



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KARANJA, OKWENGU & G. B. M. KARIUKI, J.J.A.

CIVIL APPEAL NO. 87 OF 2008

BETWEEN

SUSAN JANE SHAH.....1ST APPELLANT

REKHAVANTI PANKAJ SHAH.....2ND APPELLANT

AND

CO-OPERATIVE MERCHANT BANK LTD.....1ST RESPONDENT

GARAM INVESTMENTS LIMITED.....2ND RESPONDENT

(An appeal from the Ruling and Decree of the High Court of Kenya

at Nairobi (Ringera, J) given on the 20th November, 2002

in

H.C.C.C. NO. 1111 OF 2002)

JUDGMENT OF THE COURT

Susan Jane Shah and **Rekhavanti Pankaj Shah** (1st and 2nd appellants respectively) were the registered proprietors of land parcel L.R. No. 1870/VIII/15 (I.R. No. 80343) Nairobi (suit property). They were also directors of Unigate Industries Limited (borrower).

Co-operative Merchant Bank Limited (1st respondent), a limited liability company was a banking institution, which among other things was in the business of lending money, while **Garam Investments Limited** (the 2nd respondent), was a limited liability company carrying out auctioneering business.

From the record of appeal before us, the appellants approached the 1st respondent for a loan facility, and on 10th June, 1999 they charged their aforementioned property to secure repayment of the loan which was advanced to the borrower. After sometime, the borrower was unable to service the loan. The usual notices were issued and several correspondences exchanged, with the 1st Respondent threatening to realise the security, but apparently the issue was not resolved. This led to the appellants filing Civil Suit Nairobi

HCCC No. 1743 of 2001 on 1st October, 2002 against 1st respondent and 3 others, seeking *inter alia* orders of injunction to restrain the respondents from interfering with the charged property or dealing with it in any way.

That suit and an application dated 16th November, 2001 seeking similar orders was disposed of by consent of all the parties on 13th February, 2002 when the court entered consent in the following terms.

“It is hereby ordered by consent:-

1. That this suit and the chamber summons application dated 16th November 2001 be marked as settled under the following terms:-

a. The plaintiffs do redeem the charge over L.R. No. 1870/VIII/15 – Spring Valley, Nairobi within 90 days.

b. In default of such redemption, the 1st defendant be at liberty to realise the said security.

2. That the plaintiffs do pay the cost of the suit and the costs of the application to the 1st and 4th defendants.”

It is important to reiterate that the plaintiffs in that suit were the appellants herein and the 1st defendant the 1st respondent. Apparently, the appellants did not redeem the charge within the 90 days as agreed. The 1st respondent thus restarted the process to recover the money and instructed the 2nd respondent to sell the suit property by public auction.

This is what prompted the appellants to file Civil Suit No. 1548 of 2002 against the two respondents; seeking almost the same orders sought in the earlier suit, but in addition seeking an order that the two appellants be released from the charge, the subject of the suit.

It was against that suit that the 1st respondent filed a notice of preliminary objection dated 2nd October 2002. The objection was premised on the ground that there was a consent order recorded in HCCC No. 1743 of 2001 which had compromised the suit, and that the appellants had failed to comply with its terms. The appellants had failed to redeem the property within the 90 days as agreed, and so the 1st respondent was at liberty to realise the security as per the terms of the said consent.

It was argued on behalf of the 1st respondent that HCCC No. 1548 of 2002 was *res judicata*, given that the issues therein had been raised in the earlier suit that was compromised vide the consent order. The parties were all heard on the preliminary objection and the learned judge (Ringera, J as he then was), in his ruling dated 20th November, 2002 upheld the preliminary objection faulting the fresh suit as follows;

“it not only offends the provision of section 7 of the Civil Procedure Act as read with explanation No. 4 but is wholly subversive of the said consent order which required the plaintiff to redeem the charge within 90 days or the security would be realised. All matters that were raised in that suit or which could have been raised but were not, were superceded by the consent order and the present suit cannot lie as long as that consent order remains in force.”

It is against that ruling that this appeal, in which the appellants have proffered a total of 13 grounds, was filed. Basically, the appellants in their grounds of appeal are challenging the validity of the charge. They state that the charge was not signed by the 1st respondent and so there was no valid, enforceable contract between the parties; that the consent order being impugned was obtained through mistake, suppression of facts or fraudulent misrepresentation; that the learned Judge should not have allowed the defence of *res judicata* by way of a preliminary objection; that counsel on record for the first appellant was not properly on record; and that by striking out the suit, the court had denied the appellants their

constitutional right of access to justice. The appellants' plea is that the said ruling be set aside *ex-debito justitiae*, and that the preliminary objection be dismissed with costs.

