



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL CASE NO. 18 OF 2018

TAHIR SHEIKH SAID INVESTMENT LIMITED.....PLAINTIFF

-VERSUS-

ADMINISTRATOR – TSS GRAIN MILLERS LTD....1ST DEFENDANT

BAKHRESA GRAIN MILLING (K) LIMITED.....2ND DEFENDANT

KCB BANK KENYA LIMITED.....3RD DEFENDANT

RULING

Determination on 1st & 3rd defendants' application

1. The 1st & 3rd defendants each filed notices of motion applications both dated 20th March 2018 brought under the provisions of Section 1A, 1B, 3A and 6 of the Civil Procedure Act and Order 2 Rule 15 (d) Civil Procedure Rules seeking for orders:

1. Spent

2. That the Plaintiff's suit against the 3rd defendant commenced by way of a plaint dated 29th January, 2018 and filed in Court on 29th January, 2018 be struck out being an abuse of the process of the Court.

3. That in the alternative to (1) above, the plaintiff's suit against the 3rd defendant commenced by way of a plaint dated 29th January, 2018 and filed in Court on 29th January, 2018 and all consequent proceedings be stayed for being sub-judice Mombasa HCC Number 3 of 2016 – Tahir Said Investments Limited & TSS Grain Millers Limited vs Kenya Commercial Bank Limited.

4. That the costs of the suit and this application be awarded to the 3rd defendant.

2. The application is supported by the grounds on the face of it inter alia:

(i) There is another suit pending before the High Court in Mombasa relating to the plaintiff and the 3rd defendant, regarding the same suit property, arising from the same debt and the same securities; being Mombasa HCC Number 3 of 2016 – Tahir Sheikh Said Investments Limited & TSS Grain Millers Limited vs Kenya Commercial Bank Limited. This suit was filed by the plaintiff in the Commercial and Civil Division of the High Court in January 2016.

(ii) However, on 27th March, 2017, the High Court in the aforementioned Mombasa HCC Number 3 of 2016 discharged the orders of injunction previously issued by the Court on 13th January, 2016.

(iii) In the premises, the plaintiff's current suit amounts to an abuse of the process of the Court and the 3rd defendant prays that the same be struck out with costs to the 3rd defendant.

(iv) Further to the above, the plaintiff's current suit offends the mandatory provisions of Section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya and therefore ought to be struck out or in the alternative stayed for the grounds and reasons set out hereinabove.

3. The application is also supported by the affidavit of Mr Francis Kiranga. Mr Kiranga deposed that there is another suit vide Mombasa HCC No 3 of 2016 – Tahir Sheikh Said Investments Ltd & TSS Grain Millers Ltd vs Kenya Commercial. That at the time of filing the current suit, the plaintiff herein knowingly failed to disclose the existence of the case No. 3 of 2016 thus the current suit amounts to abuse of the Court process. The applicant therefore urged that the current suit be struck out or be stayed for offending the provisions of section 6.

4. In opposing the application, the plaintiff filed a replying affidavit through Mr Nurein Shekh Said who stated that he is one of the directors of the plaintiff. Mr Nurein deposed that the claims in this suit are distinct and separate from those made in Mombasa HCC No 3 of 2016 and he proceeded to list the distinct issues as:

i) That the 1st or 3rd defendant sold the suit property without any colour of right to do so.

ii) That the charge forming the basis of the 3rd defendant's claim is non – existent or was forged.

iii) The present suit challenges the title issued to the 2nd defendant as a result of the unlawful sale which claim the High Court lacks jurisdiction to determine.

iv) The 1st & 2nd defendants are not parties to HCC case No 3 of 2016.

5. Mr Nurein further deposed that if the Court is of the opinion that the two suits are similar then they are willing to withdraw HCC No 3 of 2016 which was filed under immense pressure and mistake of fact that there was a facility between the plaintiff and the 3rd defendant when in real sense the facility was between TSS Grain Millers Ltd & the 3rd defendant. That the filing of this case was not meant to mislead the Court or abuse its process but a legitimate effort made by the plaintiff to protect their rights over the suit property.

