REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 357 of 2010

TRITON SERVICE STATIONS LIMITED. ..... PLAINTIFF

VERSUS

PJP HOLDINGS LIMITED. ..... DEFENDANT

R U L I N G

1. The summons before me for determination is dated 25th June, 2010 and is brought under the former Order 6 Rule 13 (1) (d), Order 7 Rule 1 and Order 25 Rules 1, 6 and 7 of the Civil Procedure rules. The inherent power of the court is also invoked. In the application, the Defendant has sought the striking out of the Plaint and in alternative that the Plaintiff do deposit security for costs and in default, the suit be dismissed. The grounds upon which the summons was grounded were set out in the body of the application and in the Supporting Affidavit of Carey Muriithi Ngini sworn on 25th June, 2010. The application was heard by Hon. Njagi J, on 25th October, 2010 and the file was placed before me on 19th March, 2013 when the parties asked the court to write this ruling on the basis of the Affidavits on record and the submissions made before Hon. Njagi J.

2.The Defendant's contention is that the suit is an abuse of the process of the court because the Plaintiff had not disclosed the existence of an earlier suit, **HCCC No. 338 of 2009** concerning the same subject matter, that the verifying affidavit in support of the Plaint was fatally defective, that the suit contravened Section 7 of the Civil Procedure Act and that the present suit was an attempt to escape the consequences faced by the Plaintiff in **HCCC No. 338 of 2009**. That there was real fear that the Plaintiff may not be able to meet the costs of this and the earlier suit. That George Dicks Atetwe who had sworn the Verifying Affidavit was not a director of the Plaintiff but a Legal Assistant. That Triton Petroleum company Ltd which had negotiated the lease the subject matter of the suit had been placed under receivership, that the Plaintiff would, therefore, not be able to pay the costs of the present suit.

3.Mr. Ohaga learned counsel for the Defendant submitted that the cause of action in the earlier suit as was in the present suit were the same, that Section 7 of the Civil Procedure Act applied to this suit as Hon. Koome J (as she then was) had determined an injunction application in the former suit. That the averment in Paragraph 16 of the Plaint that there was no other suit pending was untrue, that since what is in question in both cases is the tenancy of the Plaintiff in the suit premises the causes of action in both suits are the same. Counsel urged that the application be allowed.

4.The Plaintiff opposed the application through the Replying Affidavit of George Dicks Atetwe sworn on 18th October, 2010. The Plaintiff denied that the present suit is in contravention of Section 7 of the Civil Procedure Act as the causes of action in this and **HCCC No. 338 of 2009** are separate and distinct. That this suit was for special damages on the developments carried out on the suit premises, whilst in HCCC No. 338 of 2009 it was to prevent the Defendant from evicting the Plaintiff from the suit property. That

the Verifying Affidavit was not fatally defective, that George Dicks Atetwe was a director of the Plaintiff contrary to the averments of the Defendant and that the Plaintiff was a distinct legal entity from its majority shareholder, Yagnesh Devani. Mr. Wena learned counsel for the Plaintiff submitted that the prayers in the previous suit had been overtaken by events, that no sufficient grounds had been given for the prayer for security for costs, and that the orders sought were discretionary and nothing had been shown to warrant the exercise of that discretion. Counsel urged that the application be dismissed.

5.Having carefully considered the Affidavits on record, the written and oral submission made before Hon. Njagi J, the view of this court is as follows:-

The jurisdiction to strike out a pleading is both limited and discretionary. It is a power that is to be sparingly exercised. It may lead to a party being unseated from the seat of justice without being heard. It is a draconian power that should only be exercised in clear and obvious cases. When being exercised, it should not be upon minute and detailed examination of the issues as that is a preserve of the trial court. Indeed the Court of Appeal laid down the rule in the case of **D.T. Dobie & Company Ltd Vs Muchina (1982) KLR 1** at page 9 thus:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this state, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way." (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right."

6.The principal grounds upon which the suit is sought to be struck out is that by averring is paragraph 16 that there is no previous suit filed, the Plaintiff lied to court, that the cause of action in this suit is similar to the one in **HCCC No. 338 of 2009,** that this suit is Res Judicata, **HCCC No. 336 of 2009** by dint of the ruling of Koome J of 10th July, 2010. That this suit is therefore an abuse of the court process. The Plaintiff has submitted otherwise and did attempt to differentiate between the two suits.

