



**Rono v Paramount Bank Limited & 3 others (Civil Case
E11 of 2021) [2022] KEHC 10310 (KLR) (22 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 10310 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE E11 OF 2021
OA SEWE, J
APRIL 22, 2022**

BETWEEN

ALEX KIPCHIRCHIR RONO PLAINTIFF

AND

PARAMOUNT BANK LIMITED 1ST DEFENDANT

S.M. GATHOGO T/A VALLEY AUCTIONEERS 2ND DEFENDANT

LIZANO LIMITED 3RD DEFENDANT

JACKSON MANDAGO 4TH DEFENDANT

RULING

1. Before the Court for determination is the Notice of Motion dated 21st June 2021. It was filed pursuant to Section 3, 3A and 3B of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order I Rule 10, Order 2 Rule 15(1)(a) and (2) of the *Civil Procedure Rules*, 2010, for orders that:
 - (a) Spent;
 - (b) The suit against the 4th defendant be struck out for non-disclosure of any cause of action or any reasonable cause of action against the 4th defendant;
 - (c) The 4th defendant be awarded costs of the application and that of the entire suit;
2. The application was premised on the grounds that, vide a Further Amended Plaintiff dated 6th May 2021, the plaintiff seeks, inter alia, a declaration and a permanent injunction on the basis that the intended exercise of the statutory power of sale is a nullity; yet the body of the Plaintiff does not contain any particulars to form the basis for those prayers as against the 4th defendant. It was further contended that there was no privity of contract involving the 4th defendant, as he was neither a borrower nor a chargor.



3. The plaintiff filed a response to the application by way of a Replying Affidavit, sworn by him on 7th July 2021. He averred that he is the registered owner of Land Parcel No. Eldoret Municipality/block 7/190 and that in or about March 2018, he was at his home in Kuinet when he received a phone call from the 4th defendant; that the 4th defendant requested him to go and see him in his office with a copy of his Title Deed for the suit property; and that he acceded to the request as the 4th defendant was his personal friend. He further stated that the 4th defendant then explained to him that he was in urgent need for Kshs. 8,900,000/=; and had approached the 1st defendant through the 3rd defendant for a facility; and that all he needed was a guarantor for the facility.
4. The plaintiff further averred that the 4th defendant explained to him the purpose of the loan; which was to buy fertilizer for sale at a profit; and that he was agreeable to providing the needed guarantee on the basis of their friendship with the 4th defendant. He was then introduced by the 4th defendant to the directors of the 3rd defendant before going to the branch office of the 1st defendant to execute the requisite instruments. He further confirmed that the funds were thereafter released in the names of the 3rd and 4th defendants. He also stated that although he was told by the 4th defendant that the application was for a facility of Kshs. 8,900,000/=, he was shocked to later learn that the loan advanced was in fact in the sum of Kshs. 15,000,000/=.
5. The plaintiff therefore asserted that the 4th defendant is the principal debtor alongside the 3rd defendant; and therefore is a proper and necessary party to these proceedings. In the premises, it was the view of the plaintiff that the participation of the 4th defendant is necessary; and therefore that the application has been made by the 4th defendant with an ulterior motive of avoiding the rigors of a full trial. He stressed the importance of having all the issues probed and determined by the Court; and explained that this was why he applied for the joinder of the 4th defendant vide his application dated 3rd May 2021; which application was allowed on 6th May 2021. The plaintiff annexed copies of the title for the suit property and the account opening forms for the loan account in proof of his assertions.
6. The application was canvassed by way of written submissions, pursuant to the directions issued herein on 6th July 2021. Counsel for the 4th defendant, in his written submissions filed by M/s G&A Advocates LLP, proposed a single issue for determination, namely: whether the main suit raises any cause of action or any reasonable cause of action against the 4th defendant. He referred to *Investments & Mortgages Bank Limited v Nancy Thumari & 3 Others* [2015] eKLR as to the meaning of “cause of action”. He urged the Court to find that, nowhere in the Complaint has the plaintiff attributed any fault or acts of omission to the 4th defendant. The case of *Susan Rokih v Joyce Kandie & 6 Others* [2018] eKLR was also cited by counsel for the 4th defendant to buttress his arguments. Counsel accordingly prayed that the application be allowed and that the suit against the 4th defendant be struck out as prayed.
7. Mr. Kibii for the plaintiff opposed the application, contending that the entire application is incompetent, devoid of merit and amounts to an abuse of the process of the Court. He explained that the 4th defendant was joined to these proceedings on the application of the plaintiff; and that the order for joinder was granted on 6th May 2021. He explained that the Court was satisfied with the grounds given for the joinder; and therefore in so far as that order for joinder remains in place, the application is misconceived. Counsel consequently proposed the following issues for determination:
 - (a) Whether the 4th defendant is a necessary party in these proceedings; and whether the suit against the 4th defendant should be struck out for failure to disclose a reasonable cause of action against him;
 - (b) Who should pay the costs of the application.



