



REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL NO. 14 OF 2014

BETWEEN

DAMIANS MAGOLO OMOLO APPELLANT

AND

PETER ONYANGO ODERO RESPONDENT

(Being an appeal from the Ruling and Order of Hon. B.R.Kipyegon, RM in Ndhiwa Principal Magistrates Court Civil Case No. 30 of 2013 dated 28th October 2014)

JUDGMENT

1. The respondent sued the appellant for wrongfully impounding his 8 head of cattle valued at Kshs. 187,000/-. During the proceedings, in the subordinate court, the appellant invoked the provisions of **Order 8 rule 2(1) and (2), Rule 7(2) and (3), Order 2 rule 15(1), Order 51** of the **Civil Procedure Rules** and **section 3A** of the **Civil Procedure Act** and moved the court by way of Notice of Motion dated 17th July 2014 seeking the following orders;
 1. *That this Honourable Court be pleased to strike out the plaintiff's amended plaint.*
 2. *Further the Honourable Court be pleased to dismiss the plaintiff's suit in its entirety for non-disclosure of a reasonable cause of action against defendant/applicant.*
 3. *Costs of this application be provided for.*
2. In the course of hearing the application, the appellant abandoned prayer 2 and urged the court to strike out the plaint. The grounds set out on the face of the affidavit and in the supporting deposition were that the amended plaint was scandalous, frivolous and vexatious, that the amended plaint was bad in law, that the amended plaint was an attempt to raise a reasonable cause of action where there was none, that the procedure for amendment of pleadings as prescribed in the **Civil Procedure Rules** was not followed and that the plaintiff's claim was belated since the subject matter was already auctioned to satisfy a decree in **Civil Suit No. 73 of 2012**.
3. In response to the application, the respondent filed a notice of preliminary objection in which he contended that the application was *res-judicata* as a previous application had already been filed. In the grounds of opposition, the respondent stated the application was incompetent, bad in law, frivolous and vexatious. The respondent contended that the application offended **Article 159(2)** of the Constitution and that the claim raised a triable issue in that the appellant admitted that the respondent's cattle were auctioned albeit in a suit that he was not party to.
4. After hearing the parties, the learned magistrate dismissed the application on the ground that, in

fact, the cause of action in the original plaint remained unchanged as the amended plaint claimed the value of 8 head of cattle rather than return of 2 bulls referred to in the original plaint. He also found that there was no delay in presenting the application for amendment and that the appellant would have the right to respond to the amended plaint.

5. The appellant now appeals against the order dismissing the application to strike out the amended plaint on the grounds set out in the memorandum of appeal dated 4th November 2014. The thrust of the appeal, as submitted by Mr Nyauke, counsel for the appellant, was that the learned trial magistrate misapprehended the law governing amendment of pleadings in general, that the learned magistrate permitted the respondent to introduce new matters into the suit which substantially altered the original suit and that the learned magistrate failed to exercise his discretion judiciously so as to avoid miscarriage of justice.
6. The respondent did not participate in these proceedings despite being served with court process.
7. As this is an appeal against the exercise of discretion by the trial court, I remind myself of the dictum so clearly stated in the case of ***Mbogo v Shah [1968] E.A. 93,95*** as follows;

A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been misjustice.

8. I have examined the proceedings and what emerges is that the appellant had filed an application seeking to strike out the suit on the ground that it did not disclose a reasonable cause of action against the defendant. The application was dismissed by a ruling dated 5th March 2014. Thereafter, the respondent filed an application seeking to amend the plaint. The application was allowed on 25th March 2014 and leave granted for the respondent to file and serve the amended plaint and that the appellant do have corresponding leave to file the amended defence. It is the filing of the amended plaint that triggered the appellant's motion to strike it out.
9. Although the learned magistrate came to the correct conclusion in dismissing the application. It is clear that the tenor and substance of the application was to attack the leave granted to amend the plaint. In my view, the grant of leave settled the issues raised by the appellant and indeed the issue whether the amended plaint raised a new or different cause of action, was a matter that was considered or ought to have been raised by the appellant and considered at the time the application for leave was urged. In other words, the application, even though framed in the clothes of an application to strike out, was *res-judicata*. Furthermore, the court had previously declined to strike out the respondent's claim on the ground that it did not disclose a cause of action. It is this finding that led to the respondent filing the application to amend the plaint.
10. The appellant's application was in fact an abuse of the court process as the issues raised had already been considered in the previous application for amendment. In the result I dismiss the appeal.
11. As the respondent did not attend court, I direct that each party bear his own costs.

DATED and DELIVERED at HOMA BAY this 24th day of April 2015.

D.S. MAJANJA

JUDGE

Mr Nyauke instructed by Nyauke and Company Advocates for the appellant.