REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 101 OF 2014

1. MARANGU RUCHA

2. WALTER KONYA.....PLAINTIFFS

VERSUS

1. ST. MARY'S MISSION HOSPITAL NAIROBI

2. MARIE THERESA GACAMBI

3. TERESIA NDETO

4. CHRISTINE WANJIRU KAGUNYE

4. MARIA FELIX MWIKALI.....DEFENDANTS

RULING

1. Before court is the Defendants' notice of motion dated 11th September, 2014 in which they seek to have the Plaint dated 7th April, 2014 struck out. The grounds upon which the application is premised are that; the suit filed herein is frivolous or vexatious; that the suit is an abuse of process of the court and that this court has powers to grant the orders sought. In the Supporting Affidavit to the application, Sister Marie Therese Gachambi, the 2nd Defendant outlined the numerous proceedings that have been instituted and heard between the parties herein.
2. The Defendant's contended that there was filed **Nairobi Industrial Cause No. 538 of 2011, Sister Bernadette Muthina Nzioki & 7 Others v. St. Mary's Mission Hospital & 3 Others ('Cause No. *538 of 2011*')** in which an award was given in favour of the claimants therein. In that suit, the Plaintiffs and the 1st Defendant in this case were sued for unlawful termination of services; the court found that the Plaintiffs had terminated the services of the claimants without offering any reasons for so doing; the court therefore issued a permanent order of injunction restraining the Plaintiffs and a Mr. Seth Manera from in any manner interfering with the reinstatement and employment of the claimants or interfering with the claimant's right to occupy the residential houses provided by the claimants' employer. Apparently there was non-compliance with those orders whereby the claimants sought and obtained orders of committal against the Plaintiffs.
3. Pursuant thereto, the Plaintiffs filed **High Court Petition No. 337 of 2012** seeking conservatory orders by way of mandatory injunction or direction to compel the officer in charge, Industrial Area Remand Prison to release them from Industrial Remand G.K. Prison. The orders were granted on condition that each Plaintiff posts a cash bail of KShs. 1 Million. The Plaintiffs also filed **Petition No. 20 of 2012** before the Industrial court for a declaration that the order of committal to civil jail

made on 31st July, 2012 by that Court in Cause No. 538 of 2011 was unconstitutional and invalid. They also sought, in the alternative, a declaration that the order made on 7th May, 2012 granting the 4th to 11th Respondent's therein leave to commence contempt proceedings in Cause No. 538 of 2011 against them was made without jurisdiction and was therefore unconstitutional. That Petition was dismissed. The Plaintiffs thereupon filed an application for stay of the judgment in **Petition No. 20 of 2012** pending the hearing and determination of the intended appeal. That application was dismissed by the Court of Appeal on 24th January, 2014.

4. In view of the foregoing, Sister Marie Therese Gachambi averred that this suit is vexatious and scandalous and an abuse of the due process of this court. It was submitted on behalf of the Defendant that the Plaintiffs' suit is frivolous and vexatious since this suit is predicated upon recovery of costs expended to defend committal proceedings that have been decided upon by three competent courts. The Defendants cited **D.T. Dobie & Company (Kenya) Limited v. Joseph Mbaria Muchina & Another (1980) eKLR**, **Capital Construction Co. Ltd v. National Water Conservation and Pipeline Corporation (2013) eKLR**, **Henry Masaku Ngei & 2 Others v. Gatatha Farmers Ltd (2014) eKLR** and **Mary Wangari Mwangi v. Peter Ngugi Mwangi t/a Mangu Builders Ltd & 3 Others (2013) eKLR** in support of their contentions.
5. The Plaintiffs filed grounds dated 3rd March, 2015 in opposition to the application. The grounds were that the application is frivolous and vexatious; the application is an abuse of the process of the court; the application is misconceived as the facts pleaded therein do not support its tenor or prayers and that the application is completely bereft of any merit whatsoever. It was the Plaintiffs' contention that the facts set out by the Defendants do not support the application. That the facts set out in the Plaint was that the orders of contempt were made as a result of the negligence of the Defendants and that they had been put in an awkward position by the Defendants in this case. The Plaintiffs associated themselves with the case of **D.T. Dobie (supra)** submitting that there was similarity with this case since in that case, a party aggrieved by an attachment filed a separate suit which was struck out but the Court of Appeal was emphatic that a party cannot be barred from suing on wrongful attachment. It was contended that it is only the 1st Defendant who is the same in the other cases. They contended that striking out a suit is a drastic power to be used only in the clearest of cases.
6. The power to strike out pleadings has been held to be employed only as a last resort and even then only in the clearest of cases. Since the enactment of Section 1A and 1B of the Civil Procedure Act, Sections 3A and 3B of the Appellate jurisdiction and Article 159 of the Constitution, the courts strive to sustain rather than prematurely terminate suits by striking out pleadings. In the case of **D. T. Dobie & Company (Kenya) Ltd** (supra), Madan J as he then was held:-

"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."