6. The parties agreed to canvass the applications by filing of written submissions. The 1st & 3rd defendants filed their submissions on 6.6.2018, the 2nd defendant filed his submissions on 16th July 2018 while the plaintiff filed two sets of submissions dated 21.5.2018 and 19.7.2018 respectively. The plaintiff in their submissions conceded that their suit against the 1st defendant is untenable based on the facts contained in the 3rd defendant's replying affidavit. The plaintiff thus admits prayer 1 of the motion by the 1st defendant with an order that each party bears their costs of the suit.

7. The 1st defendant on its part submits that it is entitled to costs. In support of this submission, it has put reliance in the case of **Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another (2016) eKLR** where Mativo J set out what the Court should consider whether or not to award costs to include:

i) Conduct of parties

ii) Subject of litigation

iii) Circumstances which led to the institution of the proceedings

iv) Events which led to their termination

v) Stage at which they were terminated

vi) Manner in which they were terminated

vii) Relationship between the parties

8. Taking the above factors and applying them to the circumstances of this case, the plaintiff stated that he sued the 1st defendant because all his attempts to get information from the 1st defendant before initiating the suit did not bear any fruits. Secondly that after being sued, the 1st defendant filed his defence alongside the application to strike out the suit. On being served with the application, the plaintiff in his replying affidavit at paragraph ...conceded that its claim cannot be sustained as against the 1st defendant. The result of the admission is that the case as against the 1st defendant has thus been terminated at an early stage. (For this reason I am satisfied that this is a proper and fit case for the Court to make an order that each part meets its own costs of the suit). The costs incurred by the 1st defendant are minimal as the matter has not taken off.

9. The next application for determination is the one made by the 3rd defendant. In support of its application, the 3rd defendant submitted that the subject matter of this suit is challenging the right of the bank exercising the statutory power of sale and also challenging the validity of the securities. While in HCC No 3 of 2016, the plaintiff sought declaration that the scheduled sale on 25.1.2016 was unlawful and void. Further that in suit number 3 of 2016, the plaintiff filed an application seeking orders of temporary injunction where he was issued with an interim injunction on 13th June 2016 which orders were subsequently discharged on 27.3.2017.

10. The 3rd defendant contends that they have demonstrated that the subject matter and the cause of action in the two suits are the same as the plaintiff did file in both an application seeking orders of injunction to restrain the bank from selling the suit property. That the parties are the same except the addition of the 2nd defendant and that adding or removing parties does not sanitize abuse of Court process. The 3rd defendant referred the Court to paragraph 17 of the plaint in the current suit to be the same as paragraphs 13, 14, 15, 16 & 17 of the plaint in

case No 3 of 2016. The 3rd defendant relied on the findings in the following case laws to support their submissions.

(i) E.T.S vs Attorney General & Another (2012) ECLR

(ii) R vs Chairman District Alcoholic Drinks & 4 others Exparte Detlef Heier & Another (2013) eCLR

(iii) Co-operative Bank of Kenya Ltd vs Patrick Kangethe Njuguna & 5 others (2017) eCLR

11. The plaintiff submitting on the provisions of section 6 of the Civil Procedure Act reiterating that the issues in the two suits are not similar. The plaintiff further submits that whether or not the 3rd defendant holds a valid charge over the suit property to enable it exercise its power of sale was not in issue in suit No 3 of 2016. Secondly that the issue of whether the transfer of the suit property to 2nd defendant was done lawfully or unprocedurally was also not in dispute in the former suit. That these issues cannot be part of suit No 3 of 2016 hence the plaintiff had to file a fresh suit. They referred this Court to the decision in **Twin Buffalo Safaris Ltd vs Business Partners International Ltd (2015) eCLR** where an application to amend a plaint after a property was sold was rejected. The plaintiff also cited **Lawe Investments Ltd vs National Bank Ltd & 3 others (2013) eCLR** where Mabeya J held that a fresh suit when circumstances change is not res judicata. The plaintiff further submitted that the High Court lacks jurisdiction to hear and determine the present claim. He thus urged the Court to dismiss the application with costs.

