



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 46 OF 2013

POLYCAP OKUMU OCHOLA.....1ST PLAINTIFF

GUARDFORCE SECURITY LIMITED.....2ND PLAINTIFF

VERSUS

DUBAI KENYA LIMITED.....1ST DEFENDANT

ZACHARIA BARAZA SIUMA T/A

SIUMA AUCTIONEERS.....2ND DEFENDANT

RULING

1. The 1st plaintiff on 23rd March, 2017 filed a Notice of Preliminary Objection to the effect that the 2nd defendant's Notice of Motion dated 4th May, 2015 offends the provisions of Order 2 rule (1)(d) of the Civil Procedure Rules, 2010 and amounts to an abuse of the court process.
2. The reason advanced for the said objection was that there is no separate cause of action arising on the part of the 2nd defendant who acted as an agent of the 1st defendant and the suit herein was dispensed with through a consent order dated 23rd July, 2013 where the plaintiff undertook to pay the amount of Kshs. 15 Million plus costs of the suit. The 1st plaintiff's Counsel prays that the application be struck out. The Counsel for the 2nd defendant filed grounds of opposition dated 24th April, 2017 to oppose the Preliminary Objection.
3. Mr. Oduor, Learned Counsel for the 1st plaintiff submitted that the application dated 4th May, 2015 is ill drawn and is an abuse of the court process as the respondent has no *locus standi* to prosecute the said application. He stated that the suit only involves the plaintiffs and the 1st defendant but the 2nd defendant was merely an agent of the 1st defendant.
4. He argued that Order 2 rule 15(1)(d) of the Civil Procedure Rules provide that at any stage of the proceedings, the court may make orders for striking out of pleadings for being an abuse of the court process. He stated that the suit between the 1st defendant and the plaintiffs was by consent settled on 26th July, 2013.
5. He further submitted that the plaintiffs were to pay Kshs. 15 Million and that upon full payment of the said amount the plaintiffs and the defendants would then consider the matter settled as against the defendants. He added that the amount of Kshs. 15 Million covered the entire cost of the suit. Counsel cited the case of **Peter George Anthony D'costa vs Attorney General and Another** [2013] eKLR where Majanja J., held that the process of the court must be used properly, honestly and in good faith.
6. It was argued by the 1st plaintiff's Counsel that the application dated 4th May, 2015 implies that the 2nd defendant intends to institute a second suit, but he has no *locus standi*. Counsel submitted that the provisions of Section 159(2)(b) of the Constitution provides that the court should dispense justice without delay and so does Section 3A of the Civil Procedure Act. He prayed for the application dated 4th May, 2015 to be struck out with costs.
7. Mr. Oledi, Learned Counsel for the 2nd defendant submitted that the Preliminary Objection did not raise a pure point of law but raised factual issues. He stated that Kasango J., gave directions in her ruling of 19th December, 2013, where she stated that the consent did not apply to the 2nd defendant and that its suit would subsist. He added that the consent recorded on 10th October, 2016 was between the plaintiffs and the 2nd defendant, wherein the application of 4th May, 2015 was marked as spent with costs being awarded to the 2nd defendant. He stated that the 2nd defendant's bill of costs is awaiting hearing.

8. In his rejoinder, Mr. Oduor submitted that as far as the order of 10th October, 2016 is concerned, the ruling of Kasango J stated that the costs of the 2nd defendant can only be ascertained at the conclusion of the suit filed against it and only if such costs were to be awarded to the 2nd defendant. He undertook to peruse the consent order of 10th October, 2016 referred to by Mr. Oledi.

ANALYSIS AND DETERMINATION

The issue for determination is if the application dated 4th May, 2015 is an abuse of the court process for offending the provisions of Order 2 rule 15(1)(d) of the Civil Procedure Rules, 2010.

9. Order 2 rule 15 of the Civil Procedure Act provides as follows:-

“(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

(a) It discloses no reasonable cause of action or defence in law; or

(b) It is scandalous , frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be

(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and petition.”

10. A perusal of the court file reveals that through a ruling delivered on 19th December, 2013, Judge Kasango was of the finding that a consent recorded on 23rd July, 2013 was between the plaintiff and the 1st defendant but did not include the 2nd defendant. She held that costs of the 2nd defendant could only be ascertained at the conclusion of the suit filed against it and only if such costs were awarded to the 2nd defendant. The said court declined to award the 2nd defendant costs and stated that it should seek first to conclude the case between it and the plaintiff.

11. Subsequently, on 10th October, 2016 Mr. Kithi for the plaintiff and Mr. Kakula for the 2nd defendant appeared before this court where they recorded a consent. The said consent was adopted as orders of the court. The consent order rendered the application dated 4th May, 2015, which forms the subject of the Preliminary Objection herein, spent.

12. It is therefore quite surprising that the 1st plaintiff who was represented in court by Mr. Kithi at the time of recording the consent on 10th October, 2016 went ahead to file a Notice of Preliminary Objection to the application dated 4th May, 2015, which was compromised vide the said consent order.

13. Contrary to Mr. Oduor's submissions, the Notice of Preliminary Objection dated 23rd March, 2017 and not the application dated 4th May, 2015 is the one that is an abuse of the court process as was submitted by Mr. Oledi, for the 2nd defendant. Mr. Oduor, seems not to have gained sight of the consent order of 10th October, 2016 at the time of arguing the Preliminary Objection and it is apparent that he was working at cross purposes with Mr. Steve Kithi, by arguing the Preliminary Objection herein.

14. In **Tana and Athi River Development Authority vs Jeremiah Kimigho Mwakio and 3 Others** [2015] eKLR, the Court of Appeal cited with approval the definition of abuse of the court process in **Beinosi vs Wiley** 1973 (SA 72) (SCA) at page 734 F-G) and adopted by the Court of Appeal in **Muchanga Investments Ltd., vs Safaris Unlimited (Africa) Ltd and 2 Others** [2009] eKLR as follows:-

“What does constitute an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of abuse of process. It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of the court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective.” (emphasis added).

15. It is my finding therefore that the 1st plaintiff's Counsel abused the court process by filing the Notice of Preliminary Objection dated 23rd March, 2017 in a matter where a consent order had issued touching on the application dated 4th May, 2015. The Preliminary Objection by the 1st plaintiff is therefore dismissed. I award costs to the 2nd defendant.

DELIVERED, DATED and SIGNED at MOMBASA on this 9th day of March, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

No appearance for the 1st plaintiff/applicant

No appearance for 2nd defendant/ respondent

Mr. Oliver Musundi - Court Assistant