



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.140 2017

SURJIT SINGH PANDHAL.....1ST PLAINTIFF

MALKIT SINGH PANDHAL.....2ND PLAINTIFF

VERSUS

AFRICA BANKING CORPORATIONDEFENDANT

RULING

1. **Surjit Singh Pandhal and Malkit Singh Pandhal**, the Plaintiffs, seeks vide the notice of motion dated 20th April 2017 for the following orders;

“ 3. That this court be pleased to issue an order of temporary injunction restraining the defendant whether by themselves, their agents, servants or persons claiming through them howsoever, from selling or by other means whatsoever dealing adversely with the suit property belonging to the Plaintiffs namely, Kisumu

Municipality Block 7/181 and/or rights and privileges incidental thereto until determination of this suit or further orders of this honorable court.

4. That the honourable court be pleased to grant any order for accounts to be taken in respect of the several loan account to wit 00444400010122, 00444400010125, 00444400010124 and 00042000000543 with a view of ascertaining the lawful amount owing and payable to the defendant.

5. Costs of the application.”

That prayer 1 and 2 of the notice of motion have been dealt with through the court's order of 20th April 2017. The application is based on the nineteen (19) grounds marked (a) to (s) on its face and is supported by the undated affidavit sworn by Surjit Singh Pandhal, the 1st Plaintiff, the further affidavit sworn by Wilfred A. Onono on 19th May 2017 and supplementary affidavit by the 1st Plaintiff sworn on the 20th May 2017.

2. The application is opposed by African Banking Corporation, the Defendant, through the replying and further affidavits sworn by

Douglas Okiring, the Defendant's Kisumu Branch manager, on the 30th April 2017 and 5th June 2017 respectively.

3. The court gave directions on filing and exchanging written submissions on the 22nd June 2017.

4. The following are the issues for the court's determination;

a) Whether the Plaintiffs have established a reasonable case with a probability of success for the injunctive order sought to be issued.

b) Who pays the costs.

5. The court has considered the grounds on the notice of motion, affidavit evidence filed by both sides, written submissions and come to the following findings;

a) That there is no dispute that prior to the filing of this proceedings, there was Kisumu ELC 124 of 2013, where the Plaintiff was Caneland Ltd and the Defendant was the same to the Defendant in this suit. That in Kisumu ELC124 of 2013, the Plaintiff applied for injunctive order which were declined through the ruling delivered on the 8th February 2016. That thereafter a notice of appeal dated 17th February 2016 was filed on the 18th February 2016. That there followed two notices of motion by one Kopot & Co. Advocates and Malkit Singh Pandal, the 2nd Plaintiff in this case, seeking to be

enjoined as parties and for temporary injunction orders. The two applications dated 15th July 2016 and 26th July 2016 were dismissed through the ruling of 1st March 2017. The parties filed notice of appeal on the 7th March 2017.

b) That the Plaintiff in Kisumu ELC 124 of 2013 moved to the Court of Appeal in Civil Application No.24 of 2017 [UR 15/2017] seeking for among others stay of execution of the ruling of 8th February 2016. That the application was dismissed through the ruling delivered on the 7th April 2017. Thereafter the notice of intended withdrawal of appeal dated 11th April 2017 was filed in the court of appeal and a consent duly signed by the counsel for the parties dated 18th April 2017 striking out the notice of appeal dated 16th March 2017 was filed. Then a notice to withdraw suit dated 12th April 2017 was filed and the appeal No.25 of 2017 was withdrawn through the consent dated 19th April 2017

c) That what followed the termination of Kisumu ELC 124 of 2013 and the Court of Appeal related processes, was the filing of this suit which was filed on the 20th April 2017.

d) That the Defendant has challenged the Plaintiffs suit and application on the basis of being res judicata in view of the previous suit, being Kisumu ELC 124 of 2013 and the orders made in relation to processes connected thereto. That the Plaintiffs view is that the earlier suit being Kisumu ELC 124 of 2013 was between different parties, different issues and in any case it has been withdrawn and hence the current suit and application are not res judicata.

e) That it has not been disputed that the Plaintiffs herein are directors to Caneland Limited, who was the Plaintiff in Kisumu ELC 124 of 2013. That the court has had occasion to deal with some of the applications filed in Kisumu ELC 124 of 2013 and some of the rulings issued thereof and it is clear the 1st Plaintiff in this suit is the one who had sworn the processes on behalf of Caneland Limited in that other case. That the 2nd Plaintiff had applied to among others, be enjoined in that case and for injunctive orders but failed. That further, the suit properties in this suit and Kisumu ELC 124 of 2013 are the same being Kisumu municipality/block 7/171 and 181. That the accounts detailed in prayer 4 of the current application are the same accounts listed at paragraph 23 of the court ruling of 8th February 2016 in ELC 124 of 2013. That the Defendant in that other case and the current suit is the same and the loan facility transactions in both cases are the same, being loan of Ksh.135,000,000/=.

f) That the withdrawal of Kisumu ELC 124 of 2013, and the appeals preferred against any of the rulings made thereunder, did not mean that the court's pronouncements in respect of the various applications

made thereto are of no legal effect. That if the intention of Caneland Limited and the two applicants in Kisumu ELC 124 of 2013 in withdrawing that case and the appeals was to allow the directors of Caneland to come to this court in a fresh suit and attempt to get what they could not get through Kisumu ELC 124 of 2013, then they took a wrong step. That as correctly submitted by counsel for the Defendant, the doctrine of res judicata makes sure that a party is not vexed twice for the same cause. That the provision of **Section 7 of Civil Procedure Act, Chapter 21 of Laws of Kenya** sets out the doctrines of res judicata in the following words:

“ 7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

g) That though the Plaintiffs claim this suit is raising new issues, the transactions upon which this suit is based is the same one upon which Kisumu ELC 124 of 2013 was based. That accordingly, under explanation **4 of Section 7 of the Civil Procedure Act**, there is nothing in this current application that could not have been raised in the applications subject matter of the rulings of 8th February 2016 and 1st March 2017 in ELC 124 of 2013.

h) That accordingly, the court finds that the issues on whether or not to grant temporary injunction to the Plaintiffs herein against the Defendant over the loan facility of Ksh.135 million, is a matter that has already been decided upon by this court in Kisumu ELC 124 of 2013, in which the Plaintiffs were acting through the name of their company, Caneland Limited, who was the plaintiff. That the application dated 20th April 2017 is therefore an abuse of the courts process and res judicata.

6. The Plaintiffs notice of motion dated 20th April 2017 is without merit and is dismissed with costs and the interim order of temporary injunction issued on the 20th April 2017 is hereby vacated.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF FEBRUARY 2018

In presence of;

Plaintiffs Absent

Defendant Absent

Counsel Mr Maganga for Menezes for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/2/2018

12/2/2018

S.M. Kibunja Judge

Joane court assistant

Parties absent

Mr. Maganga for Menezes for the Defendant

Order; the ruling dated and delivered in open court in the presence of Mr. Maganga for Menezes for the Defendant and absence of Plaintiffs and their counsel.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/2/2018