



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION )

CIVIL SUIT 878 OF 2009

**KAWAMAMBANJO LTD ..... 1<sup>ST</sup> PLAINTIFF**

**TIMOTHY BENSON KAMANDE .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LTD..... 1<sup>ST</sup> DEFENDANT**

**DAVID KARIUKI t/a WATTS ENTERPRISES AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**JULIET THEURI ..... 3<sup>RD</sup> DEFENDANT**

**MR. GICHURU ..... 4<sup>TH</sup> DEFENDANT**

**CHARLES PATRICK VINCENT WALKER ..... 5<sup>TH</sup> DEFENDANT**

**HON. JOHN NJOROGE MICHUKU.....6<sup>TH</sup> DEFENDANT**

**NEW HOMS DEVELOPMENT LIMITED .....7<sup>TH</sup> DEFENDANT**

**RULING**

1. On 30<sup>th</sup> September, 2010, the 5<sup>th</sup> Defendant took out a summons in chambers dated 14<sup>th</sup> September, 2010. The same is brought under Order 6 Rule 13 9a), (b), (c) and (d) of our former Civil Procedure Rules and Sections 3A of the Civil Procedure Act. The same sought that the name of the 5<sup>th</sup> Defendant be struck out as a party from this suit. The grounds upon which the application was brought were set out as the suit as against the 5<sup>th</sup> Defendant is scandalous, frivolous, vexatious, that the suit arises out of a decree made in HCCC No. 4698 of 1987 wherein the 5<sup>th</sup> Defendant had settled his portion of liability, that the execution of that decree has been statutorily barred, that there is no reasonable cause of action against the 5<sup>th</sup> Defendant and that therefore the suit against him is an abuse of the court process.

2. The applicant swore a affidavit in support of the application sworn on 14<sup>th</sup> September, 2010 wherein he reiterated the grounds set out in the summons and swore that the 1<sup>ST</sup> Defendant's manager legal services had sworn an affidavit on 5<sup>th</sup> March, 2010 confirming that the 5<sup>th</sup> Defendant had settled his portion of the liability arising out of the decree in HCCC No. 4698 of 1987, that he had therefore been advised by his Advocate that the suit does not raise any reasonable cause of action. Mr. McCourt, learned Counsel for

the Applicants submitted that there is no prayer in the Plaint that can bind the 5<sup>th</sup> Defendant. He was supported by Mr. Onyango for the 1st Defendant.

3. The Plaintiff's Replying Affidavit sworn in opposition was withdrawn on 17<sup>th</sup> November, 2010. Mr. King'ara, learned Counsel for the Plaintiff was only allowed to address the court on matters of law only. Mr. King'ara denied that the cause of action in this case was founded on the decree in HCCC No. 4698 of 1987, that it arise from a borrower lender relationship pursuant to a charge made in 1987, that the 5<sup>th</sup> Defendant was a co-guarantor in relation to the debt and the Plaintiff's property was being sold in 2009 which provoked the suit. That in prayer (e) of the Plaint the Plaintiff has prayed against the 6<sup>th</sup> to 8<sup>th</sup> Defendants, that it was an oversight not to have included the 5<sup>th</sup> Defendant therein.

4. The law on summary procedure was settled in **DT Dobie & Company Ltd –vs- Muchina 982 KLR 1** wherein the Court of Appeal held at page 9 thus:-

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no 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 injuncted with real life by amendment, it ought to be allowed to go forward for a court of justice out not to act in darkness without the full facts of the case before it.” (Emphasis provided.)***

5. In the said case, the Court of Appeal considered various cases on the issue of summary determination of proceedings and the principles that come out are that the power to strike out a pleading in a summary manner is a draconian remedy that should only be exercised in the clearest of cases, it should be exercised only in plain and obvious cases where the pleading is so hopeless and is on the face of it unsustainable, it is a power to be exercised with extreme caution and a strong power to be exercised sparingly. However, the power can and should be exercised in appropriate cases.

