



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC. NO. 261 of 2015

CRISSAM ACRES LIMITED..... PLAINTIFF

VERSUS

**CFC STANBIC BANK LIMITED.....1ST
DEFENDANT**

MAURICE OMUSEE BUSURU..... 2ND DEFENDANT

RULING

1. The application before the court is the Plaintiff’s Notice of Motion dated 29th May, 2015. The first prayer in the application is that pending the hearing and determination of this suit, a mandatory injunction be issued compelling the 1st Defendant to immediately review the negative credit listing made against the Plaintiff with the Credit Reference Bureau and cause the Plaintiff’s name to be removed forthwith. Additionally, the Plaintiff seeks that pending the hearing and determination of the suit, the Defendant be ordered to cancel, close and or delete the loan account and or agreement in No. 010000376698 or any other account in its records illegally operated by the 2nd Defendant in the name of Plaintiff. The same was supported by the grounds contained in the application and the supporting affidavit of Christine Mutile Mwangi described as the Managing Director of the Plaintiff, sworn on 29th May, 2015.
2. The gravamen of the application is that the Plaintiff has been negatively listed by the credit bureau reference at the instance of the 1st Defendant without due cause. In elaborating this ground, it was contended that the Plaintiff approached the 1st Defendant for loan facilities for the purchase of a motor vehicle registration number KBN 808A through a Hire Purchase Agreement. That after purchase thereof the 2nd Defendant took the vehicle and refused to return the same to the Plaintiff even after leaving the Plaintiff’s engagement. This in turn culminated into a dispute where the 2nd Defendant filed a suit **HCCC No. 232 of 2014 Maurice OmuseeBusuru –vs- Crissam Acres Limited and CFC Stanbic Bank Limited**, against the Plaintiff and 1st Defendant. The 2nd Defendant in that suit wanted to be declared as the bona fide owner of the motor vehicle. Hand in hand with the Plaintiff, the 2nd Defendant also sought an interim injunction restraining both the plaintiff and 1st Defendant from selling the motor vehicle pending the hearing and determination of the matter. Vide a Ruling dated 17th October, 2014, **Ogola J** vide ordered that subject to the determination and hearing of the suit, the motor vehicle at the center of the suit should be released

- to the immediate custody of the 2nd Defendant and that he should additionally continue making payments for the said motor vehicle. The Plaintiff was also ordered to make available records of its previous repayments in regard to the said motor vehicle in readiness for the inter parties hearing. It is due to these orders that the Plaintiff contends that it was not responsible for repayment of the loan that had been advanced to it by the 1st Defendant.
3. In sum, the Plaintiff contends that the 1st Defendant's actions of having it listed as a defaulter culminating in a negative credit score listing with the Credit Bureau Reference were illegal and arbitrary. That further, the plaintiff had been unable to file a counter claim on the aforementioned suit, since it had not to date been served with summons by the 2nd Defendant. The Plaintiff further contended that the 1st Defendant illegally rescheduled and varied the loan repayment period without its knowledge. That in it is therefore in the interest of justice that the orders sought be granted as the plaintiff continues to suffer due to this negative score that is unfounded and with no basis.
 4. In reply to the application, the 1st Defendant filed a Replying Affidavit sworn by Ann K Muli on 16th June 2015. In it, it was contended that the matter herein was sub judice in view of **HCCC no. 232 of 2014**, since the issue of the true ownership of the suit motor vehicle is awaiting determination of the court. That further the issue of liability of the Plaintiff and the 2nd Defendant under the Hire Purchase agreement under which the plaintiff was advanced the loan facility to purchase the subject motor vehicle, was correlated with the issue of ownership of the suit motor vehicle. As such, it was the contention of the deponent that the rule of sub-judice bars the Plaintiff from seeking the orders in the instant application while **HCCC No. 232 of 2014** was pending full determination. As such, the 1st Defendant urged the court to strike out the application as an abuse of the court process. That in any case the present application should have been filed in **HCCC No. 232 of 2014**. The 1st Defendant also reiterated that in the aforementioned suit, the 2nd Defendant failed to issue summons to the plaintiff and the 1st Defendant and as such by operation of law, that suit had abated as 12 months had lapsed since the institution of the said suit. That therefore, no orders there from are subsisting and the parties were thus taken back to their positions before the orders were issued.
 5. The 1st Defendant also claimed that this court did not have jurisdiction in matters of negative credit listing as the same is by law vested on the Credit Reference Bureau. It was also the Deponent's assertion that it was justified in listing the Plaintiff as it had defaulted in its obligations to pay the loan advanced to it under the Hire Purchase Agreement dated 19th November, 2010. The 1st Defendant also pointed out that the Ruling of Ogola J in **HCCC No. 232 of 2014** did not discharge the Plaintiff from repaying the loan facility, but that the learned judge only ordered for the release of the motor vehicle into the custody of the 2nd Defendant pending the determination of the ownership. The 1st Defendant also insisted that the Plaintiff had failed to satisfy the conditions for the grant of injunction. In conclusion, the 1st Defendant urged the court to dismiss the application as the Plaintiff's recourse lies in **HCCC No. 232 of 2014**.
 6. When the application come up for hearing on 15th October, the parties respectively agreed to canvas the same by way of written submissions. The same essentially expounded on what was contained in the affidavits of the Plaintiff and the 1st Defendant. It is therefore not essential for the Court to outline the same in the ruling as the affidavits have already been analyzed.