- (8) Mr. Kibii relied on Order 1 Rule 6 of the Civil Procedure Rules and *4MB Mining Limited v Minsak International (UK) Limited & 3 Others* [2018] eKLR to buttress his argument that, on the basis of the facts of this case, the plaintiff should be accorded an opportunity to ventilate his suit at a full hearing for a determination on the merits. He also relied on *D.T. Dobie & Co. (K) Ltd v Muchina* [1982] KLR eKLR, among other authorities, for the proposition that the power to strike out pleadings is one to be exercised sparingly and cautiously; and that the main consideration in such circumstances is whether the party concerned is a necessary party for the effectual and complete adjudication of all the questions involved in the suit.
9. Mr. Kipkogei for the 4th defendant filed Supplementary Submissions in response to the plaintiff's written submissions dated 16th September 2021. He reiterated the posturing that the 4th defendant was not privy to the loan agreement or the Charge executed by the plaintiff as security for that loan. At paragraphs 2.4 to 2.12 counsel respondent to each of the assertions made by the plaintiff against the 4th defendant and urged the Court to find that the cause of action against him cannot be founded solely on the basis of the account mandate of the 3rd defendant. Counsel relied on *GBM Kariuki v Nation Media Group Limited & 3 Others* [2012] eKLR to underscore his submission that the plaintiff has joined the 4th defendant to the suit with a view of gaining some collateral advantage; and therefore acted in abuse of the process of the Court.
10. I have given careful thought to the application as well as the pleadings and the written submissions filed by learned counsel. The background facts are not disputed and were well summarized by counsel in their submissions. Those facts are that, by an arrangement between the 1st defendant and the 3rd defendant, the 1st defendant advanced a loan facility to the 3rd defendant; which loan was guaranteed by the plaintiff vide a third party Charge. The plaintiff thereafter instituted this suit vide his Plaint dated 17th March 2021 against the 1st, 2nd and 3rd defendants. He alleged, at paragraph 7 thereof, that the 1st defendant had illegally and prematurely instructed the 2nd defendant to sell the suit property in exercise of the 1st defendant's statutory power of sale. He alleged that the amount claimed by the 1st defendant was disputed among other reasons. Accordingly, the plaintiff prayed for the following reliefs:
- (a) A declaration that the defendant's intended exercise of the statutory power of sale is a nullity coupled with a perpetual injunction restraining the defendants jointly and severally from selling, transferring or in any manner whatsoever dealing with the suit property.
 - (b) Costs and Interest.
11. The court record further confirms that, vide an application dated 3rd May 2021, the 4th defendant was enjoined to these proceedings on the ground that, he not only negotiated with the plaintiff for the provision of the collateral for the loan, but also that he was, at all times material to the suit, a signatory to the bank account that received the loan funds. The order for amendment of the Plaint and joinder of the 4th defendant was made on 6th May 2021. Thereupon, the plaintiff immediately filed his Further Amended Plaint by which the 4th defendant was brought on board as a party.
12. It is against the foregoing background that the 4th defendant filed the instant application; seeking that the suit against him be struck out for not disclosing any cause action against him. It is noteworthy that the application is expressed simply as having been filed under Order 2 Rule 15(1)(a) and (2) of the Civil Procedure Rules. This is significant for Rule 15(2) stipulates that:

“No evidence shall be admissible on an application under sub- rule 1(a) but the application shall state concisely the grounds on which it is made.”



