REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISON & ADMIRALTY DIVISION

CIVIL SUIT NO. 335 OF 2013

HENRY WANYAMA KHAEMBA ……..........................………PLAINTIFF/APPLICANT

-VERSUS-

STANDARD CHARTERED BANK (K) LTD ……….....1ST DEFENDANT/RESPONDENT

EDWARD OTIENO

T/A DOSAWII ENTERPRISES………..………..……..2ND DEFENDANT/RESPONDENT

RULING

A Preliminary Objection: Matter Res Judicata

[1] When a party says that he has a preliminary objection to take out, the court expects the matter objected to be a complete demurrer in the plain eye-sight of the court. The 1st Defendant by a Notice dated 30th August, 2013, took out a preliminary objection that; this suit is res judicata and should be struck out. The suit is also duplicity since the Plaintiff filed similar suits against the 1st Defendant, to wit; 1) NBI **HCCC NO 45 OF 2005;** 2) **NBI HCCC NO 560 OF 2006;** and 3) **NAIROBI COURT OF APPEAL CIVIL APPLICATION NO 67 OF 2008.** The Defendant further stated that the duplicity is an indication that the Plaintiff did not come to court with clean hands.

[2] The Defendant has revealed further grounds of its objection to the application dated 30th July, 2013 and the sustenance of the suit as a whole: that the relief being sought by the Plaintiff was granted by the court of Appeal in **NAIROBI COURT OF APPEAL CIVIL APPLICATION NO 67 OF 2008** in its ruling delivered on 4th July, 2008 pending the hearing of the Plaintiff's Appeal**.** According to the 1st Defendant, the cumulative effect of the said Ruling of the Court of Appeal is to **render** this suit unsustainable as it has been spent. In its submissions filed herein, the 1st Defendant reinforced the above arguments and provided the factual status of its objection; that aforementioned suits initiated by the Plaintiff herein emanates from the fact that the 1st Defendant bank granted a loan facility of Kshs.4,500,000/- to the 2nd Defendant herein being the borrower and the Plaintiff herein being the guarantor and/or Chargor and which facility was secured by a Charge dated 5th November, 2002 created over L.R. 209/3890 I.R 32478 to secure the said sum of Kshs.4,500,000/-.

[3] Further information has been provided by the 1st Defendant that the said property L.R. 209/3890 I.R 32478 is registered in the name of the Plaintiff herein and he executed a guarantee and indemnity in favour of the 1st Defendant bank dated 1st November, 2002 and the same is annexed to the 1st Defendant's Replying Affidavit dated 30th August, 2013 as **'JN-1'.** The 2nd Defendant failed to pay the outstanding balance owed to the 1st Defendant bank and the 1st Defendant is not precluded by law from demanding the entire outstanding balance from the 2nd Defendant being the borrower and/or the Plaintiff as a guarantor and having offered his title document as security to the bank.

[4] Even more elaborate history of the suits filed by the Plaintiff was provided; but I do not wish to go into the details, given what I am about to say: Looking at what the 1st Defendant has submitted, it is not possible to imagine that the points raised herein fit the limited scope and dimensions of a preliminary objection. On that, I am content to adopt a work of this court in **MOSES LIKOYE WANJALA v BERNARD WEKESA SAMBU [2013] eKLR** reproduced below:

Threshold for Preliminary Objection

[3] The legal delimitations for a preliminary objection were set a long time ago in the case of Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd [1969] E.A 696. The principle (preliminary objection) is not in dispute and I do not think anything novel could be said about it. It has been and continues to be quoted and reinforced by the superior courts including the Court of Appeal, and recently by the Supreme Court. I did not, therefore, understand why Mr Onsando wanted to re-invent the wheel. Nonetheless, I shall restate the principle for purposes of clarity.

As per Law J.A:

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

As per Sir Charles Newbold P:

"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

As per our own J.B. Ojwang J (as he then was) in a simple and clear manner in the case of Oraro v Mbajja [2005] e KLR that:

? I think the principle is abundantly clear. A ? preliminary objection?, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle , a true preliminary objection which the Court should allow to proceed. I am in agreement...that „?where a court needs to investigate facts, a matter cannot be raised as a preliminary point.?

[5] That re-statement of the limited scope of a preliminary objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as preliminary objections because of the limited scope of the jurisdiction on preliminary objection. Courts of law have always had a well-founded quarrel with parties who resort to raising preliminary objections in improperly. See the words of Newbold P. in registering a strong deprecation on such improper preliminary objections in the **Mukisa Buscuits case** that:

"That the improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop."

[6] The upshot is that I decline to determine the issues which have been raised in the Notice of Preliminary Objection *in limine*. Instead, those issues should be raised in a more broad-based approach like a formal application under the relevant law and procedure, or in the trial of the suit, or in reply to the application dated 30th July, 2013 which will allow the other party and the court sufficient room to interrogate the points raised by the 1st Defendant. Even in the cases quoted by the 1st Defendant in support of its preliminary objection, a formal application supported by affidavit were made, and it is upon those applications that the court heard all the parties and rendered itself accordingly on the issues of res judicata and limitation of actions. Accordingly, let them be discussed and interrogated in the application dated 30th August, 2013. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 3rd day of June, 2014

F. GIKONYO

JUDGE

IN THE PRESENCE OF

Githinji for Kariu for the Plaintiff

No appearance for the Defendant