REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 638 of 2006

SAMUEL NDIBA KIHARA ……..……1ST PLAINTIFF

VIRGINIA NDUTA NDIBA ……..……2ND PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY OF KENYA .....1ST DEFENDANT

ROBERT NGUNYI NJURA ……..……2ND DEFENDANT

NANCY WANJIKU MBUGUA ……..……..3RD DEFENDANT

RULING

Before the court begins to consider in depths the arguments made by the parties in this matter, the court wishes to deal with an amended Chamber Summons filed in court on 23rd November, 2006. That Chamber Summons was amended without the leave of this court. A Chamber Summons is not a pleading and accordingly any amendment being made ought to be made with leave of the court. This indeed was the holding in the case Civil Appeal No. 61 of 1999 Between Board of Governors, Nairobi School and Jackson Ireri Geta. The Court of Appeal had the following to say in respect of an argument that a Chamber Summons can be amended without leave of the court before close of pleadings.

"However, before we conclude this judgment, we consider it pertinent to consider the issue which the appellant raised, namely, whether a chamber summons is a pleading within the meaning of the term as used in the civil procedure act and rules made there under. "*Pleadings*" is defined in section 2 of the Civil Procedure Act as follows:-

" *.includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant:*"

Mr. Amolo for the appellant urged the view that the general practice of the High Court and the working of the afore quoted definition suggests that the term "*pleadings*" may be extended to cover a chamber summons and other proceedings commenced otherwise than by plaint, petition or originating summons. He cannot be right. The definition, above, is couched in such a way as to accord with Order IV rule 1, which prescribes the manner of commencing suits, which rule provides that:

"Every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed."

Chamber summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used in the Civil Procedure Act and rules made there under. The use of the term "*summons*" in the definition of the term "pleading' must be read to mean '*Originating summons'* as that is "a manner …..prescribed" for instituting suits".

In view of what is stated hereinabove the Chamber Summons amended and filed in court on 23rd November but dated 21st November, 2006 is hereby struck out for having been filed without the court's leave. The costs of that struck out Chamber Summons are awarded to the Defendants in any event.

When this matter came up for hearing the Defendants raised a preliminary objection to the Plaintiffs' chamber summons dated and filed on 21st November, 2006. The objection was in the following terms:-

1. THAT the Plaintiffs' application is *Res Judicata* as the Plaintiffs had filed a similar application against the same Defendants in *Milimani HCCC No.402 of 2006* which application was dismissed by this Honourable court on8th November 2006.

2. THAT the current application for injunction is also a gross abuse of the court Process and ought to be struck out *in limine* under the courts inherent Jurisdiction as preserved under Section 3A of the Civil Procedure Act.

In order to understand the objection raised by the Defendant it is necessary to give a background to this matter. The Plaintiffs previously filed another case namely HCCC No.402 of 2006 and therein filed injunction application which application was heard by this court and was dismissed on 8th November, 2006. That Chamber Summons sought the following prayers:-

(a) That this Honourable Court be pleased to certify this application as Urgent and service be dispensed with in the first instance.

(b) That the defendants and their servants, agents be and are hereby restrained from taking vacant possession evicting or in any other manner interfering with the quiet possession and occupation by the plaintiffs of the Parcel of Land No.76/202 pending hearing and determination of the application

(c) That the 1st defendant do adjust the loan account NO.600-0003164 to correspond to what is legally owed by the plaintiffs.

(d) The cost of this application be provided for.

In this present case the Plaintiff filed a Chamber Summons dated 21st November, 2006 and sought the following prayers:-

1. That this Honourable Court be pleased to certify this application as urgent and service be dispensed with in the first instance.

2. That the Defendants, their servants and agents be restrained from taking vacant possession, evicting or in any other manner interfering with the quiet possession and occupation by the Plaintiffs of Parcel of land No.76/202 pending the hearing and determination of the application interpaties and the suit.

3. That the 1st Defendant do adjust the loan account No.600-0003164 to correspond to what is legally owed by the Plaintiffs.

4. That costs of this application be provided for.

The Defendant argued that the Plaintiffs Chamber Summons in this matter is caught by the doctrine of *Res judicata* under Section 7 explanation 4 of the Civil Procedure Act. The provision of that section is as follows:-

"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.

Explanation (1)…

Explanation (2)…

Explanation (3)…

Explanation (4) – any matter which might and 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".

The Defendant relied on book of *Halsbury Laws of England* 4th Edition Vol.37 which stated that the court could invoke its inherent power to stop amongst other things the abuse of the court process. The Defendant also relied on the case of *Rev. Madara Evans Okanga Dondo vs Housing finance company of Kenya* Nakuru H.C.C.C. No.262 of 2005 [unreported]. In this case the Plaintiff had previously filed a case in High Court at Kisii and had sought some interim orders but that suit was eventually dismissed by the court. The Plaintiff instead of pursuing an appeal in that matter opted to file a fresh suit in Nakuru and in so doing failed to make disclosure of the previously dismissed suit. The High Court at Nakuru found that that was an abuse of the court process and proceeded to dismiss the second suit. The Defendant also relied on the case of Pop-In (Kenya) Ltd & 3 others v Habib Bank AG Zurich. The holding of that case was in the following terms:-

"The plea of *res judicata* applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time".