Opposing the appeal, Mr. Mubea, learned counsel for the respondents urged that the issues raised in the subsequent suit i.e 1548 of 2002 later renumbered 1111/2002 were the same and so section 7 of the Civil Procedure Act came into play. He further submitted that the issues being raised in this appeal were never raised in the original suit; and further, that the preliminary objection was premised on undisputed facts. He urged us to dismiss this appeal as the same lacks merit.

We have considered the said grounds of appeal, the submissions of both counsel, and indeed the entire record. In order for us to make a determination as to whether the issues raised in HCC No. 1548 of 2002 were *res judicata* as found by the learned Judge, we need to look at the prayers in both matters, and also whether the issues raised in the latter suit could have been raised in the earlier suit.

The prayers in HCC No. 1743 of 2001 were as hereunder:-

“(a) An order for injunction do issue permanently restraining the 1st defendant, its agents servants and/or assigns from selling by public auction, private treaty or otherwise and Garam Auctioneers, and any other Auctioneer appointed by the 1st defendant and/or its Advocates, its officers, agents or servants or otherwise and further restraining the 1st defendant by its servants or agents be restrained (sic) from further advertising for sale and/or auction, taking possession or entering into the same and generally from interfering in any manner with the plaintiffs quiet enjoyment of the said property or any parts thereof; from sending any of its officers, servants and/or agents to all that property known as L.R. 1870/VIII/15 Spring Valley off Peponi Road, Nairobi registered in the names of the plaintiffs herein and generally from alienating the said property in any manner whatsoever whether by itself or its servant or agent, or Advocates or Auctioneers or any one of them or otherwise from further advertising for sale, selling by public auction or private treaty THAT PARCEL of land known as L.R. 1870/VIII/15 Spring Valley off Peponi Road and each one of them be bound by the said order.

(b) A declaration that the charge mentioned herein above and said to be dated 10th June 1999 or any sums purported to be secured thereby are all illegal void and incapable of being enforced.

(c) An order that the 1st defendant deliver up to the plaintiffs or to such persons as they appoint all documents in the 1st defendant's possession or power relating to the suit property and all its cost and expenses release and discharge and the Page 5 of 8 charged property from all encumbrances created thereon by the 1st defendant or any person claiming through the 1st defendant.

(d) Costs of this suit.

(e) Interest at court rates.”

Basically, the appellants wanted orders of injunction against the respondents, and the release and discharge of the suit property from all encumbrances created by the 1st respondent or any other person. The prayers in the latter suit i.e. HCCC No. 1548, later renumbered 1111 of 2002 were also for an order of injunction against the respondents or their agents; the property was the same. There was also the prayer that the appellants be released from the charge; and that the appellants be allowed to redeem the charge.

A cursory look at these prayers will clearly show that they are the same. Indeed, the first plaint was more detailed than the latter one. Issues of fraud were pleaded in the first plaint. The Court had no opportunity to determine the said issues because once the consent was entered, it brought litigation on all the issues in that plaint to a close. The appellants were given 90 days to redeem the property, failing which the 1st respondent would be at liberty to realise the security. That order compromised all the prayers sought in that suit.

The issues of not having signed the personal guarantees, or the charge were raised in paragraph 15 of the said plaint. Issues of fraud were also raised, and so were other pertinent issues. Nonetheless, by the parties agreeing to compromise the suit on the terms set out in the consent, they forfeited their right to have the issues they had raised determined by the Court on merit. These, or any other related issues could not be re-litigated in any subsequent suit. Our finding is that the consent order was given after counsel for both parties were heard. There cannot have been an issue of misrepresentation or non-disclosure of facts as claimed by counsel for the appellants in this appeal.

There was no application to set aside the said consent order before the lapse of the 90 days. By the time HCC No.1548 of 2002 was filed, that consent order, though not complied with was still valid.

As rightly observed by the learned Judge in his ruling, explanation No. 4 of section 7 of the Civil Procedure Act, bars re-litigation on matters that ought to have been raised in the former suit. The provision provides in part:-

“Any matter which might or ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

Having considered the two plaints, we find that all the issues sought to be litigated in the latter suit were either pleaded in the former suit, and if there was any that had not been raised, then it ought to have been raised in that former suit.

The issue of being denied access to justice is neither here nor there in this appeal. Access to justice is not an open ended right. The same has to be enjoyed within the confines of the law and other prescribed Rules of procedure. In any event, when a party voluntarily opts to limit, or stifle that right by compromising the suit, such a party cannot be heard to complain later, and must live with the consequences.

We also find that the matter was properly taken as a preliminary objection, because it was a point of law that was capable of disposing of the matter at that preliminary stage. The learned Judge was therefore in order to dismiss the appellants’ suit for being *res judicata*.

From the foregoing, it is clear to us that this appeal has no merit. We dismiss the same with costs to the respondents.

Dated and delivered at Nairobi this 3rd day of July, 2015.

W. KARANJA

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JUDGE OF APPEAL

H. M. OKWENGU

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JUDGE OF APPEAL

G. B. M. KARIUKI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR