



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 423 OF 2012

WILLIAM CHARLES FRYDA.....PLAINTIFF/APPLICANT

VERSUS

JOHN CARDINAL NJUE.....1ST DEFENDANT/RESPONDENT

MARIE THERESE GACAMBI.....2ND DEFENDANT/RESPONDENT

R U L I N G

The application before the court for determination is the plaintiff's Notice of Motion dated on 3rd December 2012 seeking:

- 1. That the 1st Defendant's statement of defence dated 5th October 2012 be struck out.**
- 2. That the 2nd Defendant's statement of defence dated 5th October 2012 be struck out.**
- 3. The cost of this application be borne by the Defendants/Respondent.**

The application is supported by the affidavit of **William Charles Fryda**. He states that in his plaint he made specific and detailed assertion against the two Defendants and supported each assertion with documents. In response the Defendants denied the allegations without indicating their line of defence which according to the applicant is an abuse of the court process. The applicant also claims that failure to file the relevant statements, list and documents renders it impossible for this court to proceed to full hearing of the matter.

The application is opposed. The 1st Defendant/Respondent filed grounds of opposition stating that the deputy registrar order dated 2nd august 2013 dismissed the plaintiff's application dated 12th August 2014 therefore all applications emanating from this suit abated. The 1st Respondent claims that the issues raised in the current application are similar to those raised in the application which was dismissed by the deputy registrar. The Respondent argues that since he did not appeal, review or set aside the orders of the deputy registrar dated 2nd August 2013 the court can no longer entertain any further dealings because there must be an end to litigation.

The 2nd Defendant/Respondent also filed a replying affidavit. She claims that the defence is curable with a wider interest of justice. The Respondent admitted that her defence was filled without the witness statements. She explained that the Advocate filed the documents erroneously and the mistake should not

be visited upon by her. He stated that the advocates will seek leave of the court to have the statement filed and the accompany documents deemed be properly on record. The 2nd Respondent also claims that failure to file the statement and accompanying documents with the defence should not warrant striking out of the defence as the same is a procedural technicality.

The Respondent also claim that the defence raises triable issues and has merit and outlines a clear line of defence and therefore she ought to be given a chance to ventilate the same before the court. She maintained that failure to file statements and documents is not fatal and the applicant can proceed to fix the matter for pretrial conference in order for the court to give directions.

The application was prosecuted by way of written submissions. The applicant submitted that the defence filed and counter-claim should be accompanied by the list of witnesses to be relied on at the trial, written statements signed by the witnesses and copies of documents to be relied on trial. The applicant stated that the court may grant leave for the statements to be furnished in court at least fifteen days prior to the trial conference under order 11. He further stated that in this case no leave had been sought. The applicant also submitted that the orders by the Deputy Registrar referred in the grounds of opposition by the 1st Defendant were charged with cost by Waweru J. on 18/4/2013.

The applicant also submitted that the Defendants have not given any explanations why they did not comply with the law. He claims that the situation is holding back the suit from forward going to the next stage therefore delaying justice. The applicant relied on the case of **Benard Samuel Mosi Vs National Bank of Kenya Limited in Civil Case 1863 of 2000.**

In response, the 1st Respondent submitted that the court is factus official upon pronouncement of the ruling dated 8th august 2013 by the Honourable Deputy Registrar, A K Ndungu dismissing Civil Case 423 of 2012. He stated that the Honourable Deputy Registrar did recognize that there were other suits of similar nature and involving other parties in HCCC No. 224 of 2010 (Nakuru) and HCCC No. 65B of 2012 (formerly Nairobi HCCC No. 9 of 2011) in which the main issue in controversy were the same as those captured in HCC no. 423 of 2012 (Nairobi). The 1st Respondent also submitted that the issue of subjudice coupled with other matters rendering the Plaintiff/Applicant's proposed amendments of the plaint untenable were some of the reasons that informed the decision of the deputy registrar. The Respondent submitted that a suit that has been dismissed cannot be reinstated; only an appeal, review of the decision to dismiss can remedy it. In this suit the applicant has neither appealed nor sought review of the decision.

