REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND ADMIRALITY DIVISION

CIVIL SUIT NO. 726 OF 2002

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

- VERSUS –

ALFAYO ONYANGO RIAKO.....DEFENDANT

RULING

1. By a chamber summons application dated 26th November 2010, the defendant prays that the suit be struck out or dismissed with costs. The application is expressed to be brought under sections 3A, 5 and 63 (e) of the Civil Procedure Act as well as Order V1 rule 13 (1) (a), (b) and (d) of the former Civil Procedure Rules.

2. The grounds set out are that the amended plaint filed on 15th February 2008 is barred by the provisions of section 74 (1) and (3) of the Registered Land Act and is accordingly frivolous, vexatious and an abuse of court process. In the premises, the applicant submits that the court is not seized of jurisdiction under section 5 of the Civil Procedure Act and that the suit is a nullity *ab initio* and is for dismissal with costs. The applicant has filed detailed written submissions relying on various decided cases.

3. The application is contested. The plaintiff has filed a replying affidavit sworn on 18th March 2011 together with annextures. The admissibility of that replying affidavit is challenged by the defendant but I shall come back to that point later. There are also grounds of opposition of even date. The parties have also filed their written submissions and sought to rely on various decided cases in their lists of authorities.

4. I have studied carefully the pleadings in the matter, the application before me and considered the submissions of the parties. I have formed the following view of the matter. Order V1 rule 13 (1) and (2) of the former Civil Procedure Rules (which is largely in *pari materia* with the new order 2 rule 15 (1) and (2) provided that;

"(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made"
On a plain interpretation of that rule, an applicant seeking to strike out a pleading under subrule (1) (a) cannot adduce evidence but his application must state concisely the grounds on which it is made. The bar to evidence is on the applicant. It is not to a respondent who in reply to the application may file a replying affidavit. The former order L rule 16 (now order 51 rule 14) also expressly allows the respondent to do so. Despite the strong language used by the defendant in its submissions against the decision of Anyara Emukule Judge *in Drum Publications E.A. Ltd Vs Media 24 Limited and others* HCCC 561 of 2004 [2005] eKLR, I must agree with the learned Judge in his holding that;

"In summary therefore, under Order VI Rule 13 (2) an application to strike out pleadings under Rule (1) (a) (for disclosing no reasonable cause of action) must be supported by concise grounds and affidavit evidence is expressly precluded on the part of the applicant not the respondent. Secondly, the Respondent is, under the *dicta* of Madan J.A. (as he then was) in the case of *D.T. Dobie Company Kenya Ltd – Vs – Muchina* (Supra), permitted to respond by way of an Affidavit. Thirdly, if there was any doubt on this question Order L rule 16 (1) expressly permits any respondent who wishes to oppose any motion or other application do so by way of a replying affidavit or grounds of opposition"

See also *D.T. Dobie & Company Vs Muchina* [1982] KLR 1,

5. That rests the preliminary matter of the replying affidavit. Coming back to the principal argument in the defendant's application, it is necessary to set out section 74(3) of the Registered Land Act (chapter 300) which provides;

"The chargee shall be entitled to sue for the money secured by the charge in the following cases only;

a) Where the chargor is bound to repay the same

b) Where, by any other cause other than the wrongful act of the chargor or charge, the charged property is wholly or partially destroyed or the security is rendered insufficient and the chargee has given the chargor reasonable opportunity of providing other security which will render the whole security sufficient, and the chargor has failed to provide such security.

c) Where the chargee is deprived of the whole or part if his security by, or in consequence of the wrongful act or default of the chargor."

"Provided that-

(i) In the case specified in paragraph (a)-

a) A transferee from the chargor shall not be liable to be sued for the money unless he had agreed with the charge to pay the same;

b) No action shall be commenced until a notice served in accordance with subsection 1 has expired.

