



**REPUBLIC OF KENYA**

**High Court at Eldoret**

**Civil Suit 121 of 1999**

**B.P . (K) LIMITED.....PLAINTIFF**

**VERSUS**

**INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION.....1<sup>ST</sup> DEFENDANT**

**STEPHEN K. SUGUT.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Plaintiff presented to court a chamber summons dated 10<sup>th</sup> January 2005 seeking the following orders:

- a) That the 1<sup>st</sup> Defendant’s Counterclaim dated 29/12/1999 for the sum of Kshs. 22,768,139.05 be and is hereby struck out.**
- b) That the 1<sup>st</sup> Defendant be ordered to pay costs of the Counterclaim and this application.**

The application was brought under the provisions of Order VI rule 13 (b), (c) and (d) of the civil Procedure rules) . It was supported by the affidavit of Catherine Musakali and based on the grounds that the counterclaim is scandalous, frivolous and/or vexatious. That the said pleading by the 1<sup>st</sup> Defendant are only intended to delay, prejudice or embarrass the fair hearing of this suit. That the counterclaim against the Plaintiff is an abuse of the court process. That there is no privity of contract between the Plaintiff and the first Defendant in relation to the claim of Kshs. 22,768,139.05 as indeed the first Defendant admits that the said sum was advanced to the second Defendant. That the counterclaim is clearly not tenable in law and should be struck out. Ms Catherine Musakali annexed the Charge between the first Defendant and the second Defendant to prove that there was no privity of contract at all.

The first Defendant was served and a replying affidavit was sworn by Issac B. Mogaka was filed on its behalf in opposition to the application. He depones that he is the Corporation Secretary of the first Defendant. He contends that the Plaintiff is ignorant of the nature of cause of action that the first Defendant has put forward in the counterclaim. He states that the first Defendant advanced a sum of Kshs. 10 million to the Second Defendant which amount was secured by way of a Charge registered against the Second Defendant’s land known as LR 14999/1. That by virtue of the terms of the charge the first Defendant had a contractual right to exercise statutory power of sale in the event of default by the second Defendant. That on or about 20<sup>th</sup> August 1996 the Plaintiff requested the first Defendant to release to it the original title to enable the Plaintiff register a second charge on account as security on account of rent paid in advance to the second Defendant. That the legal officer of the Plaintiff gave a professional undertaking that the original title will be surrendered to the first Defendant upon registration of the

second charge. That the second charge was registered on 3<sup>rd</sup> June 1997 but failed to return the original title. The title was returned on 20<sup>th</sup> March 2000.

That in the meantime the second Defendant defaulted in the repayment of the loan and the first Defendant rights as first charge crystallized. That the Plaintiff then learnt of the first Defendant's intention to exercise its statutory power of sale and filed a suit for restraining the first Defendant from doing so. That an injunction was granted in favour of the Plaintiff and coupled with the fact that the Plaintiff was still holding the original title the first Defendant was prevented from exercising its statutory power of sale. That there is no need for a contract to exist before a tortious claim based on inducing breach of contract can be maintained. That all that was needed was the existence of a duty to take care, breach of that duty and consequent damage. That all three ingredients were present because as at 30<sup>th</sup> November 1999 the second Defendant was indebted to the first Defendant in the sum of Kshs. 22,768,139/05. That the Plaintiff's suit was struck out on 28<sup>th</sup> August 2000. That the Plaintiff appealed to the Court of Appeal but was unsuccessful in a judgment delivered on 26<sup>th</sup> November 2004. That the application has been filed as a counter move to a demand for costs by first Defendant's counsel.

Counsels for the Plaintiff and the first Defendant made oral submissions before the court on 29<sup>th</sup> November 2006. The second Defendant was not involved in the application. Counsel for the Plaintiff submitted that facts were not in dispute. The question was one of law. The sum claimed in the counterclaim is not payable by the Plaintiff. The Plaintiff is under no obligation to settle the claim. There was no undertaking to pay on behalf of the second Defendant. Injunction was in force for a period one year. There was no privity of contract. He referred to section 64 of the Civil Procedure Act. It limits compensation for wrongful injunction to Kshs. 2000/= . That title deed was returned on 20<sup>th</sup> March 2000. Counterclaim was filed on 18<sup>th</sup> January 2000. On the face of it the title document did not stop the sell.