The Respondent also submitted that the application is not properly before the court. The Respondent argues that the original pleadings were dismissed by the Honorable Deputy Registrar which is inseparable appendage to the dismissed plaint which cannot be ignored. The Respondent stated that upon dismissal the suit was spent hence the plaintiff cannot purport to proceed with the current application for it lacks foundation. The Respondent maintained that there is no plaint from which the applicant can rely on and there are no defence statements from which the applicant can seek an order for striking out.

The 2nd Respondent also submitted that failure to comply with the provisions of order 3 rule 2 of the Civil Procedure Rules is not fatal because this honorable court has wide power to grant leave to a party to remedy the wrong done. The Respondent also submitted that the pleadings cannot be struck out since the applicant has not demonstrated to the court that the defence is scandalous frivolous and vexatious as required by the law and neither has he shown what prejudice he stands to suffer from the defence being filed as it is. The 2nd Respondent relied on the case of **George P.B Ogendo Vs James Nandasa & 4 others (2006) eKLR.**

I have considered the above submissions. Am alive to the caution that has been given time and again that striking out pleadings is a draconian remedy that should only be resorted to in very clear circumstances, and where the pleadings are not capable of resuscitation. Following the enactment of **Sections 1A and 1B of the Civil Procedure Act, and Article 159 of the Constitution**, the courts today strive to sustain rather than to strike out pleadings.

In **Crescent Construction Co. Ltd Vs Delphis Bank Ltd** Civil Appeal 146 of 2001 [2007] eKLR the Court of Appeal in dealing with an appeal where a plaint was struck out on grounds that it disclosed no cause of action and it was also an abuse of the court process and vexatious observed that:

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a non-starter.”

The substantive law on striking out pleadings is based upon **Order 2 Rule 15 of the Civil Procedure Rules**. Sub-rule 15 (1) of the aforementioned Order, it is provided that:

“(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.”

Applying the above test to the facts of this case, the applicant claims that the 1st and 2nd Defendant defence herein consists of mere denials and is only calculated at prejudicing, embarrassing or delaying the fair trial of this suit. That the defence is otherwise an abuse of the process of the court and should be struck out. That claim in my view, is not denied. The 1st Respondent in his grounds of oppositions decided to attack the application on the basis of the orders given on 8th August 2013 by the Honourable Deputy Registrar A. K. Ndungu dismissing Civil Case 423 of 2012, which I believe is the current suit. On the other hand the 2nd Respondent in her replying affidavit capitalized on the failure to file witness statements and other document together with the statement of defence.

The dispute herein is the ownership of the St Mary’s Hospital at Langata near Nairobi and Elementaita in Nakuru County. The applicant’s claim is that he constructed the two hospitals and managed them for the last 10 years. In my view it was incumbent upon the Defendants to state their case. The defence as filed does not raise any triable issue for the Defendant to be allowed to defend. A statement of defence is said to raise reasonable defence if that defence raises a *prima facie* issue that requires investigation. In the case of **Olympic Escort International Co. Ltd. & 2 others –Vs- Parminder Singh Sandhu & Another [2009] eKLR**, the Court of Appeal held that for an issue to be triable, it has to be *bona fide*. The Court stated as follows:

“It is trite that, a triable issue is not necessarily one that the Defendant would ultimately succeed on. It need only be bona fide.”

The 1st and 2nd Respondent pleadings consist of mere denials and general traverse, without reasons why the applicant is not the original and current owner or the manager of the suit premises. In the circumstances no *bona fide* triable issues are revealed by the defences to require a trial. Accordingly, this application must succeed. The defences are hereby struck out as prayed with costs. The Plaintiff should go for formal proof.

Dated and delivered at Nairobi this 22nd day of June, 2015.

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D A ONYANCHA

JUDGE