REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 476 of 2009

FRANCIS NGIRA BATWARE……..…….....….PLAINTIFF

- VERSUS –

ASHIMOSI SHATANBASI

T/A ASHIMOSI SHATANBASI & ASSOCIATE ADVOCATES.....……..1ST DEFENDANT

MUGANGA WASULWA

T/A KEYSIAN AUCTIONEEERS ……....…….2ND DEFENDANT

ADAN MAALIM ……..….3RD DEFENDANT

RULING

1. This is the 1st defendant's notice of motion dated 5th October 2012. The plaintiff prays that the suit be struck out or dismissed. Four key grounds are put forth: that the suit discloses no reasonable cause of action; that in view of other pending proceedings in High Court case 604 of 2008, the present suit is an abuse of court process; that summons to enter appearance have not been extracted; and, that the plaintiff has not prosecuted the suit for over 3 years. The motion is predicated on an omnibus of three Orders of the Civil Procedure Rules 2010: Orders 2 rule 15 (1), 5 rule 2 (7) and 17 rule 2 (3). There is annexed a deposition sworn by the 1st defendant to support the motion. The 1st defendant has also filed concise skeleton submissions dated 20th February 2013.

2. The motion is contested. There is filed a replying affidavit of the plaintiff sworn on 27th November 2012. In a synopsis, the plaintiff avers that he has a serious claim pleaded in the plaint that should go to trial. He avers that the defendants were served and entered appearance. He submitted that a number of attempts were made to fix the suit for hearing but the file was missing at the registry. He stated that the other proceedings referred to were settled and are neither here nor there. Those arguments were buttressed further by written submissions dated 7th February 2013.

3. I have considered the evidence and the written submissions filed by both parties. I am of the following considered opinion. There are clear legal benchmarks for striking out pleadings. At any stage of the proceedings, the court may strike out a pleading if it discloses no reasonable cause of action; is scandalous, frivolous or vexatious; or it is otherwise an abuse of court process. Striking out a pleading is a draconian measure to be employed sparingly. See *Wambua Vs Wathome* [1968] E.A 40 and *Coast Projects Ltd Vs M.R. Shah Construction* [2004] KLR 119. See also *Sankale Ole Kantai t/a Kantai & Company Advocates Vs Housing Finance Company of Kenya Limited* Nairobi, High Court case 471 of

2012 (unreported).

4. The dictum of Madan J.A. (as he then was) in *D T Dobie & Company (Kenya) Limited Vs Muchina* [1982] KLR 1 is an all time classic. He said at page 9;

"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 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 ought not to act in darkness without the full facts of a case before it".

5. The reason is that at this stage, the court is not fully seized of tested evidence or facts to form a complete opinion of the merits of the case. That is why the power should be exercised sparingly. This principle of restraint was restated recently by the Court of Appeal in *Kisii Farmers Co-operative Union Limited Vs Sanjay Natwarlal Chauhan* Kisumu, Civil Appeal 32 of 2003 (unreported). See also the *The Cooperative Bank Limited Vs George Wekesa* Civil Appeal 54 of 1999 (Court of Appeal, Nairobi, unreported). In addition, regard must now be had to article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act. The court is now enjoined to do substantial justice to the parties. The overriding objective of the court is clearly laid out in those statutory provisions.

6. Ideally, cases should be determined on tested evidence at a full hearing. Striking out a pleading should thus be an exception and not the norm. The bottom line cannot be better set than in the words of Sir Udo Udoma C.J. *in Musa Misango Vs Eria Musigire* [1966] E.A 390 at 395 when he delivered himself thus;

"*To my mind, it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad"*

7. When I juxtapose those principles against the facts here, I find that the first limb of the motion is without merit. For starters, it is predicated on the assertion that the suit discloses no reasonable cause of action. Under Order 2 rule 15 (a), a motion on that ground must not plead evidence: it should just concisely state its principal grounds. Here, the applicant has annexed a deposition of Fredrick Ashimosi in support. It may as well have been filed because of the plea under Orders 5 and 17. But, in my view, it has punctured the tyres of the motion under Order 2 rule 15 (1). The plaintiff's amended plaint seeks at paragraph 10 damages from the 1st and 2nd defendants for attachment of motor vehicle KV 8266 C. The 1st defendant was the plaintiff's legal counsel. The final prayers at paragraph 13 a1, a2, b and c make no reference to the 1st defendant. The suit may be embarrassing to the 1st defendant. But I am unable to say that it is so frivolous as to have no legs to rest on.