7. To succeed in this application, it is upon the Defendants to establish that the Plaint is frivolous and vexatious or that it may prejudice, embarrass the fair trial of this suit. In **Mpaka Road Development Limited v. Kana (2004) 1 E.A. 124** Ringera Judge stated:-

"A pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matters which are irrelevant to the action or defence. In short, it is my discernment that a scandalous, frivolous or vexatious pleading is ipso facto vexatious."

8. In **Black's Law Dictionary 9th Edn, 2009, West** the terms frivolous and vexatious have been defined at pages 739 and 1701, respectively as follows:-

"Frivolous -Lacking legal basis or legal merit; not serious; not reasonably purposeful, and

Vexatious-Without reasonable or probable cause or excuse; harassing, annoying.

9. In their Plaint in this case, the Plaintiffs aver that it was the legal duty of the 1st Defendant acting through the 2nd, 3rd, 4th and 5th Defendants to reinstate the employees as directed by the Industrial court. That the 1st 2nd 3rd 4th and 5th Defendants negligently failed to carry out their duty to reinstate the subject employees as directed by the Industrial court and earlier affirmed by the 2nd Defendant thereby occasioning the Plaintiffs to be prosecuted for contempt of court and exposing the Plaintiffs to special loss and damage. I have read the ruling of Nzioka wa Makau J dated 31st July, 2012. In that ruling, the court noted that in the reply to the application for committal of the Plaintiffs herein for contempt, their counsel Mr. Mindo stated that the order in the judgment in Cause No. 538 of 2011 did not require the Plaintiffs to do more than they had done i.e. that the Plaintiffs had not interfered with the return of the claimant's work. The judge cited **Attorney General v. Times Newspapers Ltd and Another (1991) 2 All ER 398** stating that it was immaterial whether one was a party to a suit or not. That anyone who knowingly impedes or interferes with the administration of justice is guilty of contempt irrespective of whether they are named in the order or not. The court held that the Plaintiffs had knowledge of the order and thereby they could not escape liability.
10. While I agree with the Plaintiffs that the parties in the suits, **Cause No. 538 of 2011** and this suit were not the same, the Plaintiffs and the 1st Defendant herein were parties to **Cause No. 538 of 2011.** In that suit, the court found that the Plaintiffs failed to carry out their duty to reinstate the subject employees as directed by the Industrial court. The suit herein seeks a refund of the legal costs incurred in defending the contempt proceedings as well as damages. Those costs were ordered by a court of competent jurisdiction. The Plaintiff's defence to the contempt proceedings seem to have been that it was third parties and not themselves who had disobeyed the order. The court refused to agree with the Plaintiffs on that contention. In my view, the Plaintiffs could have invoked the provisions of Section 34 of the Civil Procedure Act and sought that court's decision on the issue they seek to raise in the present suit. If the Plaintiff's had felt that it was 3rd parties, in this case the Defendants, who should have been ordered to bear the legal costs of those proceedings, they should have raised that issue with that court. In my view, this suit falls within the provisions of Explanation No. 4 of Section 7 of the Civil Procedure Act which provides:-

"Explanation (4) – Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit."

11. One of the prayers which must have been sought by the Applicants in the application for contempt in Cause No. 538 of 2011 was costs. I see nothing which would have barred the Plaintiff from telling that court that the costs should not be borne by them, the Plaintiffs, but by the 3rd parties who are the Defendants in this suit. To entertain this suit and make a finding that the party liable to bear the costs of those proceedings are otherwise than had been ordered in that Cause, would in my view be tantamount to interfering with the findings made in that cause by a competent court.
12. In the case of **Henderson v. Henderson (1843) 67 ER 313 the court discussed the** doctrine of res judicata *as follows:-*

"...where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

13. From the aforegoing, I find that for this court to deal with the issue of culpability for costs in **Cause No. 538 of 2011** once again it shall be tantamount to sitting on appeal against the orders made in Cause No. 538 of 2011. That being the case, I find the application to be meritorious and I

am inclined to strike out the Plaint with costs to the Defendants.

It is so ordered.

Dated, Signed and Delivered at Nairobi this 22nd day of May, 2015

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A. MABEYA

JUDGE