The court in making decision in the above case also approved the finding of the case of Hoystead and Others v Taxation Commissioner, (1925) All ER Re 56 at p 6 as follows:-

"The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgement upon a different assumption of fact; ….Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is principle of law

that this cannot be permitted".

The Plaintiff opposed the preliminary objection. In so doing it was argued on the Plaintiffs' behalf that before a court strikes out an application as sought by the Defendant it was important for the court to look at the peculiar circumstances of each case. In this case the Plaintiffs' counsel stated that the property charged to the 1st Defendant was purchased by the 2nd and 3rd Defendants at an auction. That the Plaintiffs since that purchase have requested to be supplied with the sale agreement confirming such a sale but to date it has not been supplied. For that reason counsel argued that the transaction between the 1st Defendant and 2nd and 3rd Defendant was caught by Section 3(3) of the Law of contract Act. In support of that contention Plaintiffs' counsel relied on the case of Machakos District Co-operative Union Limited v Philip Nzuki Kiilu CA No.112 of 1997. Further the Plaintiffs' counsel stated that when the Plaintiff came in this present action that they made a full disclosure of a previous suit and therefore, they cannot be said to have failed to make maximum disclosure. He stated that had they failed to make that disclosure the court would have been entitled to grant the prayers sought by the Defendant. To support that contention that a party coming to court for exparte orders requires to make full and frank disclosure of all material facts, the Plaintiff's counsel relied on the case of The Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Limited CA No.50 of 1989. Plaintiffs' counsel further argued that Section 60 of Transfer of Property Act allowed multiplicity of actions to a party and further that such actions could not be faced with a plea of res judicata. To support that Plaintiffs' counsel quote from the case of Uhuru Highway Development Limited v Central Bank of Kenya & 2 others CA No.36 of 1996 as follows:-

"Whilst section 60 of the Transfer of Property Act, envisages a limited multiplicity of suits without the application of the doctrine of res judicata, it cannot be correct to say that in such a suit an infinite number of chamber applications seeking an injunction to stop the statutory sale, can be filed".

I confirm that I have gone through the Chamber Summons in HCCC No.402 of 2006 and the Chamber summons in this matter. I find that in the present Chamber Summons there are new issues that are raised that are not in the previous application. The first one relates to the sale agreement not being produced to the Plaintiff. The Plaintiff relied on the case of Machakos District Co-operative Union Limited v Philip Nzuki Kiilu CA No.112 of 1997. Looking at that case it is undoubtedly clear that provisions of that section in Contract Act could only be invoked by a party to the contract of disposition of an interest in land. The Plaintiff was not a party to the contract between the 1st Defendant and the 2nd and 3rd Defendant. That as it may be the Plaintiff did not inform the court why that alleged new issue was not raised in the first application for injunction. The other issue that the Plaintiffs raised in this present application is a prayer for estoppel against the 1st Defendant who the Plaintiffs said had agreed to stop the sale of the charged property to allow the Plaintiffs to enter into negotiations. That issue was not also explained as to why it was not raised in the first application. The Plaintiffs also made a claim of fraud apparently perpetrated by the Defendants against themselves. That issue also ought to have been raised in the first application.

I have noted both application in the two actions and I am of the view that they are indeed caught by the doctrine of *res judicata* particularly explanation (4). The *locus classicus* of that aspect of *res judicata* is the judgement of Wigram VC in Henderson v Henderson (1843) Hare 100, 115 where the Judge says as follows:-

"Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even

accident omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgement, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time".

The Plaintiffs' application in HCCC 402 of 2006 was fully argued before the court and a ruling was eventually delivered when the injunction application was dismissed. That dismissal was not affected by the withdrawal of the suit. The discontinuation of that suit did not in way affect the ruling of this court and that ruling continues to subsist. That certainly was the holding of Court of Appeal case No.136 of 1996 (Unreported) Commercial Exchange Limited and Francis Njoroge Mwangi v Barclays Bank of Kenya Limited. In that case parties had reached a consent where the Plaintiff was to make certain payment for an order of injunction to subsist. The Plaintiff failed to make that payment and instead chose to withdraw the action and filed a fresh action where the previous suit and orders were not disclosed. This action was described by the Court of Appeal as 'legal ingenuity'. The court held that the consent orders in the previous withdrawn suit subsisted even after the withdrawal of the suit. Similarly this court's finding is that the ruling made by the court in HCCC 402 of 2006 subsists and continue despite the withdrawal of the suit. I am therefore, of undoubted view that the present application dated and filed on 21st November, 2006 is *res judicata* to the Chamber Summons filed in HCCC 402 of 2006 which was dated 24th July, 2006. The orders of this court therefore, are as follows:-

(1) That the amended Chamber Summons dated 21st November and filed on 23rd November, 2006 is hereby struck out with costs to the Defendants.

(2) That the Chamber Summons herein dated and filed on 21st November, 2006 is hereby dismissed with costs to the Defendants for being *res judicata* to the Chamber Summons filed in HCCC 402 of 2006 dated 24th July, 2006.

MARY KASANGO

JUDGE

Dated and delivered on this 21st day of December, 2006.

MARY KASANGO

JUDGE