



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

HCCC NO. 356 OF 2014

PAUL MAKOKHA OKOITI.....PLAINTIFF

VERSUS

EQUITY BANK

HON. ATTORNEY GENERAL.....DEFENDANTS

RULING

The Plaintiff has applied by **Chamber Summons dated 8th August 2014**(erroneously expressed to be brought under Section 3 and 3A of the Civil Procedure Rules) for orders that the statement of defence filed by the 1stDefendant be struck out and that judgment be entered against in favour of the Plaintiff as prayed in the plaint. He is acting in person.

The grounds for the application appearing on the face thereof are to the effect that –

- i. That the 1st Defendant in its defence has not addressed the issue that the account held by the Plaintiff was a joint account and could never have anticipate that a stolen cheque could be deposited there.
- ii. That the 1st Defendant though not the prosecutor was also involved in the malicious charge brought against him.
- iii. That the Defendants have no reasonable defence to the Plaintiff's claim.

The application is supported bythe Plaintiff'saffidavit sworn on 8th August 2014.

The Plaintiff's case is that he was arrested and maliciously prosecuted by the 2nd Defendant at the instigation of the 1st Defendant when a stolen cheque was deposited in his account held with the 1st Defendant. This account was maintained jointly with other account holders. He states that he did not have any reason to believe that suspicious activity was being carried out in the account. Furthermore, the criminal case instituted by the 2nd Defendant was subsequently withdrawn. The 1st Defendant has admitted this and he therefore believes that the defence should be struck out.

The application is opposed by the 1stDefendant through a replying affidavit sworn on 20th August 2014 by Florence Njuguna, its Legal Officer. It is her contention that the defence raises substantial triable issues of the details of the bank account held by the Plaintiff; whether a stolen cheque was deposited in that account; whether the Plaintiff together with his co-account holders were charged in court. Further, the

1st Defendant contends that the application is in the nature of reply to defence as it is argumentative and actually demonstrates that there are several issues for determination at trial. The 1st Defendant further contends that in view of the serious issues in dispute, there is doubt whether the Plaintiff is entitled to the judgment sought.

Order 2, rule 15 of the Rules under which this application ought to have been brought allows this court to order to be struck out any pleading on grounds that it discloses no reasonable cause of action or defence; or that it is scandalous, frivolous and vexatious; or that it may prejudice, embarrass or delay the fair trial of the action; or that it is otherwise an abuse of the court process.

The factors to be considered by the court were outlined in the case of **DT Dobie & Company (Kenya Limited) vs. Muchina [1982] K.L.R 1** thus -

“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 some semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward”.

In the matter before the court, the Plaintiff claims that the defence filed by the 1st Defendant discloses no reasonable defence. The 1st Defendant on its part asserts that it should be allowed to defend the suit as there are triable issues arising.

The role of the court within the purview of this application is not to test whether the defence would eventually successfully traverse the Plaintiff's suit. Rather, this court needs only evaluate if the defence raises plausible or triable issues as would require the suit to be submitted to full trial, or whether the defence is so hopeless that there would be no question to determine if the matter were to go to full hearing.

A number of issues arising that in my view are triable include; -

- ***Whether the Plaintiff was aware that a stolen cheque had been deposited in his account jointly held with others.***
- ***Whether the 1st Defendant instigated the arrest and charging of the Plaintiff in a criminal case with the offences of forgery, attempted stealing and stealing of the cheque leaf.***
- ***Whether the withdrawal of the charges conferred the right on the Plaintiff to lodge a civil suit against the Defendants for malicious prosecution.***

The defence by the 1st defendant raises triable issues which can only be resolved by conducting a full trial.

In the event, the Plaintiff's chamber summons dated 8th August 2014 fails and is hereby dismissed with costs. It is so ordered.

Dated and delivered at Nairobi this 21st Day of May, 2015.

A.MBOGHOLI MSAGHA

JUDGE