



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAJIADO

CIVIL CASE NO. 14 OF 2020

JOSPEH NJOROGUE MBUGUA (Suing under

Power of Attorney P/A 74/5/19).....PLAINTIFF/APPLICANT

VERSUS

NATIONAL BANK OF KENYA LTD.....RESPONDENT

RULING

1. This ruling disposes of two applications, dated 12th August 2020, seeking to strike out the plaint for not disclosing a reasonable cause of action, (The first application) and that dated 7th October 2020, seeking leave to amend the plaint (The second application).

The First Application

2. The first application is brought under sections 1A, 1B, 3 and 3A of the Civil Procedure Act and Orders 2 rule 15 (1) (a) (b), (d); 9 rule 2(a); 19 rule 2 and 51 rule (1) of the Civil Procedure Rules (2010), seeking several order. The first order is for striking out the Plaint filed on 14th July 2020 for not disclosing a reasonable cause of action and being scandalous, frivolous, vexatious and an abuse of the court process. It further seeks an order that pending the hearing of the application (now-past,) the plaintiff/respondent, Joseph Njoroge Mbugua, be summoned for cross-examination on his affidavit sworn on 13th July 2020 and upon cross-examination, the court do make a ruling on whether to direct the police to charge him with perjury. The application is premised on the grounds on its bod on the applicant's affidavit sworn on 17th August 2020.

3. The grounds in support of the motion are, that; the registered owners of the suit property **Ngong/Ngong/8278** are Joseph Njoroge Mbugua and Anne Muthoni Mbugua and not the plaintiff/respondent; that the plaintiff/respondent is guilty of perjury for deliberately failing to disclose that the property is registered in other people's names; that the plaintiff/respondent averred that the registered proprietor of the property was Mary Anne Mumbi Gichu and swore in the verifying affidavit that the statements of fact contained in the plaint were true and correct which is not true.

4. The applicant further stated that the respondent had admitted to signing and delivering a discharge of charge and original documents to the chargor; that the respondent does not admit to losing the discharge of charge and original documents by the chargor in his chambers and, therefore, cannot place the burden of the lost documents on it; that only the chargor is entitled to claim for the documents and that the order sought against it to re-issue a discharge of charge is far-fetched. The supporting affidavit contains more or less depositions similar to the averments in the grounds in support of the motion.

5. The respondent filed a replying affidavit sworn on 6th October 2021. He deposed that he made disclosure relevant to the matters before court in his supplementary verifying affidavit sworn on 24th August 2020 in support of the Amended Plaint; that the depositions made in the applicant's affidavit of 17th August 2020 are argumentative; that the applicant's statement made at paragraph 4 (i) is scandalous and inadmissible and that contents of his paragraph 4(i) in his affidavit is well explained and clarified in his supplementary verifying affidavit. He also stated that the concerns raised by the applicant had been well explained in his subsequent verifying affidavit.

6. According to the respondent, the amended Plaint takes care of the applicant's concerns raised in the application and affidavit. In the respondent's view, the attack by the applicant is directed at the Plaint and its verifying affidavit as these documents no longer exist given that the plaint has been amended.

The Second Application

7. The second application dated 7th October 2020 is brought under Section 3A of the Civil Procedure Act and Orders 8 rules 3 and 5 and 51 rule (1) of the Civil Procedure Rules. It seeks leave to of court re-amend the plaint and that the further amended plaint be deemed to have been filed and served.

8. The motion is also based on the grounds on its face and the applicant's affidavit sworn on 6th October 2020. The grounds are, that the proposed amendments are necessary and essential for the just determination of the issues between the parties; that it is in the interest of justice, fair play and for the purpose of resolving the disputes once and for all to allow the application; that the proposed amendments are *bona fide* and relevant to the matters in issue and are not belated and that the respondent will not suffer prejudice if the application was allowed. The affidavit in support of this motion contains depositions more or less similar to the grounds on the face of the motion.

Submissions

9. The applicant filed written submissions dated 19th April 2021. Its main argument is that the respondent used an extinguished Power of Attorney (PA 74/5/19) donated by Mary Anne Mumbi Gichu in respect of parcel **No. Ngong/Ngong/8278**, to file the suit. To the applicant, the suit discloses no reasonable cause of action against it since as at 27th May 2020, the suit property belonged to **Joseph Njoroge Mbugua** and **Ann Muthoni Mbugua**. It argued that after the transfer of the property to the current owners, the Power of Attorney lost its value, was extinguished and could not be relied on to institute the suit. It argued that in law, the person entitled to the discharge of charge is the chargor who, in this case, is **Mary Anne Mumbi Gichu** and, therefore, the suit is null and void as the respondent lacked capacity to institute the suit and has no cause of action against it.

10. The applicant relied on ***D.T. Dobie & Co. Limited v Muchina*** [1982] KLR among other decisions urging the court to allow the application and strike out the suit.

11. The respondent filed written submissions dated 29th June 2021 on the applicant's application dated 12th August 2020. He argued that the amended plaint discloses a reasonable cause of action and that the power to strike out pleadings should be exercised sparingly. According to the respondent, since the discharge of charge was misplaced the prayers sought in the amended plaint are sound and therefore there is a cause of action. He also relied on ***Crescent Construction Co. Limited v Delphis Bank Limited*** [2007] eKLR.

12. The respondent also filed submissions in support of his application for leave to further amend his plaint. they are dated 12th February 2021 which the court has read.

Determinations

13. I have considered the twin applications, the grounds in support and those in opposition. I have also considered submissions on record and the decisions relied on.