ANALYSIS AND DETERMINATION

7. I have carefully considered the application, the Affidavits and submissions of the respective parties. Since the issue of whether the matter herein is sub judice, it is essential for the court to render itself on the issue first. Section 6 of the Civil Procedure Act provides as follows:

“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.”

8. It is therefore clear that 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 section the conditions under section 6 have been satisfied. In my view in determining whether or not sub-judice applies the purpose of the said doctrine is crucial. It is not consequently the semantics involved or the names of the parties involved that is crucial 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.”

9. From the above case it is important for the Court to ask itself is whether by entertaining the instant suit and the application it would amount to a duplication or multiplication of suits thus clogging the wheels of justice.
10. I have taken liberty to ascertain the issue(s) in Nairobi High Court Civil Suit **No. 232 of 2014** and the issue(s) in the current suit. I have also taken liberty to also ascertain that the parties in the suit are the same in the aforementioned **HCCC No. 232 of 2014**, though on different divides.
11. What is substantially in issue in **HCCC No. 232 of 2014** is the true ownership of the KBN 808A, which was financed through a Hire Purchase agreement between the Plaintiff and the 2nd Defendant. Though a third party is involved, namely the 2nd Defendant, I believe that the extent of the Plaintiff’s liability in terms of what is owed to the 1st Defendant will have to be determined, for the court to render itself on who truly owns the motor vehicle in question. Likewise, it is my view that what is in contention in the instant suit, is essentially the same, though disguised along the lines of a negative credit listing of the Plaintiff at the instance of the 1st Defendant. For the court to determine whether the 1st Defendant was warranted in having the Plaintiff listed as a defaulter to attract a negative credit score, it would have to determine whether it was or is truly indebted to the Plaintiff under the Hire Purchase Agreement.
12. I am thus satisfied that the claim herein can perfectly be litigated in **Nairobi High Court Civil Suit No. 232 of 2014** and there can be no justification in having the two cases being heard parallel to each other. 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*”. I find so, even though the parties herein agree that in Nairobi High Court Civil Suit No. 232 of 2014 no summons were served on the defendants to allow a counterclaim. Essentially, this court cannot go into the rigors of this argument as invited to do, as such arguments are better placed before the Court handling the **HCCC No. 232 of 2014**. Further, I note that a suit cannot abate by operation of law as presumed by the 1st Defendant. The parties will have to approach the court on the issue, where an appropriate finding shall be issued.
13. Having considered all the above, I am contented that the plea of sub-judice has properly been invoked in this case. However, the remedy is not to strike out this suit as the 1st defendant has asked me to do. Since Nairobi High Court Civil Suit No. 232 of 2014 has not commenced trial, the order that commends itself to me is that the suit together with the application herein be transferred to the Court handling **Nairobi High Court Civil Suit No. 232 of 2014** for possible consolidation, determination and any further directions.
14. The plaintiff should meet the costs of this application.

Dated, Signed and Delivered in Court at Nairobi this 3rd day of December, 2015.

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C. KARIUKI

JUDGE