12. The application seeks to have the plaintiff's suit struck out and in the alternative to stay it for being sub judice. I am persuaded that res judicata does not apply herein because case No 3 of 2016 has not been heard and determination on merits. What was previously determined is an application for interim junction. The orders sought in the current application seek to dismiss/stay the suit. Is this suit subjudice case No 3 of 2016? Section 6 identifies 3 issues for a suit to become a candidate of subjudice:

(a) The matter in issue must be directly and substantially in issue in a previously instituted suit or

(b) Proceeding between the same parties or parties under whom they or any of them claim or

(c) Such suit or proceeding is pending in the same or any other Court having jurisdiction to grant the relief claimed.

13. First the word or in my understanding means that the current suit need not fulfil all the above 3 headings. If any two of the 3 happens, the doctrine of subjudice comes into play. It is not in dispute that the plaintiff in the current suit is the plaintiff in suit No 3 of 2016. The only addition is the 2nd defendant whose inclusion emanates from the actions of the 3rd defendant in an existing suit. Under the provisions of section 6 I hold that, the 2nd defendant would fall under the class of persons who can litigate his rights through the 3rd defendant in an existing suit. If the plaintiff's suit succeeds as against the 3rd defendant then the 2nd defendant's right over the suit property automatically ceases and he can only claim damages if any as against the 3rd defendant.

14. It is not disputed that case No 3 of 2016 is still pending. The only remaining question for determination is whether the subject matter in this case is directly and substantially in issue as in the HCC No 3 of 2016. In the current suit the plaintiff pleaded that *if there was a sale of the suit property MSA/BLOCK 1/316 by the 3rd defendant then the same was done illegally and fraudulently. The particulars of the illegality and fraud are set out in paragraph 17 of the plaint. The plaintiff prays for orders inter alia, to declare the purported sale & transfer as illegal, unlawful and void and for cancellation of the registration of the 2nd defendant pursuant to this sale.* The plaintiff also sought and was granted orders of temporary injunction restraining all the defendants from selling, transferring and or disposing all that parcel of land MSA/BLOCK 1/316 pending hearing of the application inter partes.

15. In suit No 3 of 2016, the plaintiff pleaded that the 3rd defendant advanced to the 2nd plaintiff (TSS Grain Millers Ltd) certain banking facilities secured by a charge over the suit property (MSA/BLOCK 1/316). At paragraph 10 of the plaint it is pleaded thus:

“In the year 2014 & 2015, the plaintiffs held numerous meetings with officers of the 3rd defendant who verbally promised to re-structure the loan to accommodate the plaintiffs' financial position. The plaintiffs had a legitimate expectation that the defendant would effect the promises but this was never done.”

16. The plaintiff proceeded to plead non – compliance with the provisions of the Land Act by the 3rd defendant while it was exercising its statutory power of sale and he therefore urged the Court to grant the reliefs inter alia;

i) A declaration that the intended sale by public auction by the defendant and or its agents is unlawful and void.

ii) An order of permanent injunction barring the defendant and or its agents from alienating and or dealing with the proprietary interests in the suit property pursuant to the impugned notice dated 16th September 2015.

17. From the contents of the two plaints, it reveals the plaintiff is challenging the sale undertaken over the suit property MSA/BLOCK 1/316. The question of whether or not the 3rd defendant/applicant had a valid charge to be able to exercise its statutory power of sale in my reading of the two plaints runs in both suits. Thus the issues for determination in the current suit and HCC case No 3 of 2016 are directly and substantially the same. The submission rendered by the plaintiff that the issues raised in the current suit cannot be part of issues raised in suit No 3 of 2016 is misconceived & frivolous. In analysing the case of **Twin Buffalo Safaris Ltd vs Business Partners Ltd (2015) eCLR** quoted by the plaintiff to support the ground of filing a fresh suit; In my view is quoted out of context. Under the quoted paragraph, the Judge was dealing with an application for amendment of pleadings. He was specific that *“allowing the amendment between the chargee and the chargor in the manner proposed and in total disregard of the rights of the purchaser will be most unfair.”* (underline mine for emphasis)

18. In effect the amendment proposed in the plaint in that suit had closed out the purchaser. In the instant case, no application for amendment has been presented in case No 3 of 2016 and it is therefore premature to state that the 2nd defendant's interest cannot be introduced in the existing suit. Secondly in the Twin Buffalo case, the amendment proposed were to deal with issues not related to the sale of the suit property unlike in the instant case where what is being challenged in both suits is the sale & transfer of the subject property.

