IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 41 OF 2008

ELIUD LANGAT AND 20 OTHERS…….....
…….PLAINTIFF

VERSUS

THE BOARD OF TRUSTEES, POSTAL CORPORATION OF KENYA STAFF PENSION SCHEME……..DEFENDANT

RULING

Twenty one (21) employees of Postal Corporation of Kenya and members of Postal Corporation of Kenya Staff Pension Scheme have brought this action against the Board of Trustees, Postal Corporation of Kenya Staff Pension Scheme (the Board) for an order of permanent injunction to restrain it, its servants, agents or representatives from evicting, selling, offering for sale or in anyway interfering with the plaintiffs' occupation of the houses occupied by them and situated in the Postal Corporation of Kenya Staff Pension Flats – Blocks A, B and C, Menengai Estate, Nakuru (the suit premises). The Plaintiffs further seek an order directing that valuation of the houses in question be conducted by an agreed government valuer before they are sold.

The basis of this claim may be summarized as follows:

i) the Board is the registered owner of the suit premises;
ii) the plaintiffs are in occupation of the suit premises as tenants of the Board;
iii) the Board is in the process of selling the suit premises and has made an offer to the plaintiffs – giving them the first option to purchase
iv) the period within which the plaintiffs were required to accept the offer was drastically reduced by the fact that letters of offer were received late.
v) the reserve price offered was:
a) exaggerated
b) arrived at without consulting the plaintiffs
c) arrived at without regard to the prevailing market rate
d) arrived at without regard to the state of the suit premises, and
vi) as members of the Pension Scheme, the plaintiffs are entitled to purchase the suit premises

In its defence, the Board has denied the foregoing allegations, particularly that the offers are exaggerated and avers that it obtained the requisite valuation and undertook due diligence in determining the reserve price of the units; that the orders sought are not available to the plaintiffs against the Board.

The plaintiffs' application for interlocutory injunction pending trial was dismissed and interim orders discharged. Thereafter some of the plaintiffs have complied fully or partially with the Board's original letter of offer. Following these two events (dismissal of application for interlocutory injunction and

compliance by some of the plaintiffs), the Board has instituted the present application dated 9th November, 2010 for orders that the plaint filed herein be truck out. The plaintiffs' advocate relied on grounds of opposition filed in an earlier similar application. The import of those grounds is that the plaintiffs have appealed against the order dismissing their interlocutory application for injunction; that they have interest in the suit premises; that the issues in dispute ought to go to hearing. The application is expressed to be brought under the provisions of **order 6 rule 13(1) (b), (c)** and **(d)** of the revoked **Civil Procedure Rules** (now reproduced under **order 2 rule 15 (1)** of the **2010 Rules**).

In other words the Board is saying that the plaint is scandalous, frivolous or vexatious; that it may prejudice, embarrass or delay the fair trial of the action; or that it is an abuse of the process of the court. What do these phrases mean and are they or any of them applicable to the plaintiffs' claim? The terms FRIVOLOUS and VEXATIOUS have been used with regard to litigation to denote an action brought regardless of its merit, factual or legal basis, solely to harass or subdue an adversary; where the party or his counsel have reasons to know that the claim or defence is manifestly insufficient or futile.

A claim or defence is SCANDALOUS if it is false, malicious and not relevant to the cause. The process of the court must only be used *bona fide* and properly. The court will prevent the improper use of its machinery and will in a proper case summarily prevent its machinery from being used as a means of vexatious and oppressive litigation. I shall shortly return to consider the application of these terms to the matter before me after setting out the law on the summary process under former **Order 6 rule 13** (present **Order 2 rule 15**).

It is now settled that only in plain and obvious cases can the court have recourse to the summary process of striking out pleadings. Recourse will only be had when the court can clearly see that a claim or defence is, on the face of it, obviously unsustainable and no legitimate amendment can save it. The power to strike out is not mandatory but permissive and only confers a discretionary jurisdiction.

The decision of Madan, JA (as he then was) in the case of **D.T. Dobie & Company (K) Limited** Vs. **Muchina** (1982) KLR 1, which has been cited in a stream of subsequent decisions both of the Court of Appeal and this Court succinctly lays down how the power of striking out pleadings must be exercised. He stated, *inter alia,* as follows:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "*without discovery, without oral evidence tested by cross-examination in the ordinary way*" (Seller, L. J. (supra)
……

If an action is explained as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally, a law suit is pursuing it. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable 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 injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of a case before it."

I have set out the basis of the plaintiffs' claim, but I reiterate the main grounds here. The plaintiffs argue that since they are in occupation of the suit premises and as members of the pension scheme, they ought to have been consulted in so far as the reserve price is concerned; that that price ought to be in conformity with the market rate.

The plaintiffs have conceded in the plaint that the suit premises belong to the Board and that they are

only tenants. As tenants in occupation, coupled with their membership of the pension scheme, the plaintiffs were only entitled to being given the first option to purchase. That option was duly extended to the plaintiffs and even more time granted to them by the Board to accept the offer.

To demand that a private owner of a property must involve potential purchasers to set the sale price defies a free market economy in a capitalist state. Indeed, as the matters stand, the plaintiffs have no protection of the law, their application for interlocutory injunction having been dismissed. A notice of appeal filed three years ago on 9th July, 2008 in the absence of an order of stay of proceedings is no bar to these proceedings or to the Board selling the suit premises to any third party.

As a matter of fact 16 out of the 21 plaintiffs, having seen the futility of pursuing this claim and running the risk of being locked out have either fully or partially settled the purchase price in accordance with the terms of the offer being challenged in this action. While it is the duty of courts to strive to sustain a suit rather than terminate it, it is equally its duty to ensure that only genuine disputes are tried and judicial resources including time utilized efficiently.

It is my considered opinion that this suit is frivolous, vexatious and scandalous. It is otherwise an abuse of the process of the court and is for striking out.

It is accordingly struck out with costs to the defendant.

Dated, Delivered and Signed at Nakuru this 6th day of May, 2011.

W. OUKO
JUDGE