



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 10 OF 2016

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

1. TAHIR SHEIKH SAID GRAIN MILLERS LIMITED

2. TAHIR SHEIKH SAID INVESTMENTS LIMITED

3. KENYA COMMERCIAL BANK LIMITED

4. GARAM INVESTMENTS LIMITED.....DEFENDANTS

R U L I N G

1. Before court for determination is the 2nd defendants Notice of Motion dated 10/7/2018 seeking orders that:-

i. “The Plaintiff’s suit against the 2nd Defendant be struck out for disclosing no reasonable cause of action in law against the 2nd Defendant.

ii. In any event, the name of the 2nd Defendant be struck out from the suit.

iii. The costs of the struck out suit and of this application be awarded to the 2nd Defendant to be borne by the Plaintiff”.

2. The grounds upon which the application is based are that the 2nd defendant is the registered owner of the parcel of land known as Mombasa/Block 1/316 on which it permitted the 1st defendant to erect a grain milling plant, which plant was part of security the 1st defendant offered to the plaintiff by a debenture dated 18/01/2018 pursuant to which the plaintiff seeks the recovery of Kshs.937,892,424 and USD 343,626.30.

3. In the plaint, the 2nd defendant contends, there is no allegation that the plaintiff lays a claim over the 2nd defendants property nor is there any allegation that the 2nd defendant owes to the plaintiff any sum hence there is no reasonable cause of action shown against the 2nd defendant to warrant its continued being pursued in these proceedings.

4. In opposition to the application, the plaintiff filed a replying affidavit sworn by one EUSTACE NYAGA whose gist is that the application has been filed by an advocate not properly on record and further that there are affidavits sworn in this suit and another suit to the effect that the second defendant owns the grain milling equipment with the 1st defendant.

5. Parties further filed written submission citing decided cases which I have had the benefit of reading. After reading the rivaling papers and submissions, I take the view that the only question for courts determination is whether or not the plant a filed revealed a cause of action against the 2nd defendant. The Application is evidently brought pursuant to Order 2 Rule 15(1) (a) and as no evidence by an affidavit has been offered.

6. In such case the court look no further than the plaint to satisfy itself if a cause of action is revealed. I have carefully perused the plaint dated 18/01/2016 and I have noted that beyond the descriptive paragraphs, the 2nd defendant is mentioned twice in the body of the plaint at paragraphs 17 and 20 (ii) and so mentioned in the passing without any allegation of misdeed or wrongdoing made. Even the four (4) substantive prayers made, none is directed at the 2nd defendant.

7. That being the position, I do consider that at trial no wrongdoing will be capable of proof against the 2nd defendant just as much as no remedy would be capable of grant against that defendant. It is not enough that the 2nd defendant would have said in an affidavit pursuant to some application in this file and in another file that it is interested in the equipment. Such affidavits are not part of the plaintiff's pleadings. The dispute as pleaded by the plaintiff is clearly made against persons other than the 2nd defendant and that alone is enough to say that there is no reasonable cause of action against the 2nd defendant. It shall serve no purpose to maintain the 2nd defendant in the suit when no allegation is made against it and no remedy is sought against it.

8. I therefore accede to the application and direct that the plaintiffs suit against the 2nd defendant be struck out and the 2nd defendant excluded from further proceedings in the matter.

9. I award the costs so far incurred to the 2nd defendant to be paid by the plaintiff.

Dated and delivered at Mombasa this 21st day of December 2018.

P.J.O. OTIENO

JUDGE