



**REPUBLIC OF KENYA**

**High Court at Kakamega**

**Civil Case 141 of 2011**

**SHADRACK WEGULO JUMA .....PLAINTIFF**

**VERSUS**

**1. AGRICULTURAL FINANCE CORPORATION**

**2. JOHN KURIA WANGUSI**

**3. NAPHTALLY MBIYU KIGAMBA**

**4. ELIUD MAKHAKA KHAEMBA.....DEFENDANTS**

**RULING**

The application by way of Notice of Motion dated 17.1.12 seeks orders that the Plaintiff herein be struck out.

The application is supported by the affidavit of SHEILA SANGA, the 1<sup>st</sup> Defendant/Applicant's Legal Officer.

The main grounds upon which the application is premised is that the Plaintiff does not disclose any reasonable cause of action, the Plaintiff's pleadings are an abuse of the court process and that the suit has been brought in bad faith.

The thrust of the evidence in the supporting affidavit is that on 3.2.95 one ELIUD SACHIDA WANGUSI applied for a loan for a purchase of land known as KAKAMEGA/SOY/215. The said ELIUD SACHIDA WANGUSI received a loan of Kshs.3,224,000/= for the purchase and development of the said parcel of land. The said ELIUD SACHIDA WANGUSI offered the said parcel of land as security for the loan advanced to him.

The said ELIUD SACHIDA WANGUSI defaulted in the loan repayments and the applicant moved to exercise its statutory power of sale. According to the affidavit, it was an express term of the loan agreement that the borrower (ELIUD SACHIDA WANGUSI) shall not alienate his interest in the security offered to the applicant, any part thereof or sell or gift it away without the applicant's written consent. It is the applicant's contention that the borrower or any other party was not given the mandate by the applicant to deal with the charged property and that the plaintiff is a stranger to the application.

In opposition to the application, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants/respondents filed grounds of opposition dated 1.2.12 which state as follows:-

- “1. That the application is incompetent and fatally defective.
2. That the application offends the provisions of order 2 rule 15 (1) (a) and (b) and sub rule (2).
3. That the application is frivolous vexatious an abuse of the process of court.
4. That in so far as the 1<sup>st</sup> defendant was receiving money from the plaintiff there is privity of contract as a contract can be express or implied from conduct of parties.
5. That striking out pleadings is a technicality which is draconian and the suit ought to be heard on merit.
6. The principle of estoppel disentitles the 1<sup>st</sup> defendant from seeking sale of land.”

The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants relied on the following authority; **BARCLAYS BANK OF KENYA VS DOMINIC S. DIFU & OTHERS NBI HCCC NO. 2064 OF 2000.**

The plaintiff/respondent, **SHADRACK WEGULO JUMA** filed an affidavit in reply sworn on 16.7.12. The said respondent’s case is that he entered into a sale transaction with the 2<sup>nd</sup> - 4<sup>th</sup> defendants with the 1<sup>st</sup> defendant’s/applicant full knowledge for the purchase of 5 acres out of the suit land. That he paid the full purchase price of Kshs.1,500.000/= which was applied by the applicant to offset the loan advanced to ELIUD SACHIDA WANGUSI.

According to the plaintiff/respondent he then went ahead to develop the land and therefore stands to suffer irreparable loss not capable of being compensated by way of damages. The plaintiff/respondent’s stand is that the applicant is estopped by his previous conduct from denying any dealings with him.

The plaintiff relied on the following authorities:-

1. **D.T. DOBIE & COMPANY (KENYA) LTD. VS MUCHINA [1982] KLR1**
2. **CRESCENT CONSTRUCTION CO LTD. VS DELPHIS BANK LTD. EALR [2007] 2 119.**

The law on striking out a suit which discloses no reasonable cause of action comes out clearly in the cited authorities. In an application on the ground that the Plaintiff discloses no reasonable cause of action, no evidence is admissible. The court examines the Pleadings only to determine the application. When an application to strike out is made on any other ground (other than that it discloses no reasonable cause of action), affidavit evidence is admissible.

A perusal of the Plaintiff in paragraph No. 11-16, without looking at the affidavit evidence, does not reveal a Plaintiff that does not show some form of a cause of action.

As stated in the recent Constitution case (supra);

**“the question whether a plaintiff discloses a cause of action must be determined upon a perusal of the Plaintiff alone, together with anything attached as to form part of it, and upon the assumption that any express or implied allegations of fact in it are true.”**

Having found that the plaintiff discloses a reasonable cause of action, it then follows that the same cannot be termed as an abuse of the court process. The affidavit evidence and the submissions of the applicant’s counsel do not specifically point out why the suit is described as an abuse of the court process or that it has been brought in bad faith especially in view of this court’s ruling dated 15.3.2012 wherein the court found that the Plaintiff has a prima facie case.

The power to strike out a pleading is a draconian one and ought to be exercised with the greatest care and

caution. The suit is not an obvious one for summary adjudication.

I therefore exercise this court's discretion in favour of the case going to a full trial.

The application therefore fails with costs to the respondents.

*Delivered, dated and signed at Kakamega this 24<sup>th</sup> day of October, 2012*

**B. THURANIRA JADEN**

**J U D G E**