



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO.549 OF 2012

SAMSON NJOKA MWENDA1ST PLAINTIFF

HILDA KAARI MWENDA 2ND PLAINTIFF

VS.

CFC STANBIC BANK LIMITED1ST DEFENDANT

CREDIT REFERENCE BUREAU AFRICA LTD.....2ND DEFENDANT

R U L I N G

1. The Notice of Motion application before the court is dated 20th March 2013 and filed in court on 8th April 2013. The application is expressed filed under Order 2 Rules 5(1)(a) and (b) and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 1A, 1B and 3A of the Civil Procedure Act, Section 31(5) of the Banking Act, (Cap 488 Laws of Kenya) and all other enabling law.

2. The application seeks the following Orders:

a. That the Honourable court be pleased to strike out the plaint and accordingly dismiss the suit as relates to the 2nd defendant.

b. That the costs of the application and the suit be borne by the plaintiff.

3. The application is premised on the following grounds;

a. The 2nd Defendant is mandated under Regulation 14(1) of the Banking (Credit Reference Bureau Regulations, 2008 ('the Regulations') as read together with Section 31 (4) of the Banking Act, Chapter 488 of the Laws of Kenya to facilitate the sharing of information concerning non performing loans between institutions licensed under the Banking Act.

b. As such any information contained in the 2nd Defendant's database cannot be deemed to be unlawful, illegal and irregular and/or actuated by malevolence and/or intended to cause pecuniary or any other damage as alleged in the Plaint.

c. Consequently, the Plaintiff as drawn does not raise any or any reasonable cause of action as against the 2nd Defendant.

d. In any event, Regulation 20(5) of the Regulations contains internal mechanisms through which any customer who disputes information maintained in a credit reference bureau's database may cause that credit reference bureau to initiate an enquiry with the aim of rectifying such information or even having it deleted all together.

e. The Plaintiffs have so far failed to invoke this statutory mechanism and therefore, the 2nd Defendant's duty to the Plaintiff cannot be deemed to have arisen.

f. In the result, the present suit is immature and amounts to abuse of the process of the Court.

g. In any further event, there has been no allegation that the 2nd Defendant acted in bad faith towards the Plaintiff with the result that the suit as relates to the 2nd Defendant is statute barred under Section 31(5) of the Banking Act Chapter 488 of the Laws of Kenya.

4. The application is supported by affidavits of **ANTONY A. MASENO** dated 20th March 2013 with its annexures.

5. The application is opposed by the Plaintiffs who filed Grounds of Opposition in court on 17th April 2013. However, there is no record of the 1st Defendants response to the application whether in support of opposition to the same.

6. The brief history of the application is as follows;

By a plaint filed in court on 29th August 2012, the Plaintiffs claim special damages of Ksh.5,000,000/= , General damages for injuries falsehoods, costs and interest against the Defendants on allegations the Defendant jointly and severally caused the listing of the Plaintiffs names in the 2nd Defendant company as loan defaulters. The said listing caused Barclays Bank of Kenya to deny the Plaintiffs loan facility which was already on progress for the purchase of a house known as Plot No. MF 1817 situated on L.R.No.25980 in respect of which the Plaintiffs had paid 50% deposit and had also met other financial obligations.

The plaintiffs allege that such listing was unlawful and malicious and that the 2nd Defendant had a duty to verify the information it had received from the 1st Defendant. By the time the listing was made, the Plaintiffs claim that they had no outstanding balances with the 1st Defendant, hence this suit for the above remedies.

7. The 2nd Defendant now brings this application stating that it was premature for the Plaintiff to sue it, and that in any event the information the 2nd Defendant maintains in its data base was provided by the 1st Defendant who should be held liable for any misinformation or damages. Indeed at paragraph 16 of the supporting affidavit herein the 2nd Defendant blames the 1st Defendant for the suit and has also through its defence filed Notice of claim by the 2nd Defendant against the 1st Defendant.

