REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 347 of 2008

SHER KARUTURI LIMITED (FORMELY KNOWN AS SHER AGENCIES LIMITED) .....PLAINTIFF

VERSUS

V/d BERG ROSES KENYA LIMITED.....1ST DEFENDANT

RULING

There are three, probably more, matters involving the parties herein regarding the same subject matter. Apart from this suit, there are **Nakuru HCCC No.381 of 2008** and **Nakuru HCCC No.391 of 2008.**

Nothing is happening or has happened in the latter while in the former, the same was slated for hearing of the main suit on 3rd March, 2010 but was stood over generally when the defendants did not attend.

Although **Nakuru HCCC No.391 of 2008** has not been active since it was filed nearly two years ago, this and **Nakuru HCCC No.381 of 2008** has kept the courts fully engaged with a plethora of applications. This is not healthy or fair to the courts or other litigants for the smooth and speedy administration of justice. Concerned about the number of applications and suits this dispute has attracted,

Hon. Mr. Justice M. Khamoni in his ruling of 23rd December, 2008 in **HCCC No.381 of 2008** remarked:

> **"The way I see it is that just as the parties are handling the main suit by filling a second suit when the first suit is pending probably with interlocutory applications therein to be heard, the same parties have also started filing subsequent applications when the original applications are filed and still pending yet dealing with same issues between same parties. That is, as Nairobi HCCC No.539/2008 now forwarded to Nakuru for hearing is still pending in Nakuru High Court. The defendant in that same suit files Nakuru HCCC No.381/2008 against the plaintiff in Nairobi HCCC No.539 of 2008 concerning the same subject matter. ……..**
>
> **In as much as that action by the defendant in Nakuru HCCC No.381 of 2008 may be desirable in my opinion, I hold such proceedings, i.e. the application dated 22/12/2008 to be irregular…… Going outside that chamber summons is engaging in irregular and misconceived proceedings which should not be encouraged by our law courts because allowing such conduct of the parties is encouraging chaos in our legal procedure thereby creating**

confusion……"

Parties ought to have taken the queue from the frustration expressed by the learned Judge and have instead continued to file one

application after the other, yet I consider the issues in controversy are fairly straight forward.

For instance there is no dispute that the temporary occupation licence granted the plaintiffs in this matter and which formed the basis of their presence on L.R. 25263 formerly L.R. 10854/5 and in particular lines 6 and 7 expired on 31st October, 2008 before this suit was filed (filed on 3rd November, 2008); that after the expiration of that licence the plaintiff's status on the suit land can at worst be described only as a trespasser and that is what Mugo, J meant when in her ruling in **HCCC No.381/2008** delivered in 19th February, 2009 she stated thus:

> **"It is clear to me that the Respondent might not even consider paying any damages to the applicants given that it would rather cling onto the applicant's property despite the termination of the licence and knowing very well that it had no legal right whatsoever to do so."**

I have digressed to only to demonstrate how counsel can misuse the court process. The time so far taken in arguing all the applications in the two matters would have been put to constructive use by listing one matter for hearing on merit and that would have gone along way in conserving judicial economy and finances of the litigants.

The application provoked this concern this time is chamber summons dated 14th April, 2010 in which the applicant/defendant has asked the court to strike out the amended plaint and dismiss the suit with costs on the following grounds:

i) that L.R. 10854/06 is not the subject matter of any dispute between the plaintiff and the defendant

ii) that the licence to the plaintiff was in respect of lines 6 and 7 of L.R 25263 formerly L.R. 10854/5

iii) that the licence expired on 31st October, 2008 before this suit was filed

iv) that the defendant is not party to the pending arbitral proceedings which are infact between the plaintiff and third parties

v) that the amended plaint is not verified by affidavit especially on the new set of facts

vi) that the suit as framed is frivolous, vexatious and pure abuse of the court process

In response, the plaintiff has averred that the mix-up in the parcel number of the suit property can only be determined at the
trial; that the suit discloses a cause of action which calls for a full trial; that the defendants had no justification to take the law into their hands and use excessive force in an attempt to evict the plaintiff.

I have considered the applications, submissions and authorities by each party. The application is expressed specifically to be brought under **section 3A** of **Civil Procedure Act, Order 6 rules 13 (1)(b)** and **(d), Order 7 rules 1(2)** of the **Civil Procedure Rules**. The authorities cited by both sides are unanimous that the power to strike out a pleading or any part of a pleading is a power that courts must exercise with a lot of restraint and further that an application under **Order 6 rule 13** specifies four distinct grounds upon which an application for striking out pleadings must be brought. Those grounds may be summarized thus:

(a) that the pleading discloses no reasonable cause of action or defence; or

(b) that the pleading is scandalous, frivolous or vexatious; or

(c) that it may prejudice, embarrass or delay the fair trial of the action; or

(d) that it is otherwise an abuse of the process of the court.

