



REPUBLIC OF KENYA

High Court at Bungoma

Civil Suit 110 of 2012

BENJAMIN WAFULA BARASA PLAINTIFF

VERSUS

PUBLIC HEALTH OFFICER & 23 OTHERS DEFENDANTS

RULING

The matter before me is an application dated 27.9.2012 brought by the 13 defendants specifically 2nd, 3rd, 4th, 5th, 11th, 14th, 15th, 16th, 17th, 18th, 22nd, 23rd, 24th defendants.

This application was adopted by Mr. Ateya advocate who represents the 13 defendants and argued it on their behalf.

The application is brought under Order 2 Rule 15 (1) (a), (b) & (d) of the Civil Procedure Rules seeking to strike out the plaint for failing to disclose a reasonable cause of action against them, is scandalous and an abuse of the court process.

It is supported by affidavit of Ali Waziri Abubakar who is one of the defendants and on grounds on the face of the motion.

The respondent on his reply to the present application filed several documents which included a document titled Notice of Preliminary Objection filed on 11.10.12, a replying affidavit and statement of ground of opposition both filed on 11.10.12.

At the hearing of the said application, the other defendants were not present (1st, 6th, 7th, 8th, 9th, 10th, 12th, 13th, 19th, 20th, 21st) but affidavit of service filed in court showed they were served with the hearing date of 10.12.12.

The case therefore proceeded their absence notwithstanding.

Mr. Areba's contention is that the suit as filed does not disclose any cause of action against his clients.

Secondly that the suit as filed does not have a plaint. That what is before court is a document for which the defendant is unable to file a defence. It does not have a verifying affidavit and therefore ought to be struck out.

The respondent on his part stated that this court has powers to hear and determine the application

and sought to have this court send someone to the ground to assess the damage,

I have analyzed the above submissions and read through the pleadings. The issues for determination are two.

The first is whether the plaint is proper and should be allowed to go for trial or be struck out.

The second issue is whether the plaint discloses any cause of action as against the 13 defendants in the present application.

Under the Civil Procedure Act, Order 1, a party is allowed to commence suit by way of plaint or originating summons depending on the nature of each case. In the instant case, amongst the documents filed was a plaint, a supporting affidavit and a verifying affidavit, hence the applicants submissions that there is no plaint filed and if it is there then there is no verifying affidavit is completely misleading.

There is a verifying affidavit sworn on the 27th May 2012 and filed in court on the 11th September 2012. As to whether the format of the plaint is proper is neither here nor there.

Article 159 of the Constitution mandates this court to administer justice while referring to the substance of the suit rather than the form.

What the applicant is raising is a mere technicality on form which cannot and should not deny the plaintiff/respondent the right to be heard on the merits of his case. I do therefore dismiss the first objection on basis of the reasons given above.

On second issue as to whether the suit discloses any reasonable cause of action against the 13 defendants, the plaintiff claims that the defendants have constructed open sewers and also blocked drainage hence storm waters are destroying his crops.

In the leading decision of D.T. Dobbie Co. (K) LTD. VS. Muchina (1982) KLR, the court of appeal held that as the power to strike out pleadings is exercised without the court being fully informed of the merits of the case through discovery and oral evidence, it should be used sparingly. Similarly in the case of Githunguri Vs. R [1986] KLR 1, the court of appeal (Madan, Aganyanya & Gicheru, JJ) stated that it is in the interest of justice to deem as amended an application brought under appropriate procedure and deal with it as such putting the victory of substance over form or as provided under article 159 of the Constitution.

I find from my reading of the plaint that there is an issue of boundary dispute as well as damage to environment which affect his right to a clean and healthy environment as envisaged in Sec. 3 of EMCA and article 70 of the Constitution.

Being alive to the reasoning given in the stated decisions, I now look at the question then whether all the 13 defendants are playing a role to the boundary issue on plot No.NDIVISI/MUCHI/1372 or environmental damage.

From the pleadings, I do not see anything connecting the 11th, 15th, 16th, 17th, 23rd, & 24th defendants to the plaintiffs complaints.

He has also not disclosed his relationship to **L.R. NDIVISI/MUCHI/1732** to raise a complaint on how the 22nd defendant is using it. It is also not contained what sought of prayers he needs against the 22nd defendant. From the foregoing, I allow the application in part and proceed to strike the suit as against the 11th, 15th, 16th, 17th, 22nd, 23rd & 24th defendants for not disclosing any reasonable cause of action.

They will have the costs of the application and the suit. The suit as against the remaining defendants in the application dated 27.9.2012 shall proceed to hearing.

Orders accordingly.

DATED and **DELIVERED** on...17th day of DECEMBER 2012.

In the presence of for applicant.

..... for respondent.

A. OMOLLO

JUDGE