8. The Plaintiffs/Respondents in their grounds of opposition have raised the objections stating that the application is not maintainable as the same was not filed timeously; that the application is not maintainable as the same pleads evidence; that the Plaintiff dated 29.08.12 and filed on even date, and the 2nd Defendant's Defence dated 29.10.12 and filed on 30.10.12 raise inter alia issues whether the 2nd Defendant implemented strict quality controls of its database; whether the 2nd Defendant had a current, authentic, legitimate reliable, accurate and truthful information; that the 2nd Defendant is a necessary and material party to the material dispute; that maintenance and the dissemination of the material credit information is such that there cannot be severability of the two Defendants; that the sum total of the above

is that this suit is not one that can be struck out summarily; that the application is non-meritorious.

9. With the leave of the court the parties filed written submissions to the application. The 2nd Defendant/Applicant filed its submissions on 6th June 2014 while the Plaintiffs/Respondents did the same on 9th June 2014.

10. After carefully considering the applications, the opposition for it and the submissions, I raise only one issue for determination by the court.

- Whether the suit against the 2nd Defendant is so hopelessly useless – which hopelessness and uselessness are so manifestly clear - that this court should strike the plaint as against the 2nd Defendant summarily.

11. I wish to affirm the position of the law that no suit, however hopeless or unmerital, shall be struck out unless the need to do so is so clear, in fact, as clear as day light, so that a court in the exercise of its ordinary jurisdiction will have no option but to strike it out. Such a suit must be one which raises no triable issues abinitio, or if based on bad faith, the bad faith must be clearly manifested. For the applicant to succeed under Order 2 Rule 15 of the Civil Procedure Rule 2010 the following requirements must be proved;

- a. The pleadings disclose no reasonable cause of action.
- b. The pleadings are scandalous frivolous or vexations.
- c. The pleadings may prejudice embarrass or delay the fair trial of the action.
- d. The pleadings are otherwise an abuse of the process of the court.

12. I have looked at the issues raised by the applicant at paragraph 19 of the applicant's submissions. Those issues mainly plead matters of evidence and the law. While the law needs no proof, evidence must be tried and tested. The 1st issue raised by the applicant is whether the 2nd Defendant/applicant herein owes the Plaintiffs a duty of care in tort and/or common law and even if it did, whether the Plaintiffs claim was foreseeable. This issue is at the heart of the matter, and prime facie, it is a triable issue. Issues number (ii) (iii) and (iv) are based on statutory provisions which would require interpretation based on evidence. Indeed the very detailed written submissions by the applicants indicates clearly that the issues raised require a determination in a full trial.

13. In my view, the suit against the 2nd defendant is neither frivolous, vexations or and abuse of the court process. To the contrary it raises issues of great public concern and the extent to which the 2nd defendant can treat information it receives from its bank clients, the safeguards and quality controls which the 2nd Defendant needs to put in place and adjustments of liabilities between the 2nd Defendant and its bank clients in relation to parties who claim that their rights have been injured. A summary dismissal of this suit would be unjust to all the parties.

14. In support of the above view, I rely on Halsbury's Laws of England, 4th Edition Volume 37, paragraph 435 (pages 1-3), where the learned authors states:

“The power to strike out, stay or dismiss under the Court's inherent jurisdiction is discretionary. It is a discretion which will be exercised with great circumspection and only where it is perfectly clear that the plea cannot succeed; it ought to be exercised sparingly and only in exceptional circumstances.”

15. In DT Dobie and Company (Kenya) ltd vs. Joseph Mbaria Muchina and Another (Civil Appeal Number 37 of 1998[1982]KLR 1 (pages 4-20)

Madan JA held that, “***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.***”

“... A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal”.

16. In Coast Projects V. Mr. Shah Construction (k) Ltd [2004] 2 KLR 118 (Pages 21-27), the court held that ***striking out a pleading is to be resorted to in very clear, plain and obvious cases. It is a summary procedure and by virtue of that it is a radical remedy and a court of law should be slow in resorting to this procedure.***

17. Arising from the foregoing paragraphs of this ruling, the only option open for this court is to dismiss the Notice of Motion application herein dated 20th March 2013 and filed in court on 8th April, 2014.

18. The costs of this application shall be for the Plaintiffs/Respondents.

Orders accordingly.

Dated, Read and Delivered at NAIROBI this 26th Day of September 2014.

E.K.O OGOLA

JUDGE

Present:-

M/s. Omolo for Plaintiff

Ogunde for 1st Defendant

Kissinger for 3rd Defendant

Teresia – Court clerk