7.I have looked at both the Plaints' in **HCCC No. 338 of 2009** and in this suit. They both relate to the Plaintiff's tenancy in the Defendant's premises known as L.R. No. 209/8177. In **HCCC No. 338 of 2009** the Plaintiff had been evicted from the suit property and had sought a prohibitory order restraining the Defendant from evicting the Plaintiff from the suit premises. It also sought a mandatory order to remove the defendant from the suit premises and allow the Plaintiff vacant and quiet possession of the same. The Plaint in the present suit has pleaded that as a result of the termination of the tenancy between the parties and the Defendant's re-entry into the suit premises, the Plaintiff had lost its properties therein valued at ksh.48,853,260/-. That is the sum claimed in the Plaint. It is crystal clear from the foregoing that the basis of both suits is the tenancy of the Plaintiff over the suit property and the termination thereof. In the premises, what can it be said of the causes of action in both suits? A cause of action was defined by **Lord Pearson in Drummond-Jackson Vs British Medical Association (1970) 2WLR 688 at page 696 as:-**

"..... an act on the part of the defendant which gives the plaintiff his cause of complaint."

Accordingly, my view is that the causes of action in both suits are the same.

8.Under Section 6 of the Civil Procedure Act, when a suit which is similar to a previously filed suit is filed the sanction is to stay such latter suit. In this case, the Defendant has sought for this suit to be struck out for being Res Judicata **HCCC No. 338 of 2009** and therefore, an abuse of the court process. In Paragraphs 12 and 13 of the Plaint in **HCCC No 338 of 2009**, the Plaintiff pleaded: -

"12. The Plaintiff avers that the occupation of the suit premises is lawful and for a period agreed by both parties and the Defendant cannot purport to evict the Plaintiff without any considerations of the

<u>developments and the investments</u> the plaintiff have put on the suit premises with the approval of the Defendant in the strong believe that the tenancy will last for the period of ten (10) years.

13. The Plaintiff reserves its right to amend the Plaint." (<u>Emphasis supplied</u>.)

9.In paragraphs 5 and 7 of the present Plaint, the Plaintiff has pleaded thus: -

"5. At the time of the termination of the tenancy aforesaid, the Plaintiff had constructed, erected and/or installed the following plant and machinery, moveable items and immoveable structures at the suit premises: -

6. .....

7.The Plaintiff's claim against the Defendant is for the sum of Kshs. 48,853,260/- being the value of the Plaintiff's construction, plant and machinery and equipment installed at the Defendant's premises and which property the Defendant continues to use for itself and for other third parties to the exclusion of the Plaintiff."

10. To my mind, in the former suit, the Plaintiff pleaded the developments it had carried out in the suit premises and reserved the right to amend its statement of claim probably to claim the loss of the same. In the present suit, paragraphs 5 and 7 of the particular Plaint, the claim is on those developments. My view is, the Plaintiff would have perfectly included its present claim in the former suit by way of amendment. This is a right it had clearly reserved paragraph 13 of that suit. I am not however, convinced that the issue is res judicata. Koome J did not in her ruling of 10th July, 2010 finally determine the rights of the parties in the matter she had only made findings on the interlocutory application. That suit is still pending. If it had been determined, I would hold that this suit is Res Judicata by dint of Explanation No. 4 of Section 7 of the Civil Procedure Act.

11. Having found that the claim herein is intertwined or is the same as the claim in **<u>HCCC No. 338 of 2009</u>**, what order should be made. As I have already stated under Section 6 of the Civil Procedure Act, the sanction on such a suit is to stay the same. The question that arises is, of what use and/or benefit will be to stay this suit? It was submitted by the Plaintiff that the prayers in the previous suit had been overtaken by events. That means that there may be no intention to prosecute the same as that would be an academic exercise. That may be the reason why the Plaintiff abandoned the same and rushed to institute the present suit. Can the Plaintiff be allowed to do so? I do no think so. Staying this suit will only go towards clogging the court system. It would add to the many so called pending cases for no reason. For that reason the previous suit may never be prosecuted. My view is, in the circumstances of this case, this suit is but an abuse of the court process. By abandoning the previous suit with no intention of prosecuting the same for the reason that the reliefs therein had been overtaken by events, and subsequently filing the present suit, the Plaintiff was obviously abusing the court process. The claim herein could be effectively be incorporated and prosecuted in **<u>HCCC No. 338 of 2009</u>** by way of an amendment a right which the Plaintiff had clearly reserved as I have already stated above.

12. Accordingly, this suit is an abuse of the court process and I accordingly strike out the same with costs to the Defendant. The alternative prayer for security does not therefore fall for consideration.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 19th day of April, 2013.

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A. MABEYA
JUDGE