19. The plaintiff also submitted that the High Court lacks jurisdiction to determine the issues raised in this plaint. In opposing this ground, the 3rd defendant/applicant quoted the decision of **Co-operative Bank Ltd vs Patrick Kangethe & 5 others (2017) eKLR**. I have read this decision where the Court of Appeal as constituted held that issues of charges falls within the jurisdiction of the High Court. For me, I would state that whether or not a Court has jurisdiction to hear and determine a matter rests with the presiding judicial officer to deal with only after the question of jurisdiction has been raised. Consequently for now I will state that the matters in this case are directly and substantially in issue as the suit case HCC No 3 of 2016 which is still live making this suit to be in contravention of the provisions of section 6 of the Civil Procedure Act.

20. The plaintiff urged the Court if satisfied with the merits of the application to stay this suit. This is indeed true but this Court also has powers to strike out such a suit where its filing is a clear case of abuse of Court process. Since the plaintiff was aware of the scheduled sale dated 4.1.2016 by the 3rd defendant that formed the basis of their filing of the suit No 3 of 2016. If the circumstances changed thereafter, nothing stopped the plaintiff from withdrawing the earlier suit before filing of the current suit on 29th January 2018. In my opinion, the filing of the current suit was a clear demonstration of a party who intended to obtain interim reliefs as they were indeed given on the Court process. In the case of **Abud Abdalla Omar & 28 others vs KPA and Salaries & Remuneration Commission** the Court of Appeal at Malindi in case No 99 of 2017, upheld Rika J's decision of striking out a suit for that was subjudice as being abuse of the Court thus amounting to abuse of process. The Court of Appeal posed the question whether the Appellants were left without any remedy as a result of the striking which they answered NO. The plaintiff in this case will also not be left without a remedy as he can pursue his claim in suit No 3 of 2016. For the forgoing reasons I proceed to strike out this suit as against the 3rd defendant with costs of the application and the suit awarded to the 3rd defendant.

Determination on 2nd defendant's application

21. The 2nd defendant also filed an application dated 25.2.2018 brought pursuant to Order 2 rule 15 (1) (a) of the Civil Procedure Rules seeking for orders that the suit against the 2nd defendant be struck out with costs.

22. The application is opposed by the plaintiff's grounds of opposition dated 26th June 2018. The plaintiff has pleaded that whether or not the 2nd defendant was a bonafide purchaser for value without notice is subject of the suit which can only be determined after full trial. That each and every prayer in this suit affects the 2nd defendant.

23. I have made a detailed discussion on the subject that this suit is subjudice suit No 3 of 2016 in my determination of the 3rd defendant's application dated 20th March 2018 which reasoning I have hereby adopted. Since the suit against the 3rd defendant has been struck out for being subjudice and given the position I have taken that the 2nd defendant's rights only accrue from the 3rd defendant's action which is the subject matter pending in HCCC 3 of 2016, once the claim against the 3rd defendant has been struck out, the plaintiff's claim against the 3rd defendant then lacks legs to stand on its own in the current suit. I say so because the determination of the validity or otherwise of the sale & transfer of the suit property MSA/BLOCK 1/316 by the 3rd defendant to the 2nd defendant can be dealt with fully in HCCC No 3 of 2016. The plaintiff acknowledges this in paragraph 11 of his submissions and more particularly the citation he quoted in the case of **Stephen Boro Gitiha vs Nocholas Ruthiru Gatoto & 2 others (2017) eKLR** paraphrased here below;

24. In light of the finding (of 3rd defendant's application dated 20.3.2018), the proper order to make which I hereby do is to have this suit as against the 2nd defendant to also be struck out not on account of disclosing any reasonable cause of action but because of the provisions of the subjudice rule.

25. As regards the costs of the suit against the 2nd defendant I order the same to abide the outcome on order for costs in HCCC No 3 of 2016. The costs of the application is however awarded to the 2nd defendant.

Dated, signed & delivered at Mombasa this 4th Dec. 2018

A. OMOLLO

JUDGE