



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL DIVISION
HIGH COURT CIVIL CASE NO. 404 OF 2011

ROCHMAN INVESTMENTS LIMITED.....1ST PLAINTIFF

TRADECOM HOLDINGS LTD.....2ND PLAINTIFF

VERSUS

DANIEL GICHURU NJUGI T/A

GICHURU & GICHURU ADVOCATES.....DEFENDANT

RULING

1. This ruling is in respect of two applications. The application dated 13th September, 2012 seeks orders that:

i. the Honourable court be pleased to strike out the defendant's amended defence dated 4th November 2011 and filed on 9th November, 2011 and enter judgment in favour of the Plaintiffs as prayed for in the plaint.

ii. That the costs of this application and suit be borne by the defendant.

2. The application is predicated on the grounds stated in the application and is supported by the affidavit sworn by John Nyoro Wairumbi, a director of the plaintiffs' companies. It is stated that the defence herein is a mere denial meant to prejudice the expeditious disposal of the suit and amounts to an abuse of the court process. It is stated that the Defendant has in his defence and other pleadings admitted the Plaintiffs' claim.

3. The Plaintiffs' case is that the Defendant was their advocate in a transaction for the purchase of land parcel No. Kajiado/Kitengela/2983 at the sum of Ksh.6,250,000/=. Following the purchase the Title Deed to the property turned out to be a forgery. The Plaintiffs ended up reporting the matter to the police and to the Law Society Disciplinary Committee. (hereinafter Disciplinary Committee)

4. The Plaintiffs have exhibited the sale agreement dated 17th December, 2009 and other documents in support of their claim as follows:

- Copy of cheque for the deposit of the 10% of Kshs.625,000/=.

- Receipt for payment of the balance of the purchase price of 5,575,000/= plus Ksh.50,000/= for

disbursements.

- Receipt for payment of Ksh.142,000/= to cover disbursements and legal fees.

5. It was further averred that the Plaintiffs paid the sum of Ksh.40,000/= as commission to one Margaret Waithera Njugi, the Defendant's mother, Ksh.299,531/= as legal fees in the matter before the Disciplinary Committee and Ksh.600,000/= to the surveyor for the subdivision of the land.

6. The Plaintiffs have further contended that on 18th July, 2011 the Defendant was found guilty of professional misconduct by the Disciplinary Committee and convicted accordingly. That the Defendant made proposals for payment in a bid to settle the Plaintiffs' claim but only made a payment of one installment of the Ksh.500,000/= then defaulted and was subsequently struck off the roll of advocates.

7. In opposition to the application, the Defendant filed the replying affidavit herein sworn on 19th October, 2012. The agreement between the purchaser and the vendor is admitted together with the payments of the purchase price plus Ksh.50,000/= and Ksh.142,000/= disbursements and legal fees. The payment of Ksh.40,000/= commission on behalf of Margaret Waithera Njugi is denied. Payments made to the surveyor and to the advocate who represented the Plaintiffs before the Disciplinary Committee are also denied.

8. The Defendant further deponed that the Disciplinary Committee gave him six months within which to comply with its findings and forwarded the file to the Registrar of the High Court for further action. That consequently, this suit is an attempt to short circuit the process. The Defendant made reference to his pending suit in HCC Mks 226/2011 involving the same transaction and also referred to his defence herein and stated that the refund of Ksh.142,000/= was made in fulfilment of his professional and moral obligation and that the payment of the sum of Ksh.500,000/= was made on a "without prejudice" basis. The payment of Ksh.299,531/= to the Advocates who prosecuted the complainant before the Disciplinary Committee and the payment of Ksh.600,000/= for subdivision of the land is denied.

9. The Defendant also filed the application herein dated 20th June, 2016 which seeks orders that the Plaintiffs' suit be struck out with costs. It is stated in the supporting affidavit that the Defendant has since complied with the judgment of the Disciplinary committee and paid the outstanding amounts to the Plaintiffs. That the interest of Ksh.2,250,000/= assessed by the Disciplinary committee was later quashed by the High Court Nbi. JR Misc. Appl. No. 425/2013. The Defendant deponed that the allegations of negligence have been determined by the Disciplinary Committee and the Defendant having complied with the orders of the Disciplinary Committee and paid, the matter is now *res judicata* and therefore the suit is frivolous, vexatious and an abuse of the court process.

10. The Plaintiffs filed the grounds of opposition dated 28th June, 2016 which state that the Defendant's application is misconceived and devoid of merit, frivolous, vexatious and an after thought.

11. During the hearing of the two applications the parties opted to have the same disposed of by way of written submissions.