13. Consequently, the instant application had no Supporting Affidavit accompanying it. That being the case, no Replying Affidavit ought to have been filed by the plaintiff in opposition to the application. His response ought to have been either by way of a preliminary objection or Grounds of Opposition, pursuant to Order 51 Rule 14(1) of the Civil Procedure Rules. Accordingly, in compliance with Order 2 Rule 15(2), and to ensure equality of arms, I will ignore the averments set out in the plaintiff's Replying Affidavit, including its annexures, and rely solely on the pleadings for the purposes of the instant application.
14. Order 2 Rule 15(1)(a) of the Civil Procedure Rules, under which the instant application has been brought provides that:
- “At any stage of the proceedings the Court may order to be struck out or amended any pleadings on the ground that:-
- a. it discloses no reasonable cause of action or defence in law;”
- (15) The principles guiding the exercise of discretion under the aforementioned rule were well-discussed in *D.T Dobie & Company (Kenya) Limited v Muchina (supra)* thus:
- “The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being an abuse of the process of the Court. At this stage the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral discovery tested by cross-examination in the ordinary way...”
16. These principles have been restated in a host of other decisions, including the authorities relied on by counsel herein; such as *Alumark Investments v Tom Otieno Anyango & 4 Others* [2018] eKLR; *Sarah Rokih v Joyce Kandie (supra)* and *Lavington Security Ltd v Consolidated Bank of Kenya & 3 Others* [2020] eKLR, which I have perused.
17. Thus, the 4th defendant's application is primarily hinged on the fact that he was neither the borrower nor guarantor in the transaction that gave rise to the instant suit. It was consequently his assertion that nowhere in the body of the Further Amended Plaintiff have particulars been given to form the basis of orders that would ultimately be directed his way. And, in response to this assertion, counsel for the plaintiff referred the Court to Paragraphs 5B and 8(b) of the Further Amended Plaintiff. Paragraph 5B states:
- “The plaintiff avers that the 1st defendant advanced a loan to the 3rd and 4th defendants herein and the plaintiff entered into a guarantee agreement limited to the tune of Kshs. 15,000,000/=.”
18. Similarly, at Paragraph 8(b) of the Further Amended Plaintiff, the plaintiff asserted that:
- “The 1st, 3rd and 4th defendants conspired and colluded and extended a loan of Kshs. 15 million shillings when the amount agreed upon was Kshs. 8,900,000/=.”
19. It is manifest therefore that there is indeed a cause of action evinced thereby against the 4th defendant; which the 4th defendant has already responded to in his Statement of Defence dated 28th May 2021, particularly at paragraphs 3-8 thereof. Needless to say that a reasonable cause of action is not necessarily



one that must succeed. In the D.T. Dobie case, a reasonable cause of action was defined to be an action with some chance of success when allegations in the plaint only are considered. Such a cause of action would invariably include a particular act on the part of the defendant which gives the plaintiff his cause of complaint, or the subject matter or grievance founding the action and not merely the technical cause of action (see Halsbury's Laws of England 4th Edition Vol 37 at paragraph 20). Hence, in D.T. Dobie, it was emphasized that:

“...no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward...”

20. And, in *Crescent Construction Co. Ltd v Delphis Bank Limited* [2007] eKLR, the Court of Appeal underscored the principle thus:

“...one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle...”

21. In the premises, and granted the plaintiffs assertions at Paragraphs 5B and 8(b) of the Further Amended Plaint, I am convinced that indeed, a reasonable cause of action has thereby been disclosed against the 4th defendant. It is noteworthy too that the joinder of the 4th defendant was done by consent on 6th May 2021. The parties must have been satisfied that he is a necessary party to the suit; and it is for that specific purpose that the Further Amended Plaint was filed.

22. It is for the foregoing reasons that I find no merit in the application dated 21st June 2021. The same is hereby dismissed with an order that the costs thereof be costs in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF APRIL 2022.

OLGA SEWE

JUDGE

