



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Case 90 of 2009

BENJOH AMALGAMATED LIMITEDPLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD. DEFENDAN

R U L I N G

The plaint in this case was filed on 11/2/2009 and is dated the same date. On 22/4/2009 the Kenya Commercial Bank filed application seeking to strike out that plaint with costs.

The provisions invoked is **Order 13 (1) (b) and (d) of Civil Procedure Code** and **Section 3 and 3A of the Act (Civil Procedure Act)** and also **Section 4, Limitations of Actions Act, Cap. 22** on the ground that the suit is incompetent, res judicata, sub judice, scandalous, frivolous, vexatious and an abuse of the court process. And that the suit has been filed without authority of the plaintiff however there is an authority under the seal for Mr. Ungu to conduct the suit and that is caught up with **Limitations of Actions Act (Section 4)**.

This application is supported by affidavit of one Chris Theuri, an employee of the bank. Before this application was filed, this court had heard and determined an application in **HCC No.494/2008**. In that case this court said:-

“If the plaintiff has any claim there is remedy in damages but only against the person exercising power of sale and that is the defendant (the Bank). However, due to the suits above mentioned this issue is now res judicata.”

That ruling was in issue of injunction as between the first defendant and the plaintiff, not the second defendant who was a new party in **494/08** in respect of an application filed by the company to stop the respondents by injunction from taking possession of land subject of the suit. However, order was made for the bank to produce accounts and hand to the applicant of account stated in the application. There were allegations of fraud in the case and these issues are still pending.

In this case the cause of action relates to breach of contract. Paragraph 10 of plaint states that the defendant breached the contract in 1990 and the particulars of breach are particularized therein. It is also pleaded that in 1990 the defendant offered further finance. Then the entire project which was being financed collapsed and the plaintiff claims Kshs.2,243,067,494/= projected profit from 1997. Paragraph 31 and 32 refers to ruling in **HCC 494/08**. This issue appears not resolved yet. The prayers here are that:-

1. Declaration that the statement of account rendered by defendant is fraudulent and a sham;

2. **Declaration that the defendant breached the contract failing to pay Kshs.23,175,000/= for horticulture project;**
3. **Special damages Kshs.2,243,067,494/=;**
4. **General damages.**

It appears the plaintiff is seeking declarations. Regarding pleading

declaration, it is to be noted that **Order II Rule 7** permits declaratory suits to be determined whether there is a consequential relief sought or not. It is clear these suits are seeking remedy for declarations with consequential relief for damages; special and general damages.

This application is supported by affidavit of one Chris Theuri described as Relationship Manager of the 1st defendant bank. There is no doubt that there has existed for long time a relationship of bank and customer between the parties in this suit and on 12/4/1989 the bank granted financial facilities which were secured by the legal charges over properties L.R. No.12411/1 Nyandarua and L.R. 14916/1 Nyandarua and L.R. 10075 Kiambu.

The plaintiff defaulted. There was a guarantor, Muiri Coffee Estate Ltd. The bank proceeded to realize its security in March 1992 but before that date plaintiff filed suit **HCC No.1219/92**. By a consent decree the plaintiff undertook to liquidate the debt by 31/7/1992 and confirmed that the bank could sell the security if no payment was not made.

It is not disputed that since that time the efforts by the bank to realize its security have been frustrated by plaintiff's application to court to stop sale in several cases namely:-

1. **HCC No. 285/1993;**
2. **HCC No. 1520/1996;**
3. **HCC No.1611/1996;**
4. **HCC (Nyeri) No. 24/1997;**
5. **HCC No.1219/1992 revived on 16/4/1997.**

The matter went to court as **Appeal No. 276 of 1997** where that court confirmed the consent and the suit **No. 1219/92** is settled by that consent.

However, plaintiff took other steps and proceeded to seek review which was dismissed. Thereafter, a Constitutional Application was filed under **Section 75** of the **Constitution** again on 8/3/2007 plaintiff and guarantor filed **HCC No.122/2007**. All these suits were dismissed because of consent entered in 1992. Another suit **494/2008** was filed. This suit is still pending.