6. The application before me seeks to strike out the name of the 5<sup>th</sup> Defendant from the suit. It is akin to an application to strike out the suit against that particular defendant. It is brought under Order VI Rule 13 (1) (a), (b), (c) and (d) of our former Civil Procedure Rules. Under sub rule 2 of Rule 13 no evidence was (is) admissible in an application brought under sub rule 1(a) – that is where the allegation is that the pleading sought to be struck out discloses no reasonable cause of action or defence. One of the grounds upon which the summons before me is brought is that the suit does not disclose any cause of action against the 5<sup>th</sup> Defendant. In my view, having sought to strike out the case against him for disclosing no cause of action, it was not open for the 5<sup>th</sup> Defendant to rely on Affidavit evidence as he did in this case. On such an application the court only looks at the pleadings only.

7. I have had an opportunity to consider this issue in the case of **Kyanzavi Farmers Ltd –vs- Middle East Bank Kenya Ltd HCCC No. 388 of 2011 (UR)** wherein I stated thus:-

***“In the case of Olympic Escort International Co. Ltd & 2 others –vs- Perminder Singh Sandhu & another (2009) e KLR the Court of Appeal when considering an application made under our former Order VI Rule 13(i)(a) held that:-***

***‘We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned judge. It matters not therefore that the applicant had stated that the affidavits should not be considered. As the prayer sought under Order 6 Rule 13 (1) (a) was in contravention of Sub rule (2) of that order, it was not for consideration and we would have similarly struck out the application on that score.’***

***I will here add that, since our legislature in its wisdom decided that the grounds in rule 15(1) of Order 2 are in the alternative and that three (3) out of four (4) of them, that is Rule 15 (1) (b) (c) and (d) may be based on evidence whilst the one under Rule 15 (1) (a) should not, I do hold that whilst a party can bring an application combining the grounds in Rule 15 (1) (b) (c) and (d) – such an application cannot***

*and should not be brought with a ground under Rule 15 (1) (a). This is so because, if those grounds are combined, there would definitely be prejudice in that the court would have to look at the evidence produced in support of the grounds under sub rule (1) (b) (c) and (d) yet sub rule (2) has specifically barred the Court from considering any evidence once an application under Rule 15(1) (a) is up for consideration. Applying the rule of interpretation that a latter provision amends or varies an earlier provision, I hold that the intention of the legislature in enacting Rule 15(2) was that if an application is brought to strike out a pleading for disclosing no reasonable cause of action or defence, no evidence at all shall be adduced in support of such an application. That is so even if any of the grounds thereon are under Order 15 Rule (1) (b) (c) and (d). In my view, prejudice must be guarded against and it will be very difficult for the court to consider the other grounds based on the evidence produced then disabuse itself of that evidence when considering the ground of disclosing no reasonable cause of action under Rule 15 (1) (a).”*

**8.** I still hold the same view. A Respondent will be prejudiced when faced with an omnibus application brought under Order 6 Rule 13 (1) (a), (b), (c) and (d) of the Civil Procedure Rules. On this ground alone, the application cannot succeed.

**9.** As to the merit of the application, on 14<sup>th</sup> May, 2012 when ruling on the Preliminary Objection by the 1<sup>st</sup> Defendant, I made a finding that the Plaintiff’s suit is not solely predicated upon the decree in HCCC No. 4698 of 1987. I held that subsequent actions of the Defendants and in particular, in or about 2009 may give rise to a cause of action. For example, it is pleaded that the 5<sup>th</sup> Defendant was a guarantor for a debt in respect of which the suit property was allegedly sold in 2009. I may point out here that the Plaintiff is verbose but unhappily worded such that the causes of action have not been properly pleaded, but that does not make it so hopeless and incapable of being cured by an amendment. Indeed Mr. King’ara for the Plaintiff submitted that there was an oversight in having left out the 5<sup>th</sup> Defendant from prayer No. (e) of the Plaintiff. Of course that is an oversight which is curable by an amendment in terms of the D.T. Dobie case.

**10.** A careful reading of the pleadings in this case, would show that there are issues which are inherent therein which have not been properly pleaded. It is not for this court to bring them out. The Plaintiff has an opportunity and can bring them by way of amendment. My view is that the Plaintiff’s claim in the Plaintiff is not so hopeless and incapable of an amendment to warrant the drastic order of striking out the same. Courts are supposed to lean towards sustaining suits that have some semblance of life such as the present one rather than terminating them.

**11.** On the foregoing reasons, I decline to allow the 5<sup>th</sup> Defendant’s application and dismiss the same with costs.

DATED and DELIVERED at Nairobi this 28<sup>th</sup> day of September, 2012.

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**A. MABEYA**

**JUDGE**