(ii) The court may also in its discretion, stay a suit brought under paragraph (a) or paragraph (b) notwithstanding any agreement to the contrary, until the chargee has exhausted all his other remedies against the charged property, unless the chargee agrees to discharge the charge"

It is common ground that the defendant executed a charge in favour of the plaintiff, which charge is still subsuming, and for the consideration and terms set out therein. The defendants principal objection to this suit is that under section 74 (3) (a) (b) and (c), the plaintiff could only commence this suit for recovery of the charge debt after issuing a mandatory 3 months notice and failing payment by the chargor of the debt. Section 74 3 (i) (b) then provides "that no action shall be commenced until a notice served in accordance with subsection (1) has expired". The defendant submits that neither the original plaint nor the amended plaint aforementioned have pleaded specifically that the plaintiff has complied with the above provisions or that their conditions have been met. To the defendant, such an averment in the plaint was mandatory and failure to do so means the suit is barred by that statute and that accordingly, this court has no jurisdiction under section 5 of the Civil Procedure Act.

6. I do not agree with that submission for the following reasons. Order 4 rule 1 of the Civil Procedure Rules provides as follows;

"A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud,, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality –

(a) which he alleges makes any claim or defence of the opposite party not maintainable;

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading."

It seems clear to me that the requirement to plead specifically to the kind of matters raised by the defendant is in a pleading subsequent to a plaint. The rule did not require the plaintiff to so in his original or amended plaint. On the contrary, it is the defendant, in its defence or in subsequent pleadings to the plaint to specifically plead limitation etc. I am of the considered view that the defendants' attack on the plaint in that regard has no foundation in law.

7. Does the plaintiff's suit disclose a reasonable cause of action against the defendant? Is it frivolous, vexatious or an abuse of court process? The Civil Procedure Rules require a pleading, such as the plaint herein, to contain "only a statement in a summary form of material facts on which the party pleading relies on for his claim". This is borne out of the realization that the meat of the matter is reserved for the evidence before the trial court. But the pleading must on the face of it disclose a reasonable cause of action and must not be frivolous or vexatious.

For the defendant to succeed, he must show that the plaint, on a plain reading is so obviously weak and fragile and incapable of redemption. It is a jurisdiction that the court must exercise with extreme caution. In the *D.T. Dobie* case (supra) the court observed;

"No suit ought to be summarily dismissed unless it appears so hopeless that it obviously and plainly discloses no reasonable cause of action and is so weak as to be beyond redemption or incurable by way of amendment. The court ought to act very cautiously and consider all facts of the case without embarking

on a trial thereof, before dismissing a case for disclosing no reasonable cause of action."

Again in *Peru Vs Peruvian Cuono Company Limited* (36 Ch.D 389) Lord Chitty was emphatic in saying

"it has been said more than once that the rule is to be acted upon only in plain and obvious cases and in my opinion the jurisdiction should be exercised with extreme caution".

The amended plaint here at paragraphs 5,7 and 9 states that the plaintiff at the request of the defendant advanced banking facilities by an overdraft of Kshs 2,500,000 secured by a charge over the defendant's parcel of land known as East Karachuonyo/Karabondi/560. It is pleaded further that default has occurred and as at 30th December 1999, the defendant owed the plaintiff Kshs 6,292,518.25 which sum is claimed in the plaint.

8. I have already held that the plaintiff was not required to plead specifically to the provisions of section 74 (3) of the Registered Land Act. Section 74 of that Act on a plain reading does not set up a statutory bar or limitation as the defendant interprets it. I did not understand the defendant to be talking of the suit being time barred by that statute.

9. Looking at the amended plaint at paragraphs 5, 7 and 9, I cannot say they do not disclose a reasonable cause of action against the defendant. I cannot say it is vexatious or frivolous although the suit may annoy the defendant. And I cannot say that the suit is so hopeless that it is beyond redemption.

10. For all of those reasons I find that the defendant's chamber summons dated 26th November 2010 is without merit. I proceed to dismiss it with costs to the plaintiff.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 11th day of November 2011.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of
Ms Oluoch holding brief for Ngugi for the Plaintiff.

No appearance for the Defendant.