In reply counsel for first Defendant indicated that they are pursuing claim based on tort and not contract. The Plaintiff unlawfully interfered in the contract between the first and second Defendant. The first Defendant advanced a sum of money and after default it was entitled to exercise power of sale. Counsel referred to Michael A Jones, 'Text Book on Torts' in support of the proposition that 'the law of tort is primarily concerned with providing a remedy to persons who have been harmed by the conduct of others. That the application to strike out had been brought 5 ½ years from date when counterclaim was filed. That it was a blatant abuse of the court process. That I reserved my ruling for 9<sup>th</sup> February 2007. I regret the delay in delivering this ruling. The delay was occasioned by factors beyond my control.

I have considered the rival submissions of the parties and I wish to start by pointing out that the categories of tortious claim cannot be closed. The tort of inducing a breach of contract is a well recognized tort in legal jurisprudence. The argument of the Plaintiff which seems to make sense is that the first Defendant has pegged based on the amount that he was in default by the second Defendant. That viewed from this perspective it was as if the first Defendant was holding the Plaintiff liable for default of the second Defendant. It becomes necessary to consider the counter claim filed by the first Defendant. The first Defendant pleaded as follows in its counterclaim as far as material:

5. That on 14<sup>th</sup> June 1999 the Plaintiff further proceeded to file this suit against the 1<sup>st</sup> Defendant wishing to restrain it from exercising its statutory power of sale among other orders including costs of this suit.

6. The 1<sup>st</sup> Defendant avers that as a result of the Plaintiffs unlawful and illegal retention of the title deed to the suit premises LR No. 14999/1 Moi's Bridge and the capricious institution of this judicial proceedings against the 1<sup>st</sup> Defendant in total disregard of the 1<sup>st</sup> Defendant rights as 1<sup>st</sup> Chargee, the first Defendant has been completely shut out from recovering the monies secured by the suit land and has consequently suffered great financial loss and damages both specific and general damages. Indeed at the time of filing this suit the 1<sup>st</sup> Defendant had received an offer of Kshs. 33 million which would have redeemed the entire loan balance and there be a surplus.

**Particulars of special damages**

i) Kshs. 22,768,139/05 as at 31/11/99 and continuing loan balance unrealised.

7. The Plaintiff at the date of filing this suit had refused, failed and or neglected to return the said title deed to the 1<sup>st</sup> Defendant and have refused, failed and or neglected to honour their obligation as set out in their own second charge to uphold the 1<sup>st</sup> Defendant’s rights as 1<sup>st</sup> chargee as a result of which the 1<sup>st</sup> Defendant has suffered damages and continues to suffer the same as long as the Plaintiff continues to hold on to the said title. The 1<sup>st</sup> Defendant therefore claims against the Plaintiff general damages.

The Counterclaim prayed for special damages of Kshs. 22,768,139.05, general damages and an order for delivery of the title deed to LR No. 14999/1 Moi’s Bridge. In my view this was not a frivolous counterclaim. It was not scandalous or vexatious. Counsel for the Plaintiff admits that the title was returned after date of filing counterclaim. What the Plaintiff is alleged to have committed in detaining the original title after registering the second is called detinue. This is a tort of refusing to hand over goods to the Plaintiff after the purpose for which it was handed over has been realized or permission revoked. It is a valid claim under the law of tort. The act of seeking an injunction to interfere with contractual relations between the first and second Defendant was also actionable. Section 64 of the Civil Procedure Act is clear on the statutory basis of the claim. But the claim here is not based on section 64 of Civil Procedure Act. It is based on ordinary principles of the law of tort. The basis for the special damages claim of Kshs. 22,768.139/05 is not strong enough but this cannot be a ground for striking the counterclaim. It is now settled that a case even if weak cannot be struck out. A law suit is for pursuing. The weakness of the claim for special damages should to the contrary motivate the Plaintiff to have the counterclaim prosecuted diligently.

I do not find that the counterclaim is an abuse of the court process. There is a claim of an alleged wrong that was committed to the first Defendant and the first Defendant is lawfully entitled to pursue remedy through this court. The upshot is that I find and hold that the application dated 10<sup>th</sup> January 2005 lacks merit and is hereby dismissed with costs to the first Defendant.

Dated AND SIGNED at Nairobi ON this 24<sup>th</sup> day of august 2012.

**M.K. Ibrahim**  
**Judge**

DATED AND Delivered At Eldoret on This 31st Day Of October 2012.

**F. AZANGALALA**

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**JUDGE**

In the presence of: Ms Isiaho for Plaintiff

Mr. Barara h/b for Ms Magumba for 1<sup>st</sup> Defendant

In person for 2<sup>nd</sup> Defendant