



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL SUIT 403 OF 2010**

**AGGREY PETER THANDE.....**  
**PLAINTIFF**

**VS**

**CO-OPERATIVE BANK OF KENYA.....1<sup>ST</sup>**  
**DEFENDANT**

**JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENT AUCTIONEERS.....2<sup>ND</sup>**  
**DEFENDANT**

**BUERI LIMITED.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. By way of a Notice of Motion application dated 10<sup>th</sup> February 2012, the Plaintiff/Applicants seek orders of this court for consolidation of the suit in this matter with High Court Civil Case Number 265 of 2008 between Aggrey Peter Thande vs. Co-operative Bank of Kenya, Bueri Limited and the District Land Registrar.
2. The application is based on grounds set out on the face of the Notice of Motion and is further supported by the affidavit of Aggrey Peter Thande, the Plaintiff, sworn on 10<sup>th</sup> February 2012.
3. Essentially, the Plaintiff claims that the present suit and HCCC No. 265 of 2008 share the same subject matter that is property Limuru/Ngecha/1120 and that the present suit is founded on facts and orders of the court issued in HCCC No. 265 of 2008 that are highly contentious. In addition, the Plaintiff contends that the parties in both suits as well as the witnesses are essentially the same hence to avoid multiplicity of suits or conflicting decisions on the same subject matter, both suits should be consolidated. No prejudice would be suffered by the Defendants by consolidation of the suits and, if anything, the same would result in reduced litigation costs.
4. The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants through grounds of opposition dated 13<sup>th</sup> April 2012 through which it is contended that the current suit is an abuse of the court process as the issues it raises are *res judicata*. The two Defendants argues further that HCCC No. 265 of 2008 which is sought to be consolidated is already spent. It is also contended that the application should be dismissed as the Plaintiff has no *locus standi* to file any suit having filed for bankruptcy.
5. On its part, the 3<sup>rd</sup> Defendant opposes the application through a Notice of Preliminary Objection

dated 14<sup>th</sup> March 2012 through which it contends that the current application is in collision with the provisions of Order 3 Rule 5 of the Civil Procedure Rules, 2010, with regard to joinder of causes of action as the issues and parties in HCCC no. 265 of 2008 are substantially the same. The application before the court therefore constitutes vexatious litigation and should be dismissed as the same is an abuse of due process of the court. It further contends that the court lacks jurisdiction to entertain the present application as filed.

6. I have carefully considered the application, the affidavit evidence adduced and the respective written submissions by counsel for the parties.

7. The purview of the present application does not require me to determine substantive issues arising from the two suits. For now, I take the view that I should merely compare and contrast the suits sought to be consolidated to determine whether the same involve similar parties and similar issues or subject matter as to render it convenient and economical to pursue the two suits in a consolidated suit.

8. With regard to the parties, I note that three of the parties in each suit are the same. In HCCC No. 265 of 2008, the only party that does not feature in the present suit is the Land Registrar, Kiambu. In the present suit, the only party that does not feature is the auctioneer, Garam Investments. In essence therefore, the two suits involve substantially the same parties.

9. As regards the issue of whether or not the subject matter of the two suits are similar, I find it necessary to juxtapose the prayers sought in HCCC 265 of 2008 with those sought in the present suit to determine whether the two suits deal with the same subject matter. The amended Plaintiff in HCCC NO. 265 of 2008 seeks the following substantive prayers:

1) *A declaration that the intended sale of L.R. No. Limuru/Ngecha/1120 by the First Defendant and subsequent transfer is illegal null and void.*

2) *That there be a permanent injunction to restrain the Defendants from alienating, disposing, charging or in any other manner whatsoever dealing with L.R. No. Limuru/Ngecha/1120.*

3) *That there be an order to cancel the sale and subsequent transfer of L.R. No. Limuru/Ngecha/1120.*

10. On the other hand, the Plaintiff in the present suit seeks the following substantive prayers:

1) *A declaration that the Charge over L.R. No. Limuru/Ngecha/1120 is null and void and of no legal effect as the Plaintiff was released from the charge vide the consent recorded in HCCC No. 508 of 2003.*

2) *A declaration that the transfer and sale of L.R. No. Limuru/Ngecha/1120 is illegal, unlawful and therefore null and void and of no effect and an order for re-conveyance thereof to the Plaintiff.*

3) *A permanent injunction to restrain the 3<sup>rd</sup> Defendant from selling, effecting any transfer, leasing, charging, subdividing, wasting or in any way interfering with the suit premises.*

4) *Cancellation of the transfer of the suit premises in favour of the 3<sup>rd</sup> Defendant;*

5) *Damages for fraud.*

6) *An order directing the 1<sup>st</sup> Defendant to produce proper and accurate statement of account.*

11. In my analysis, I find the subject matter in HCCC 265 of 2008 dealing essentially with a challenge to the First Defendant in that matter, Co-operative Bank of Kenya Limited from exercising its statutory power of sale over L.R. No. Limuru/Ngecha/1120. On the other hand, the prayers sought in the present suit go beyond merely challenging sale of the property to challenging the validity of the underlying charge and legality of sale of the property to the 3<sup>rd</sup> Defendant in the suit. In addition, the Applicant seeks

orders that upon the court finding that the said sale and transfer were null and void, the court should order that the transfer in favour of the 3<sup>rd</sup> Defendant should be cancelled and the 1<sup>st</sup> Defendant thereafter permanently restrained from ever exercising any power of sale over the property and to pay damages for fraud in relation to what the Plaintiff perceives as a fraudulent the sale.

12. My conclusion from the above analysis is that the two suits while dealing with the same subject matter, that is, property L.R. Limuru/ Ngecha/1120, never the less pursue different ends and reliefs. The reliefs sought in HCCC 265 of 2008 are in my view, fully covered and subsumed in the reliefs sought in the suit in this matter. Consequently, the Plaintiff stands to lose nothing by abandoning the previous suit and pursuing his rights under the present suit. This is particularly so because HCCC NO. 265 of 2008 has already been declared res judicata vis a vis HCCC No. 508 of 2003. Maintaining it would have the impact of rendering the present suit res judicata as well. However, I would not find the present suit res judicata HCCC No. 508 of 2003 as that suit was commenced by the 1<sup>st</sup> Defendant in the present suit purely as a debt recovery claim as opposed to a suit founded on exercise of its statutory power of sale.

13. For these reasons, I am inclined to dismiss the Plaintiff's Notice of Motion dated 10<sup>th</sup> February 2012 with costs to the Defendants.

14. I further direct that the parties do prepare the present suit for hearing by complying with Order 11 of the Civil Procedure Rules within 30 days from today and that the suit be fixed for hearing at the registry within 14 days thereafter.

**IT IS SO ORDERED.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 4<sup>TH</sup> DAY OF OCTOBER 2012.**

**J. M. MUTAVA  
JUDGE**