



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 117 OF 2015

SEBORGA LEISURE LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

THE BOARD OF TRUSTEES

NATIONAL SOCIAL SECURITY FUNDDEFENDANT/APPLICANT

RULING

By dint of a plaint dated and filed on 20th March, 2015 the plaintiff sued the defendant claiming several reliefs arising from its eviction by the defendant from premises wherein it was the tenant, while the defendant was the owner and landlord. It is the plaintiff's case that the eviction was without notice or service of any court order and therefore illegal and malicious.

Following the eviction the plaintiff pleaded that it had incurred loss and damage and therefore claimed compensation therefor.

The loss said to have been suffered has been quantified and in addition the plaintiff claimed general damages for breach of contract and tenancy terms and relationship. There is also a claim for damages on account of defamation and public embarrassment resulting from the defendant's action. The plaintiff has also prayed for interest and costs.

The defendant filed a defence in which all the allegations by the plaintiff have been denied, and added that the issues being raised by the plaintiff have been canvassed and determined in another suit at Mombasa being **ELC No. 29 of 2013**, whereby the defendant herein was the plaintiff while the plaintiff in this case was the defendant. In that case therefore, the issues raised in the present case are *res judicata*.

Following the pleadings the defendant filed an application by way of Notice of Motion dated 6th and filed on 10th November, 2015 seeking the dismissal and or striking out of the plaintiff's suit as it does not disclose any reasonable cause of action against the defendant. The application is brought under Sections 1 A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules.

The grounds upon which the application is based are set out on the face of the application. The plaintiff opposes this application and has filed grounds of objection to the effect that the motion does not disclose any valid ground or reason for the orders sought, and therefore should be dismissed. It is further contended that no affidavit has been sworn by either the advocate on record nor the applicant in support of the application.

Significantly, the plaintiff states that the issues raised in the present suit are different from those in **ELC No. 29 of 2013** as there is a reasonable cause of action and this matter should therefore be set down for hearing and decided on merit.

Upon directions by the court, both counsel filed written submissions and have cited some authorities.

Order 2 Rule 15 of the Civil Procedure Rules reads as follows,

“15. (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.”

The plaint relating to **Elc No. 29 of 2013** is part of the documents annexed to the defendant’s defence in this case. Paragraph 10 of the said plaint reads

“10. The plaintiffs claim against the defendant is for vacant possession.”

The substantive prayer in that plaint was vacant possession alongside costs of the suit. In the case of **Kenya Airports Authority Vs Queen Insurance Agency (2001) KLR** page 441 the court had occasion to deal with a similar application. The court cited the 12th Edition of Bullen and Leak’s, Precedents of Pleadings page 145 where it is stated as follows,

“A pleading or an action is frivolous where it is without substance or groundless or fanciful and it is vexatious where it lacks *bonafides* and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.”

The court continued to state,

“A pleading tending to embarrass or delay fair trial is described as a pleading which is ambiguous and unintelligible or which states immaterial matter and so raises irreverent issues which may involve expenses, trouble and delay and will prejudice the fair trial or the action and so is the pleading which contains unnecessary or irrelevant allegations. Abuse of the process of the court means in brief, misuse of the court machinery or process”.

In dealing with applications of this nature, guidance is to be found in many decided cases among them the case of **DT Dobie & Co. (Kenya) Limited Vs. Muchina (1982)KLR.** At page 9 the court stated as follows,

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the court itself is not usually fully informed as to deal with the merits without discovery, without oral evidence, tested by cross examination in the ordinary way.”

In the case of *Mosi Vs. National Bank of Kenya Limited (2001) KLR* page 333 Ringera J at page 335 cited Halsbury's Laws of England 4th Edition Vol. 36 at Paragraph 73 which states as follows,

“In judging the sufficiency of a pleading for this purpose, the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it, that the action is not maintainable or that an absolute defence exists the court will strike it out. A pleading will not however be struck out if it is merely demurrable, it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out the pleading should be exercised with extreme caution and only in a few cases.”

I have referred to the two complaints one by the defendant herein in the earlier case and the present by the plaintiff herein so as to show that the pleadings and prayers are not the same.

Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya provides as follows,

“7. No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under who they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

It cannot by any standards be said that the issues raised in the present suit have been decided by the earlier suit cited by the defendant. In any case the defence cannot be said to be absolute. It follows therefore that the issues raised by the plaintiff herein are not *res judicata*.

The plaintiff cannot be driven out of the seat of judgment before a hearing and should have its day in court. The short cut invoked by the defendant/applicant cannot be sustained by this court without resultant prejudice on the part of the plaintiff.

Applying the principles of law as enumerated in decided cases and considering the pleadings herein, I find that the defendant's application is misplaced and lacks merit. The same is therefore dismissed with costs to the plaintiff.

Orders accordingly.

Dated, signed and delivered at Nairobi this 27th Day of September, 2016.

A. MBOGHOLI MSAGHA

JUDGE