12. Learned counsel for the Plaintiffs submitted that the Defendant having paid the principal amount, there are no issues to go on trial and that the defence ought to be struck out and judgment entered for the Plaintiffs. That the suit herein was filed for the recovery of the amount of money lost by the Plaintiffs plus interest and costs whereas the Disciplinary Committee did not adjudge on the amount lost but convicted the Defendant and gave him an opportunity to make amends and refund the Plaintiffs the amount lost. The Plaintiffs urged the court to allow its case on the claim for costs and interest and urged the court to dismiss the application by the Defendant.

13. The learned counsel for the Defendant submitted that the defence raises triable issues to wit whether proceedings of the Disciplinary Committee and satisfaction of the judgment therein bar the Plaintiffs' suit herein; whether the determination of the claim for professional negligence bars the Plaintiffs from

litigating the same complaint before this court and who between the Defendant and the Third Parties are liable for the money lost by the Plaintiffs. According to the Defendant, the Plaintiffs' suit is *res judicata*.

14. The principles of the law applicable in an application for the striking out of pleadings were well set out in the case of **D.T.Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR**. Although the court has an inherent jurisdiction to dismiss a case which is scandalous, frivolous, vexatious and an abuse of the court process, it's a drastic remedy which ought to be exercised sparingly only in plain and obvious cases when it is clear that the action cannot succeed or is in some way an abuse of the court process. The parties cannot be driven out of the seat of judgment unless the case is unarguable.

15. As stated by Madan, J in the case of **D.T.Dobie (supra)**:

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

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.”

16. From the submissions of both parties herein, it is clear that the outstanding claim herein is for costs and interest. The Defendant's contention that he has paid the sum of Ksh.6,392,000/= to the Plaintiffs is not denied. The Defendant has exhibited his letter dated 14th November, 2012 addressed to the Plaintiffs' counsel which reflects that the Defendant remitted the sum of Ksh.6,392,000/= in respect of the purchase price, Ksh.142,000/= paid as advocates fees and an additional sum of Ksh.50,000/= paid as costs of the proceedings before the Disciplinary Committee.

17. Although the Plaintiffs' case is for a sum of Ksh.7,353,651/= which includes the sum Ksh.6,392,000/= already refunded, the Plaintiffs' in their submissions have stated that the only outstanding claim is for interest and costs. My understanding of the Plaintiffs' submissions is that the claims for Ksh.20,120/= for stamp duty, Ksh.40,000/= commission allegedly paid to Margaret Waithera Njugi, Ksh.600,000/= costs of the survey and subdivision and costs at the Disciplinary Committee of Ksh.299,531/= have been dropped.

18. The Defendant's aforesaid letter dated 14th November, 2012 which forwarded the cheques to the Plaintiffs in full and final payment came in after about one year and two months following the institution of the suit herein. The filing of the complaint before the Disciplinary Committee did not bar the Plaintiffs from the filing of this suit. With the payment of the sum in respect of the complaint before the Disciplinary Committee, the Defendant's case which is pending in HCC Mks 226/2011 is of no consequence to the Plaintiffs' case herein. The Plaintiffs are not parties in HCC Mks 226/2011. Any intentions of bringing in Third Party proceedings herein has been overtaken by events as far as the Plaintiffs herein are concerned as the Defendant has already paid the principal amount. In any event the Defendant has sued the Third parties alluded to. That is Paul Nyaga Kanyoi, Henry Angwenyi Araka, Cyrus Njogu Mburu, Margaret Waithera Njugi and John Nyoro Gathayo in HCC Mks 226/2011.

19. It is not in dispute that the award of costs of Ksh.2,250,000/= made by the Disciplinary Committee was quashed in Nbi. JR Misc. Appl. 425 of 2013 on 10th December, 2014. The judgment in the said Judicial Review proceedings reveals that the imposition of payment of interest in the sum of Ksh.2,250,000/= made by the Disciplinary Committee was quashed as it was made without any legal basis. The Plaintiffs' case in respect of the interest on the sum awarded by the Disciplinary Committee remained undetermined. The Plaintiffs' claim is therefore not *Res judicata*.

20. With the Defendant's admissions in respect of the payment of Ksh.6,392,000/= and with the Plaintiffs' admission that the only issue left outstanding herein is the question of interest and costs, there

is no case herein which merits going on trial. The Plaintiffs are entitled to the interest and costs on the said amount. Consequently, I allow the Plaintiffs' application with costs. The Defendant's application is dismissed with costs. Judgment is hereby entered for the plaintiffs on interest at court rates on the sum of Ksh.6,392,000/= from the date of filing suit to the date of payment in full. Costs of the suit to the Plaintiffs.

Date, signed and delivered at Nairobi this 24th day of July, 2017

B. THURANIRA JADEN

JUDGE