



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 606 of 2005

ELIZABETH NJERIPLAINTIFF

VERSUS

HOUSING FINANCE CO. (K) LIMITED.....1ST DEFENDANT
DELTA HAULAGE SERVICES LIMITED.....2ND DEFENDANT
SOUTHERN CREDIT BANKING CORP. LIMITED.....3RD DEFENDANT

RULING

1. By a ruling delivered on 18th September 2009 the suit against the 3rd defendant was struck out with costs against the plaintiff. The 1st defendant too filed an application dated 7th June 2009 under **order VI rule 13 (1) of the Civil Procedure Rules** seeking for orders that the suit against the 2nd defendant be struck out with costs. Similarly the 2nd defendant filed a chamber summons dated 1st July 2009 seeking for orders that the suit by the plaintiff be struck out. These two applications were argued together.

2. The 1st defendant’s application is premised on the grounds that the plaintiff’s suit does not disclose any cause of action against the 1st defendant. Counsel referred to the amended plaint and submitted that the 1st defendant is not at all mentioned. The allegations in the plaint generally refer to the defendants despite the fact that there are two defendants in the matter. The plaintiff should have specified which claim is against which defendant. What cause of action and the prayers are sought against each defendant. Moreover under the provisions of section 69 (2) of ITPA the plaintiff’s remedy lies in damages where a mortgagee exercises its statutory power of sale. The 1st defendant exercised its statutory power of sale of the suit premises. It matters not whether the power was exercised regularly or irregularly. The only remedy is damages but the plaint has no prayers for damages against the 1st defendant.

3. On the part of the 2nd defendant it was submitted that the plaintiff took out a mortgage which was secured by the suit premises. She defaulted in servicing the loan and as a result, the 1st defendant issued a statutory notice which fact was acknowledged by the plaintiff. Those issues were argued in an interlocutory application which was canvassed before **Ochieng J**, and a ruling was rendered which found that the plaintiff’s equity of redemption was extinguished when the mortgagee entered into a binding sale agreement with a third party. The suit property was sold to the 2nd defendant within the powers conferred

under the statute. Section 69 (b) 2 of the IPTA provides that once the sale by the mortgagee is concluded pursuant to the statutory power of sale, it cannot be challenged and the remedy available to the plaintiff is a claim of damages which is only against the mortgagor. The 2nd defendant was not a party to the mortgage arrangements as such no claim can be sustained against the 2nd defendant. The suit does not disclose any reasonable cause against the 2nd defendant

4. This application was opposed by the plaintiff. Firstly counsel was of the View that the application to strike the plaint offends the provisions of order VI rule 13(1) which requires a party to state concisely the grounds to be relied on. Moreover, the Court of Appeal decision in the case of **DT Dobie and Company Limited vs. Muchina CA No. 37 of 1978 [1982] KLR** the Court of Appeal explained what constitutes a reasonable cause of action as follows:-

“The words “reasonable cause of action” in Order VI rule 13(1) means an action with some chance of success, when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer”.

Counsel for the plaintiff submitted that the amended plaint specifically spells out how the cause of action arose and the particulars of the fraud are stated. Moreover striking out a suit is a drastic recourse which should be exercised sparingly and the court should aim at sustaining rather than terminating a suit.

5. Under the provisions of **Order VI rule 13 of the Civil Procedure Rules**, a suit which does not disclose a reasonable cause of action may be dismissed. The amended plaint merely refers to a defendant; there is no specific reference to any of the defendants. Only paragraph 19 refers to the 2nd and 3rd defendants in the following words.

“The plaintiff established that the suit premises were illegally and fraudulently sold to the 2nd and 3rd defendants on or about the 25th May 2007 and the 2 million cheques silently returned without information to her and/or her advocates.”

Even the prayers sought generally refer to the defendant except prayer (f) which seeks for a declaration that the conveyance and mortgage dated 25th May 2007 in favor of the 2nd and 3rd defendant are null and void and should be cancelled and the property be re-conveyed to the plaintiff.

6. There is no doubt that the plaintiff's suit is slovenly drawn but the question is whether these defects can be cured by an amendment. This suit was filed in October 2005, and no further amendments have been sought. The whole cause of action is in regard to a mortgage dated 16th November 1995. The plaintiff's claim is that the 1st defendant sold her property irregularly. The property was sold and transferred to the 2nd defendant who purchased the suit premises in an auction from the 1st defendant pursuant to the statutory power of sale under the mortgage.

7. The allegations against the 2nd defendant are that the property was illegally and fraudulently sold. It is also accused of colluding to perpetuate an illegality and fraud against the order of the court. What is most striking is that there is no prayer for damages against any of the defendants although the sale was pursuant to the

statutory power of sale and the transfer was effected in favor of the 2nd defendant. There being no claim for damages sought against the 1st defendant who sold the property in exercise of the statutory power of sale, there is no cause of action disclosed by the plaint.

7. As regards the claim against the 2nd defendant the contract was between the plaintiff and the 1st defendant over the suit premises which was governed by the mortgage dated 16th November 1995. The plaintiff defaulted in the repayment of the loan and the suit premises were sold by the 1st defendant in exercise of the statutory power of sale. It is trite that a contract binds only the parties to the it and cannot be enforced by, or against a person who is not a party, even if the contract is made for that parties benefit and purport to give it the right to sue or be liable upon the terms. (See the case of **Agricultural Finance Corporation v Lengetia Limited [1985] KLR page 767**).

8. The other allegations against the 2nd defendant is that it participated in the fraud which allegations must be taken against the background that the 2nd defendant was a purchaser and according to section 69 B of the ITPA part of it provides as follows:-

“and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power to otherwise properly and regularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

9. I have no hesitation to make a finding that the plaintiff's suit as drawn Does not disclose any reasonable cause of action against the 2nd defendant who was not a party to the contract and there is no claim for damages sought against the 2nd defendant. Sustaining this suit against the 2nd defendant will not serve any useful purpose. The Chamber Summons by the 1st and the 2nd defendants dated 7th June 2009 and 1st July 2009 are allowed and the suit against the 1st and the 2nd defendant is hereby struck out for disclosing no cause of action with costs.

RULING READ AND SIGNED ON 16TH APRIL 2010 AT NAIROBI.

M. K. KOOME
JUDGE