An application for injunction was disallowed and the court said the matter is res judicata. This must mean that as between bank and the plaintiff. Looking at the complaints exhibited issues of finance of farming project was raised again on 6th August 1999, the plaintiff filed another suit **HCC No.1576/99**. This suit was heard on merit and judgment was delivered on 23/7/2004. The suit was dismissed with costs.

Civil Appeal No. 239/2005 was filed which was dismissed by Court of Appeal. File suit **HCC No. 337/2007** which had acquired a new number **HCC No. 243/2006** raised same issues as in 1992. The issue of declarations that sale of plot No.10075 Nairobi was irregular was raised in 1996. Issue of damages and breach of contract was raised in 1997.

The issue of accounts was also raised in **HCC No.24/97** at Nyeri. The issue of flower project was

raised in **Civil Suit No.1576/1999.**

The plaintiff/respondent to this application filed grounds of raising Preliminary Objection and that was his opposition to this application. He made oral submissions and pointed out that the defence was filed outside the prescribed time of 7 days. Failure offends the Rules and the statement of defence ought to be struck out of the record.

If there is no defence, the applicant has no locus to filing the application against the plaintiff. The matter will not be controverted once the defence is struck out. He submitted that the claim is different in **HCC No.973/2002** the dispute is different.

The counsel for respondent relied heavily on the provisions of **Order 8 (1) (2), Civil Procedure Code** which orders that statement of defence be served within 7 days of filing praying that if defence is struck out there would be no case against the plaintiff.

In reply counsel for the bank stated that the summons to enter appearance has never been served upon the bank. The bank acted precautionary seeing that there have been so many suits by the plaintiff's counsel for respondent. Relies on **HCC No.2047/2000 – W.O. Musungu vs. Habo Agencies Ltd.** where the issue of service of defence on the plaintiff within 7 days was raised. The court said that:-

“Where a document has not been served within prescribed time and where no application has been made for extension of time the same ought to be struck out.”

However, it is to be noted that the plaintiff has not proved that it served summons to enter appearance at all. After filing the plaint the plaintiff embarked on pursuing injunction application. Further authority on this issue is **HCC No. 973/2002 – Housing & Industrial Development Contractors vs. The A.G. & Kenya Industrial Properties.** In that case defence was not served within the mandatory seven days. There was a court order to serve the defences but defendants failed to obey the court order and the **Statutory Order (VIII)**. The court struck the defence off the record.

Notwithstanding the above authorities the respondent has not demonstrated the service of summons on the defendant. His evidence has been disproved by the plaintiff and therefore the facts of this case are quite different from above authorities. The defendant filed defence on their own volition and it difficult to tell the time within which service should have been served. The affidavit of service has been declared forgery by expert examiner or the rubber stamp of the bank.

On the issue of two proceedings at the same time, **Section 6 Civil Procedure Code** is Act it relied on by the applicant there being **HCC No.494/08** proceeding on same issues (of damages and accounts). The suits are similar.

Then on res judicata, all issues have not been heard and determined by court. The replying affidavit in support of application is not controverted by sworn evidence but only on unsworn grounds of the respondents. However, as stated by Judge Waki (as he then was) in the case of **Mumina Fazzini Ad. Cause No. 7/2001**, **Section 7** states:-

“No court shall proceed with the trial of any suit or proceeding in which a matter in issue is also directly substantially in issue in a previously instituted suit or proceeding between the same parties ...”

In the circumstances, the suit now last filed by the plaintiff must be stayed pending the finalization of the previously pending suit when issues raised in this suit shall be canvassed in full.

Upon considering all matters stated above, it is clear that issues raised in this case will have to await the finalization of that earlier suit before the same can be canvassed in this suit. I now order that this suit is stayed not to be heard until the suit **No.494/08** is finalized.

Costs of this application to the defendant/applicant

It is so order

DATED, SIGNED and DELIVERED at Nairobi this 6th day of July 2009

JOYCE N. KHAMINWA

JUDGE