14. The applicant moved this court to strike out the respondent's suit on grounds that it does not disclose a reasonable cause of action. The reason as far as it can be gleaned from the application and submissions, is that the suit was premised on a power of attorney that had been extinguished because the suit land, the basis of that power had already been transferred and, therefore, the power lost its worth.

15. The respondent argued that he disclosed materials relevant to the matters before court in his supplementary verifying affidavit in support of the amended plaint. He took the view that some of the applicant's depositions were argumentative and scandalous. He maintained that he explained and clarified all issues raised by the applicant in his supplementary verifying affidavit.

16. The power to strike out pleadings is a discretionary one and must be sparingly used. Although the law allows a party to apply to strike out pleadings at any stage of proceedings on grounds such as not disclosing a reasonable cause of action, being scandalous, frivolous or vexatious, the court must act to preserve the suit and allow parties to have their day in court if that would enhance the cause of justice rather than strike out the pleadings.

17. The applicant's argument is that the respondent's suit is not viable and calls for striking it out. This is because the respondent relied on an extinguished power of attorney to file the suit, making it a non-starter.

18. I have considered the application and perused the record. The respondent's claim, according to the amended plaint dated 24th August 2020, is for an order directing the applicant to re issue a discharge of charge over the suit property and in the alternative, an order authorizing the Deputy Registrar of the court to execute the discharge of charge. He also seeks a declaration that **Mary Anne Mumbi**, the donor of the impugned power, was until 26th May 2020 the registered owner of the suit property.

19. The applicant filed a defence dated 12th August 2020, denying the respondent's claim and contended that it was not responsible for the loss of the discharge of charge and was not under any obligation to replace it. As mentioned herein above, the respondent has also filed a motion for leave to further amend his plaint.

20. The jurisdiction to strike out pleadings being a discretionary one, must at all times be exercised sparingly. If the pleadings filed by a party raise even one bona fide triable issue, then the party must be given leave to defend (***Postal Corporation of Kenya v I.T. Inamdar & 2 Others*** [2004] eKLR) and a triable issue is not necessarily one that would ultimately succeed but it need only be bona fide, (***Olympic Escort International Co. Ltd. & 2 Others v Parminder Singh Sandhu & Another*** [2009] eKLR).

21. In ***Co-operative Merchant Bank Ltd. v George Fredrick Wekesa*** (Civil Appeal No. 54 of 1999) the Court of Appeal was clear that;

Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.

22. In Crescent Construction Co. Ltd v Delphis Bank Ltd (supra) the Court stated:

[O]ne 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 realisation 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. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.

23. Again in Yaya Towers Limited v Trade Bank Limited (In Liquidation) [2000] eKLR, the court expressed itself thus:

A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.

24. Madan, JA. emphasised in D.T. Dobie & Company Limited v Joseph Mbaria Muchina & Another [1980] eKLR, 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 for a court of justice ought not to act in darkness without the full facts of a case before it.

25. And in Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2019] eKLR, the Court of Appeal emphasised that:

The striking out of a pleading, has time and time again been described as draconian and an order of last resort. A court will therefore only resort to it, in its discretion, where it has properly addressed itself on the principles enumerated under Order VI Rule 13(1) (b) and (d) of the Civil Procedure Rules (now repealed), and is satisfied, upon assessment of the material before it that any of the grounds enumerated exists or do not exist.

26. The long line of decisions above demonstrates one thing; that the court should always allow a party the latitude to have his case heard and decided on merit unless it is so hopeless that even an amendment cannot rescue it.

27. A perusal of the respondent's pleadings and the relief he seeks cannot lead to a conclusion that it is hopeless, frivolous or vexatious. It seeks specific reliefs which are capable of being granted depending on the evidence to be placed before the court. It raises triable issues.

28. The fact that the applicant has challenged the soundness of the suit, that is not on its own a ground for striking out the suit as not raising a reasonable cause of action. The reasons given by the applicant for seeking to strike out the suit are not compelling to drive the respondent from the seat of justice and deny him an opportunity to be heard on the merits.

29. It must also be taken into account that the respondent filed his own application seeking leave to further amend his pleadings. Although the applicant has argued that the application for leave to further amend the pleadings is not merited and should be declined, the position in law is that a party can amend his pleadings at any stage before judgment. An amendment will, however, not be allowed if it will cause injustice to the other side or seeks to introduce a new cause of action.

30. The respondent has sought leave to further amend his pleadings to address any shortcomings that there may be in his suit. He has stated that the intended amendments are necessary and essential for the just determination of the issues between the parties. The applicant has not alleged that the amendment, if allowed, will cause an injustice to it or will introduce a new cause of action; is inconsistent with the original pleading or will entirely alter the nature of the claim, and demonstrate how.

31. In Eastern Bakery v Castelino [1958] EA 461, it was held that:

It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs

32. In Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago [1995] eKLR, the Court of Appeal observed that the power of the court to allow amendments is intended to determine the true substantive merits of the case and if a suit is capable of being breathed life into, it ought to be done provided the defendant's legal rights are not unduly compromised.

33. With the above principles in mind, and having considered the twin applications, the responses, submissions as well as appropriate decisions on the issues, the conclusions I come to are the first application should fail while the second application is for allowing.

34. Consequently, I make the following orders;

1. The application dated 12th August 2020 for striking out the suit is declined and dismissed.

2. The application dated 7th October 2020 for leave to further amend the pleadings succeeds and is allowed.

3. The further amended plaint shall be filed within fourteen (14) days from the date of this ruling.

4. Each party will bear their own costs for the applications.

DATED, SIGNED AND DELIVERED AT KAJIADO THIS 24TH DAY OF SEPTEMBER 2021.

E. C. MWITA

JUDGE