



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 550 OF 2011

DR. PETER G. WILDRED NJIRI PLAINTIFF

VERSUS

DANIEL NDUNGU

P/a D. NDUNGU & CO. ADVOCATES 1ST RESPONDENT

RULING

The plaintiff herein filed a suit against the defendant claiming a sum of Kshs.10, 000,000/= which he deposited with the defendant for purchase of land that eventually turned out to be a fraudulent transaction. The defendant is said to have presented himself to the plaintiff as the advocate detailed to execute a transaction relating to two parcels of land and offered to act for both the vendor and purchaser who is the plaintiff herein.

It eventually transpired that the registered vendor was not selling the said property to anyone, leave alone the plaintiff. As at that time the plaintiff had deposited the sum of Kshs. 10,000,000/= for onward transmission to the vendor.

The plaintiff then made a demand to the defendant for refund of the said money by reporting to the police, but to date the defendant has failed and or refused to refund the said money hence this suit. This money was paid on 20th April, 2011 and remains unpaid to date.

The defendant filed a defence denying the plaintiff's claim and asked that the suit be dismissed with costs.

There is now before me an application by way of Notice of Motion dated 10th and filed on 17th February, 2012 under Order 2 Rule 15 (b) (c) and (d) of the Civil Procedure Rules seeking an order that the defence filed herein be struck out and judgment entered as prayed in the plaint.

The application is supported by an affidavit sworn by the plaintiff and grounds set out on the face of the application. The record does not bear any reply by the defendant although there is proof that the application was served upon him.

However, the defendant had filed an application by way of Notice of Motion dated 6th November, 2012 seeking orders that this case be stayed because there was a criminal case and Advocates Disciplinary Tribunal case that had been filed against him and were pending determination.

That application was heard by Onyancha J who dismissed the same on 24th September, 2014 holding that

it was misguided and without merit. When the present application came up for hearing on 4th October, 2017 the defendant was absent, but having confirmed that he had been served the court elected to hear counsel for the plaintiff.

Order 2 Rule 15 (1) (b) (c) and (d) states 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) ...

(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 be entered accordingly, as the case may be.”

I have looked at the pleadings herein starting with the plaint and annexures thereto, the defence and amended defence filed by the defendant, the application which was filed by the defendant resting with the present application. I have also gone through the submissions filed by counsel for the plaintiff on 19th June, 2013.

The order sought by the plaintiff if granted will drive the defendant from the seat of justice. It is an order that the courts are cautious to grant except in clear cases. It is also an accepted principle that the courts should endeavour to sustain a suit rather than dismiss it however weak that case may be.

The pleadings expose the defendant as an officer of the court who has no regard whatsoever for his name or profession. He even has the audacity to file a defence where it is clearly evident that the transaction he presided over was a fraudulent endeavour for personal benefit. He received the money paid by the plaintiff knowing or having reason to know that the vendor of the subject matter was not selling the property. He went ahead to draw an agreement purporting to commit the plaintiff to the transaction. He deposited the money into an account of a company owned by him which was never transferred to the alleged vendor. There is also evidence that the owner of the property was not selling that property and this was a scheme created by the defendant for personal gain.

Over a period of 7 years he has denied the plaintiff’s claim notwithstanding clear evidence that this was a fraudulent transaction. It will be noted that when the defendant was presiding over this transaction, according to the evidence, he had not taken out a practising certificate. This was contrary to the clear provisions of the Advocates Act which governs the practice of law in this country and which the defendant knew.

Bearing all these factors in mind, I have no doubt that the plaintiff’s application is well merited because the statement of defence is not only intended to delay the fair trial of the case, but is prejudicial to the plaintiff’s right before the court, and is indeed an abuse of the process of court. There are no triable issues that require a full trial and therefore the plaintiff’s application must succeed.

The statement of defence filed by the defendant and subsequently amended is hereby struck out and judgment entered in favour of the plaintiff in the sum of Kshs. 10,000,000/= plus costs of the suit and this application.

The plaintiff claimed interest at commercial rates of 20% per annum from 20th April, 2011 until payment in full. The defendant had withheld the plaintiff’s money from the date it was deposited with him knowing very well that he was not entitled to do so. The claim for interest at commercial rates may not

be faulted in the circumstances of this case and the court considers it merited.

Orders accordingly.

Dated, signed and delivered at Nairobi this 21st Day of November, 2017.

A. MBOGHOLI MSAGHA

JUDGE