



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

Civil Case 574 of 2008

RANI MOTORS LIMITED PLAINTIFF

VERSUS

SHAGGY INVESTMENTS LTD 1ST DEFENDANT

BERNARD GITHATU KAMAU 2ND DEFENDANT

NDUATI KIGONDU 3RD DEFENDANT

RULING

1. The Chamber Summons dated 18th December 2009, is brought by the 2nd Defendant under the provisions of order VI r.13 (1) d of the Civil Procedure Rules. The 2nd defendant is seeking for an order that the plaintiffs suit be struck out with costs. This application is based on the grounds that the suit by the plaintiff is time barred by dint of the provisions of the Limitations of Actions Act. Secondly, the suit is incurably defective because the plaintiff did not obtain leave of the court to file a suit against the 2nd defendant who was at the time of filing of the suit already an adjudged bankrupt. Lastly the case is an abuse of the court process.

2. This application is supported by the affidavit of **Benard Githatu Kamau** Sworn on 18th December 2009. According to the 2nd defendant, a receiving order against his estate was made on 9th August 2002 and pursuant to Section 11 of the Bankruptcy Act, there was a stay of any action, execution or other legal processes against the debtors' property or person in any court. Moreover, the suit filed by the plaintiff is time barred and to demonstrate this, the 2nd defendant sought for the particulars especially a copy of the Higher Purchase agreement which is the basic document in this matter but no response was received. The 2nd defendant contends that the higher purchase agreement was made 9 years ago. The plaintiff has also not set out in monetary terms the claim against the defendants. It is a liquidated claim however; the liquidated arrears and rentals are not stated in the claim.

3. This application was opposed by counsel for the plaintiff who relied on the grounds of objection. It is contended that the 2nd defendant has no capacity to file the application when his estate is under the control of the official receiver. This application could only have been brought through the official receiver. Counsel urged the court to dismiss the application. Counsel for the 2nd defendant countered that contention and relied on the Court of Appeal decision in the case of **Aggrey Peter Thande vs. ABN MRO Bank Ltd & Others CA No. 250 of 2005** where the court of Appeal held that the Bankruptcy Act does not specifically prohibit a debtor in bankruptcy from suing.

4. In analyzing the issues raised in this application, the first issue to consider is whether the suit is time barred and is therefore an abuse of the court process as it raises no reasonable cause of action. The Court of Appeal has explained what constitutes a reasonable cause of action in the case of **DT Dobbie & Co. Ltd. versus Muchina 1982 KLR** in that that case the Court of Appeal held as per Madan JA:

“The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”

5. Bearing the above principles in mind, the first issue to determine is whether the plaintiff's suit is time barred. The plaintiff's claims do not specifically give the date when the cause of action actually arose. The claim is stated under paragraph 5 of the Plaint as follows:-

“The Plaintiff's claim against the defendants jointly and severally is for the recovery of general damages, arrears of hire rentals, and all other costs and expenses arising from the breach by the 1st and 2nd Defendants of the Hire Agreements in respect of the mini buses registration Number KAM 070G and KAM 935C.”

6. The 2nd defendant claimed that he sought to be furnished with copies of Hire Agreement in respect of the subject motor vehicle and the plaintiff failed to do so, and this was deliberate so as not to disclose the date when the cause of action arose. The plaintiff has a duty to furnish the particulars especially when requested; this being a civil matter discovery must be done. There is no replying affidavit by the plaintiff to controvert the matters of facts deposed to in the supporting affidavit of the 2nd defendant. The plaintiff's suit is vague as regards when the cause of action arose. This lends credence to the allegations by the 2nd defendant that the claim by the plaintiff

could be time barred.

7. I have no difficulty in finding that the plaintiff's suit as drawn against the 2nd defendant is vague and does not disclose any reasonable cause of action. Sustaining this suit against the 2nd defendant will not serve any useful purpose; after all since the suit was filed the plaintiff has not taken any steps to prepare it for hearing. I allow the Chamber Summons dated 18th December 2009 with costs to the 2nd defendant.

RULING READ AND SIGNED ON 21ST MAY 2010 AT NAIROBI.

**M.K. KOOME
JUDGE**