the 2nd defendant has asked me to do.

36. From the averments of both the affidavit of Asha Sabrina Ayub in support of the application and the Replying Affidavit of Ashutosh Sharma, the trial in **Nairobi High Court Civil Suit No. 260 of 2014** is yet to commence. Further, it is not disputed that the Originating Summons were converted to a Plaint, in which the 2nd Defendant subsequently filed its defence.

37. From the foregoing, the order that commends itself to me is that the suit together with the application dated 18th August, 2014 herein be transferred to the Court handling **Nairobi High Court Civil Suit No. 260 of 2014** for possible consolidation and determination plus any further directions. Further, to avert the threat of any sale of the suit properties, the status quo should remain pending the hearing and determination of the application dated 18th August, 2014 or upon further orders by the court.

38. The cost of this application shall be in the cause.

39. It is so ordered.

Written, dated and signed at Nairobi this 5th day of May 2016.

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C. KARIUKI

JUDGE

Dated, signed and delivered in court at Nairobi this 6th day of May, 2016.

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O. SEWE

JUDGE