



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 82 of 2008

GREMMO DANIELLE.....1ST PLAINTIFF

HTP HOLDING DE PARICIPATION TOURISTIQUES S.A.....2ND PLAINTIFF

LIANA TAMBURELI.....3RD PLAINTIFF

VERSUS

KILILY S.P.A.....1ST DEFENDANT

RABA INVESTMENTS.....2ND DEFENDANT

RULING

1. This application dated 16th January, 2012, filed by the Second Defendant seeks that the amended plaint as against the Second Defendant be struck out, and that consequently the suit against the 2nd Defendant be dismissed This application is brought under Order 2, Rule 15(1) (a) and Order 51 Rule 1 of the Civil Procedure Rules 2010. The application is founded on the main ground that the amended plaint discloses no reasonable cause of action in law as against the second defendant.

2. The brief historical background of this matter is as follows: The plaintiff *vide* a plaint dated 10th April, 2008, filed a liquidated claim of Ksh. 21, 074, 380.10 plus interest at 18% p.a from 14.8.2001 until full payment against the 1st Defendant, Kilily S.P.A

3. On 16th June 2011 the plaintiff sought leave to enjoin LIANA TAMBURELI as the 3rd Plaintiff and RABA INVESTMENTS LTD as the 2nd Defendant. This leave was granted on 17th June 2011 by the Learned Judge J. B Ojwang. Following this order, the plaintiff filed an amended Plaint on 27th September 2011. It is this amended plaint that has triggered the instant application now before the court for determination.

4. This application seeks two substantive prayers. First that the amended paint against the 2nd defendant be struck out and two that the suit against the 2nd defendant be dismissed. Order 2 rule 15 (1) CPR, which is invoked, provides that;

“...At any stage of the proceedings the court may order to be

struck out or amended any pleading on the ground that— ...it discloses no reasonable cause of action or defence in law; ...and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

5. The applicant has stated four grounds and in accordance with the provisions of Order 51 Rule 4, no supporting affidavit is required to be filed.

“...when the application has been brought to strike out a pleading on the only ground of its disclosing no cause of action, no affidavit evidence may be relied upon...” (See Desai vs. Patel t/a Sandpipers Constructions & Civil Engineering Services & 13 Others [2001] KLR, See also Order 51 Rule 4 as read together with Order 15 Rule 15(1), para (a) of Civil Procedure Rules 2010)

Issues For Determination

6. In the premises the main issue for determination is whether the amended plaint discloses no cause of action against the 2nd defendant and hence should be struck out.

7. To support this application the 2nd defendant's counsel advanced the following salient arguments. The first is that the facts stated in the amended plaint do not impute the 2nd defendant in any way. The second is that the 2nd defendant is not privy to the alleged contract/agreement between the plaintiffs and the 1st defendant. Thirdly that the facts alluded to by the plaintiffs do not give any rise to a cause of action against the 2nd defendant.

8. On the other hand counsel for the plaintiff argued as follows: Firstly, that the instant application is premature as the application for amendment is still pending inter-partes hearing. Secondly, that the 2nd defendant was duly enjoined as per the Order of the Court and in accordance with the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules 2010: Thirdly, that the 2nd defendant is the main subject matter as the plaintiffs have sought remedies against it at prayers c), d), and e), in the Amended Plaint and hence the plaintiff's have established the cause of action against the 2nd defendant.

9. I make the following observation on this application: Firstly the amendment to enjoin the 2nd defendant was ordered by the court on 17th day of June 2011 after establishment that there was need to do so. This was pursuant to Order 1 Rule 10 (2) CPR 2010. No conditions were imposed on joinder.

10. Secondly, the 2nd defendant has in fact been adversely mentioned in the amended plaint and the reliefs sought against it are indicated to be joint and several with the 1st defendant. It is needless to emphasize that the plaintiff's have established a cause of action against the 2nd Defendant subject to proof in accordance with the law of evidence. ***(See paragraphs 2A, 3A, 7A, 12A, 12B, 14, 15, 16, 17, 18, 19 and Prayers; (b), (dd), (e), (f) of the amended plaint).***

11. I take cognizance of the case of Drummond-Jackson vs. British Medical Association and Others. The court there reiterated that;

“...over a long period of years it has been firmly established by many authorities that the power to strike out a statement of claim as disclosing no reasonable cause of action is a summary power which should be exercised only in plain and obvious cases...” (See Drummond-Jackson vs. British Medical Association and Others [1970] 1 All E.R 1094, at 1101.)

In light of the foregoing holding the instant case does not fall in the ambit of “plain and obvious.” The plaint has raised very pertinent issues against the 2nd Defendant which ought to be heard and determined on merit. Madan JA in D.T. Dobie & Company (Kenya Ltd) Vs. Muchina [1982]KLR 1 said:

“...if a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice not to act in darkness without the full facts of the case before it.”

12. Finally, the law holds that striking out pleadings is a draconian remedy, and the procedure

should only be invoked in plain and obvious cases, and that such jurisdiction must be exercised with extreme caution. (See Nitin Properties Ltd vs. Kalsi and Another 1995-98) at 267, See also, Moore vs. Lawson and Another 31 TLR 418, DT Dobie (K) and Co. Ltd vs. Muchina and Another [1978] LLR 9 (CAK), ibid, Republic of Peru vs. Peruvian Guano Company 36 Ch Div 489.)

13. In light of my observations in the foregoing paragraphs, I find that the application herein fails. Accordingly it is dismissed with costs to the Respondent.

Dated and signed this 25th day of March, 2013

R.M. MWONGO
JUDGE

Read in open court by:

Date **4th April, 2013**

Coram:

Judge: Hon. Justice M. Odero

Court clerk:

In Presence of Parties/Representative as follows:

- a).....
- b).....
- c).....
- d).....

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