



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL CASE NO. 602 OF 2007

SAMUEL MUIRURI NJOROGEPLAINTIFF

VERSUS

NASSEFU SACCO SOCIETY LTD.....DEFENDANT

RULING

1. In this application (by **notice of motion dated 16th December 2010**) the Defendant seeks the main orders that the Plaintiff's **plaint dated 23rd August 2007**, Plaintiff's **reply to the amended defence and defence to counterclaim dated 5th August 2009** and the **amended plaint dated 12th March 2010**, all be struck out; and that **summary judgment** in the sum of KShs 7,762,432/00 be entered for the Defendant against the Plaintiff as sought in the counterclaim.
2. The application is stated to be brought under **section 3A** of the **Civil Procedure Act, Cap 21 (the Act)** and under **Orders VI, rule 13(1) (a), (b), (c) and (d) and XXXV, rule 1(1)(a) and (2) of the Civil Procedure Rules (the Rules)** – since repealed and replaced by the **Civil Procedure Rules, 2010**.
3. The grounds for the application set out on the face thereof are –
 - (i) That the plaint dated 23rd August 2007 discloses no reasonable cause of action against the Defendant.
 - (ii) That the defence to counterclaim dated 5th August 2009 discloses no reasonable defence.
 - (iii) That the plaint dated 23rd August 2007 and the reply to amended defence and defence to counterclaim dated 5th August 2009 “as drawn and filed are scandalous, frivolous and vexatious”.
 - (iv) That the amended plaint dated 12th March 2010 and filed on 31st March 2010 was filed in disregard of the order of the Court of 2nd March 2010.
 - (v) That the Defendant is entitled to the sum of KShs 7,762,432/00 against the Plaintiff as sought in the counterclaim and the defence to the counterclaim “as drawn and filed consists of mere denials, has no merit and

does not reflect any triable issues”.

(vi) That the Plaintiff’s pleading if maintained may prejudice, embarrass or delay the fair trial of the action.

(vii) That the said pleadings are otherwise an abuse of the process of the court.

(viii) That it would be in the interests of justice that the application be allowed.

4. The application is supported by an affidavit sworn by one **Robert Barkinyo Kapsowe**, an assistant manager of the Defendant. He has deponed, *inter alia* -

- i. That in February 2005 the Plaintiff was employed by the Defendant as a FOSA Supervisor.
- ii. That as such employee the Plaintiff was under a duty “to oversee the proper management of the Defendant’s financial affairs...”.
- iii. That in the course of the Plaintiff’s employment by the Defendant a substantial amount of money was reported to be missing, and the Defendant commissioned an auditor to carry out an audit.
- iv. That “from the findings of the auditor it was established that the Defendant lost KShs 7,762,432/00 as a result of the reckless and/or fraudulent operation of its financial affairs by the Plaintiff” by engaging in fraudulent purchase of various parcels of land using the Defendants funds and having the parcels of land registered in his name; opening a fictitious savings account; and operating or reactivating closed or dormant accounts for fraudulent purposes.
- v. That as a result, and following the recommendations of the **Ministry of Co-operative Development and Marketing** the Defendant terminated the Plaintiff’s employment in accordance with the law.
- vi. That “no cause of action can be founded by the Plaintiff against the Defendant since the basis (for the Plaintiff’s suit) arises out of a report which was generated by the Ministry ...and not (by) the Defendant”.
- vii. That the Plaintiff never challenged the said report and the same remains uncontroverted; the institution of this suit by the Plaintiff “is misplaced, misconceived and ill-advised”.
- viii. That therefore the Plaintiff’s claim is scandalous, frivolous and vexatious.
- ix. That the Defendant lost a substantial amount of money held in trust for its members, and the deponent “verily believes that the Defendant is entitled to the relief sought...”.
- x. That the amended plaint is not properly on record having been filed “in complete disregard to the orders of the court issued on 2nd March 2010”.
- xi. That the Plaintiff is abusing the process of the court having filed another suit against the Defendant over the same issues, being **Nairobi HCCC No. 260 of 2007** seeking, *inter alia*, reinstatement to his employment.

Annexed to the supporting affidavit are various documents.

5. In response to the application the Plaintiff filed **grounds of opposition dated 20th January 2011**. These are the grounds set out –

- i. That the plaint discloses a reasonable cause of action against the Defendant.
 - ii. That the plaint is not frivolous, vexatious or scandalous.
 - iii. That the defence to the counterclaim discloses a genuine defence and is not a mere denial.
 - iv. That the filing of the amended plaint outside the time set by the Court does not prejudice the Defendant at all and does not offend the overriding objective of litigation under the Act.
7. The Plaintiff also filed a **replying affidavit sworn on 28th January 2011**. He deponed, *inter alia* -
- i. That his claims against the Defendant as set out in the plaint are known to the law and are neither frivolous nor vexatious.
 - ii. That the Defendant has denied the Plaintiff's claims and set up its counterclaim.
 - iii. That the Plaintiff has denied the counterclaim; more specifically he has denied that he was fraudulent or reckless and averred that if the Defendant lost any money such loss was not attributable to him but was on account of the Defendant's own accounting weaknesses which made it easy for staff and members to pilfer funds.
 - iv. That another audit report also commissioned by the Defendant opined that the Defendant was losing money due to weak internal controls, and did not attribute such losses to the Plaintiff.
 - v. That though the amended plaint was not filed within ten days of 2nd March 2010 as ordered by the court, the same was ready for filing by 12th March 2010 but was not filed until 30th March 2010 because of inadvertence on the part of his advocate's court clerk, one **Enock Mulindi**.
 - vi. That the impugned pleadings raise serious and substantial points of law and fact, and the suit ought to go to trial.

There are various documents annexed to the replying affidavit.