It is also trite learning that no evidence is admissible on an application based on (a) above and further that the application shall
state concisely the grounds on which it is made.

It is established practice that such an application can be grounded on any or all the above grounds. All that is required is that the grounds relied on be specified in the application and that if they be

other than the first ground, then the application must be supported by affidavit evidence.

The chamber summons before me is premised on eight (8) grounds on the face of it, yet the application is based on **rules 13(b)** and **(d),** namely, that the suit is scandalous, frivolous or vexation and that it is otherwise an abuse of the process of the court.

None of the eight (8) grounds aforesaid relate to **rules 13(b)** and **(d)**. The only mention made to that rule is in paragraph 30 of the supporting affidavit.

The defendant’s written submissions appears to be raising two grounds, no reasonable cause of

action and the ground that the suit is scandalous, frivolous and vexatious. That it was the applicant's clear intention not to rely on the first ground because the application is expressly brought under **rule 13(1)(b)** and **(d)** and secondly because the application is supported by affidavit evidence.

In view of the mix-up on the grounds, the application contrary to **sub-rule (2)** cannot be said to have concisely stated the grounds on which it is made.

Turning to the substance of the application, I reiterate the words of Madan JA (as he then was) in the case of **D.T. Dobie & Company (K) Limited** Vs. **Muchina** (1982) KLR 1:

> **"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal"**

To further emphasis that the jurisdiction under **Order 6 rule 13** must be resorted to only obviously hopeless cases, I cite the case of **Kisii Farmers Co-operative Union Limited** Vs. **Sanjay Natwarlal Chaunhan t/a Oriental Motors**, Civil Appeal No.32 of 2003 where the Court of Appeal states as follows:

> **"Normally it is better to allow a weak case to go to trial than invoke the guillotine process"**

The application is based on the ground that the suit is scandalous, frivolous and vexatious and also that it is otherwise an abuse of the process of the court. **Jowitts Dictionary: English Law**. 2nd Edn and **Mulla on the Code of Civil Procedure**, 13th Edn describes the above words as follows:

> **"A proceeding is said to be vexatious when the party bringing it is not acting *bona fide* and merely wishes to annoy or embarrass his opponent. Or when it is not calculated to lead to any practical result, such a proceeding is often described as frivolous and vexatious."**

A matter is said to be scandalous when:

> **"…….it is calculated to do great and permanent injury to all persons whom it affects, by making the records of the court the means of perpetrating libelous and malignant slanders."**

One would be tempted to conclude that the plaintiff's conduct, in clinging onto the suit property and bringing this suit and subsequently amending it to claim damages which appears also to be the subject matter in **Nakuru HCCC No.391 of 2008**, amounts to acts of annoyance or embarrassment of its opponent. But I do not wish to say so at this stage.

Suffice to state in the same breadth that on further reflection, the amendments introduced in this suit ought to have been raised as a counter-claim in **Nakuru HCCC No.391 of 2008**. Is this suit an abused of the process of the court?

On this ground, it cannot be doubted that the court has an inherent jurisdiction to dismiss or strike out an action which is an abuse of the process of the court. But it is a jurisdiction which, once again, ought to be very sparingly exercised and only in exceptional cases.

Abuse of process has been defined in **WIKIPEDIA**, the free encyclopedia as follows:

> **"The persons who abuses process of interested only in accomplishing some improper purpose that is collateral to the proper object of the process and that offends justice."**

In **Beinosi** Vs. **Wiyley** (1973) SA (SCA) pg 734 F-G (a South African case) cited with approval in **Muchanga Investment**

Limited Vs. **Safaris Unlimited (Africa) Limited & 2 others**……

sets out the principle as follows:

> **"What constitutes an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of *"abuse of process"* It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous, to that objective."**

In **Muchanga Investment Limited** (supra), the Court of Appeal stated that:

> **"We are of course aware that we cannot formulate any hard and fast rule to determine whether in any given facts, abuse is to be found or not"**

Again there is temptation to conclude that the plaintiff knowing quite well that the licence had expired and the defendant having had nothing to do with the licence in bringing this suit was pursuing extraneous purposes. But again that cannot be said in view of the cause of action introduced by the amendment namely damages for goods allegedly destroyed in the course of attempted eviction.

The Court of Appeal in **E.A. Railways Corporation** Vs. **Karangi** (1988) KLR 108 held that:

> **"A trespasser is not allowed to recover damages against a true owner who is entitled to possession and who uses a reasonable amount of force to evict the trespassers."**

The extent and nature of force as well as the items allegedly destroyed in the process and their ownership is a matter for trial as the defendant has also claimed damages in respect of the same items.

For all the reasons stated in this ruling, the application fails and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 11th day of June, 2010.

W. OUKO

JUDGE