8. I would then focus on the second ground: the existence of other proceedings in High Court case 604 of 2008. Section 6 of the Civil Procedure Act is couched in mandatory terms. It prohibits a court from trying a suit in which the matter in issue is directly or substantially in issue in a previous or existing suit between the same parties. I have perused a copy of the plaint in the other suit annexed to the 1st defendant's deposition. It is between *Ndimo Limited and Bizabigomba Modeste* (as plaintiffs) Vs *Francis Ngirabwatare and Muganda Wasulwa* (as defendants). The 1st defendant in this suit is not a party. At paragraph 5 (d) of the plaint in that other suit, the motor vehicle KV 8266 C is mentioned. It is the same vehicle in this suit. In a sense then, the present suit would seem to offend section 6 of the Civil Procedure Act. There is a caveat however: the plaintiff avers, and the 1st defendant has not rebutted, that the other suit was settled or withdrawn. The substratum of that ground thus collapses. The parties have chosen to leave the court in a blind spot over the terms of settlement or withdrawal.

9. I then proceed to the third ground: that summons have never been served. Faced with that accusation, it behoved the plaintiff to show the converse. All that the plaintiff states is that the 1st defendant has entered an appearance. In view of the interlocutory proceedings, the mere fact that the 1st

defendant has filed an appearance does not answer the question. The High Court is a Court of record. I have seen 4 original sets of unexecuted summons to enter appearance dating back to the year 2009, the year of the suit. There is no affidavit of service of summons to enter appearance upon the 1st defendant. This contravenes Order 5 rules 1 (6) and 2 (7) of the Civil Procedure Rules 2010. Where no summons are collected within 30 days the suit abates. Where the summons are not renewed in 24 months, their validity expires.

10. Failure to follow the code in Order 5 is a fundamental defect incurable by the inherent powers of the court. See *UdayKumar Chandulal Rajani and 4 others Vs Charles Thaithi*, Court of Appeal, Nairobi, Civil Appeal 85 of 1996 [1997] e KLR, *Nagendra Saxena Vs Miwani Sugar Mills Limited and 3 others*, Court of Appeal, Kisumu, Civil Appeal 261 of 2008 [2011] e KLR, *Kenya Industrial Estates Limited Vs Ogana & another* [2004] 1 E.A 96. See also *Sandhurst Limited and 3 others Vs Kenya Commercial Bank Ltd and 3 others* Nairobi, High Court case 227 of 2010 [2013] e KLR.

11. Without the summons there is no suit to proceed with. The nexus is obvious. It is the summons and their service that activate the suit: they bring the proposed defendants to defend the action by entering an appearance and defence within the prescribed time. It is incumbent upon the plaintiff to ensure that the summons filed are signed, sealed and collected for service. See *Mobile Kitale Service Station Vs Mobil Oil Kenya Limited and another* [2004] 1 KLR 1. The negligence of the plaintiff and his counsel here for so long is such that the inherent power of Court or even the overriding objective at sections 1A and 1B of the Civil Procedure Act cannot cure it. It is a patent error or latent defect at the least and not a simple technicality. I thus find the suit as against the 1st defendant incurably defective for want of summons to enter appearance since the year 2009.

12. That finding is enough to dispose of the motion. But I am minded to comment on the fourth ground: that the suit has not been prosecuted for over 3 years. At paragraph 6 of the replying affidavit, the plaintiff says there were "*several attempts to set down the suit for hearing but the court file has always been untraceable (sic) at the registry"*. Four letters inviting the 1st defendant to fix the suit for hearing dated between 25th February 2010 and 13th July 2012 are annexed. I would not begrudge the plaintiff. The record shows the parties appeared in Court on interlocutory matters on 13th July 2009, 14th July 2009, 21st July 2009, 27th July 2009, 17th August 2009, 29th September 2009 and 15th December 2011. So it is not entirely true that the plaintiff has been sleeping for 3 years. What is true is that the plaintiff has not set down the main suit for hearing. And no correspondence has been annexed to the Deputy Registrar or the Court enquiring about the loss or misplacement of the court file. Certainly, the original court file is here with no evidence of loss. But in the interests of justice and the overriding objective, and in view of the attempts to fix the suit for hearing, it would not be right to dismiss the suit for want of prosecution.

13. In the end, the notice of motion dated 5th October 2012 succeeds on only one ground. The plaintiff's suit against the 1st defendant is hereby dismissed. In view of the plea of trust between the plaintiff and 1st defendant, and considering that 3 of the grounds in the motion were untenable, and in the interests of justice, I order that each party shall bear his own costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 20th day of March 2013.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

No appearance for the 1st Defendant.

No appearance for the 2nd Defendant.

Mr. Collins Odhiambo Court Clerk.