8. In a supplementary affidavit sworn by the same Robert Barkinyo Kapsowe as swore the replying affidavit and filed on 3rd March 2011, it is argued that the Plaintiff being a FOSA Supervisor, was "under duty to ensure that the Defendant's funds were not pilfered by staff and members "if at all there were accounting weakness..."

9. The application was canvassed by way of written submissions. The Defendant's submissions were filed on 15th June 2011 while the Plaintiff's were filed on 20th June 2011 I have considered the submissions, including the cases cited.

10. I will deal first with the issue of the late filing of the amended plaint. The Plaintiff has explained the circumstances of the late filing – inadvertence on the part of his advocates' named court clerk. That explanation has not been controverted in any material way. It is not an outlandish or unlikely explanation. Besides, there cannot be any prejudice suffered by the Defendant that cannot be made good by an award of costs. I will in the circumstances deem the amended plaint dated 12th March 2010 and filed on 31st March 2010 to be duly filed and served.

11. The Plaintiff's case as pleaded in the amended plaint is –

- i. that the Defendant unlawfully terminated his employment;
- ii. that he was defamed by a report of the Inquiry Committee published by the Commissioner for Co-operative Development on behalf of the Defendant; and

iii. that the Defendant caused cautions to be placed against his three named parcels of land.

He therefore seeks appropriate damages for unlawful termination of employment, libel and unlawful placement of restrictions against his parcels of land. He also seeks a permanent injunction to restrain the Defendant from publishing any defamatory material concerning him, and also an order for removal of the cautions from the registers of his parcels of land.

12. In its amended defence and counterclaim dated 31st July 2009 the Defendant denied the Plaintiff's claims. It more particularly denied –

i. that the termination of the Plaintiff's employment was unlawful;

ii. that the offending words were published; or

iii. that any cautions were placed against the Plaintiff's parcels of land, and that if the same were placed, it was not at the behest of the Defendant.

13. The Defendant's counterclaim of KShs 7,762,432/00 was based upon the plea –

i. that the Plaintiff was at the material time an employee of the Defendant as a FOSA Supervisor;

ii. that it was the duty of the Plaintiff to “oversee the proper management of the Defendant's financial affairs and to ensure that the funds and accounts entrusted to him were properly managed”; and

iii. that in the course of his employment the Plaintiff “fraudulently and recklessly operated its financial affairs, thus causing it to lose substantial amounts of money”. Particulars of fraud as given in three pages.

14. The Defendant has also counterclaimed for an order to prohibit the Plaintiff from disposing of, or charging, or in any way taking benefit from such transfer or charge, of some four (4) parcels of land.

15. One of the documents annexed to the supporting affidavit is a report titled “***Inquiry Report of NASSEFU SACCO Society Ltd C5NO 6070***” dated 28th May 2007. It is one that the Defendant says disclosed the fraud and recklessness of the Plaintiff. It formed the basis for termination of his employment and for the counterclaim. It runs to about 50 pages.

16. On his part the Plaintiff has annexed to his replying affidavit an audit report dated 7th March 2007 by a firm of certified public accountants. He says that the report exonerated him and pointed out weaknesses in the Defendant's internal financial controls as the cause of the loss of funds to staff and members.

17. In the case of ***DT Dobie & Company (Kenya) Ltd –vs– Muchina [1982] KLR 1*** it was held as follows, *inter alia*, by the ***Court of Appeal*** –

i. **The words “reasonable cause of action” in Order VI, rule 13 (1) mean an action with some chance of success, when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as tend to support the claim prayer.**

ii. **The words “cause of action” mean an act on the part of the defendant which gives the plaintiff his cause of complaint.**

iii. **As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence it should be used sparingly and cautiously.**

iv. ...

v. ...

vi. ...

vii. ...

viii. **(Obiter Madam, JA) The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing (of) the case.**

ix. **(Obiter Madam, JA) The Court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”**

18. I would add that the Court should not permit an action to be tried by way of affidavits and submissions under the guise of an application to strike out pleadings.

19. An application to strike out a pleading upon the ground that it discloses no reasonable cause of action or defence does not permit evidence beyond the pleading itself. See **Order 2, Rule 15(2)** of the **Civil Procedure Rules, 2010 (Order VI, rule 13(2)** of the repealed Rules).

20. The amended plaintiff pleads three distinct causes of action – one for unlawful termination of employment, a second one for defamation and a third one for unlawful placement of cautions upon the Plaintiff’s four parcels of land. The Plaintiff has in all three instances pleaded facts that support those causes of action. Looking at the amended plaintiff without more, it cannot be said that it raises no reasonable cause of action. Whether or not those causes of action will succeed in light of the defences put forward by the Defendant is a different matter best left to trial of the action.

21. The Defendant’s counterclaims are based upon a report which the Plaintiff has pleaded is not the final authority on the matter. He has pleaded an audit report by a firm of certified public accountants which he pleads exonerates him and points to the real cause of the financial loss to the Defendant – its own deficiencies in internal financial controls. I am satisfied that a *bona fide* defence is disclosed worth going to trial.

22. As for the summary judgment sought by the Defendant for the counterclaim of KShs 7,762,432/00, since the Plaintiff has already filed defence to the counterclaim, summary judgment is not available. See the wording of **Order XXXV, rule 1(1) (a)** of the repealed Rules. The defence to the counterclaim has not been struck out.

23. In the event, I find no merit in the application, and the same is dismissed. As the Defendant had cause to complain about the late filing of the amended plaintiff, I will award the Plaintiff two-thirds ($\frac{2}{3}$) only of his costs for the application. Those will be the orders of the court.

DATED AT NAIROBI THIS 2ND DAY OF SEPTEMBER 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 5TH DAY OF SEPTEMBER 2013