



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 198 OF 2014

CECILIA JEPKOSGEI SERGO

(Suing as Administratrix of the

estate of the late JACKSON KIPROP KIPKECH

Deceased) PLAINTIFF/APPLICANT

VERSUS

ATTORNEY GENERAL 1ST DEFENDANT

INSPECTOR GENERAL OF POLICE 2ND DEFENDANT

DANIEL MBURU 3RD DEFENDANT

EDWRD KOECH 4TH DEFENDANT

RULING

The plaintiff filed this suit against the defendants jointly and severally for various prayers set out in the plaint, following a fatal shooting of one Jackson Kiprop Kipkech who was her husband and a police officer. She blamed all the defendants for the death of her husband.

After service of summons to enter appearance the defendants filed statements of defence denying the plaintiff's claim. By an application dated 13th December, 2016 the plaintiff moved the court for orders that the statements of defence filed by the defendants be struck out or dismissed for being scandalous, frivolous, vexatious and or prejudicial, as they amount to a delay of a fair trial of the action, and are otherwise an abuse of the process of the court. It is her prayer that judgment be entered in her favour against all the defendants jointly and severally.

The grounds upon which the application is based are set out on the face of the application alongside a supporting affidavit sworn by the plaintiff. The 1st and 2nd defendants filed a replying affidavit and so did the 4th defendant. The plaintiff also filed a supplementary affidavit.

There are submissions which have been filed following a court order at the request of counsel on record. Several authorities have also been cited. The order sought by the plaintiff is discretionary and in addressing the subject, the court has to look at the cause of action, the pleadings thereof and the respective defences raised by the parties.

The general principle is that the court should endeavour to sustain a suit rather than dismissing it. This is to ensure that any party who approaches the court has his or her day in court. To drive a party out of the seat of justice should only occur where his case is so hopeless that it cannot be sustained under any circumstances. In relation to statements of defence, the applicant must show that no triable issues exist to justify a hearing. The bottom line however should be that, access to justice is open to all regardless of their positions in society.

Cases cited include **D.T. Dobie & Company Limited vs. Muchina & Another (1982) KLR 1, Pelican Haulage Contractors Limited vs. Hon. Attorney General (2012) e KLR. See also Fremar Construction Company Limited vs. Minakshi Navin Shah (2005) e KLR, Equitorial Commerical Bank Limited vs. Jodam Engineering Works Limited & 2 others (2014) e KLR.**

I have looked at the respective defences filed by the defendants herein alongside the plaintiff's plaint and asked myself whether or not they disclose any triable issues. The courts have variously defined a triable issue as one which raises a *prima facie* defence and which should be

allowed to go to trial for adjudication. At the same time, a defence which is a sham should not be allowed to consume judicial time and therefore should be struck out without delay.

The defences filed herein cannot be termed a sham or mere denial. Indeed, the plaintiff's application and in particular the grounds relied upon, are in the form of evidence which cannot be accepted at face value and therefore must be subjected to some test through cross-examination. I note that this application was filed on 14th December, 2016 after the plaintiff had filed issues for determination on 8th June, 2016. In the list of issues for determination, it is very clear that the defendants have raised substantial issues for determination and this can be discerned from the weight of questions under issues number 3, 4 and 5.

Guided by the cited provisions under which this application has been made, case law and principles of law, I am not persuaded that the defences should be struck out. The defendants, I find, have raised substantial triable issues and are entitled to their day in court.

This application has contributed to the delay in the final determination of this case. I note that the parties are yet to fully comply with Order 11 of the Civil Procedure Rules. I direct that the parties shall now comply with the said provisions within 30 days from the date of this ruling so that the main suit may be heard expeditiously on merit. The end result is that this application is dismissed and the costs shall be in the cause.

Dated, signed and delivered at Nairobi this 15th Day of February, 2018.

A. MBOGHOLI MSAGHA

JUDGE