No. 138

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL CASE NO. 71 OF 2009

KENNEDY OTIENO ODIYO.....1ST PLAINTIFF
JOSEPH OCHIENG OTIENO.....2ND PLAINTIFF
MARTIN ODUOGO OYIEKO.....3RD PLAINTIFF
TUKIKO OTIEWO OWUOR.....4TH PLAINTIFF
TERESA CHIENG AMIMO.....5TH PLAINTIFF
EMMANUEL NYAMOLO DIDA.....6TH PLAINTIFF
JAMES ONYANGO ODINGA.....7TH PLAINTIFF
GEORGE OTIENO OBURU.....8TH PLAINTIFF
KENNEDY OMONDI OWARE.....9TH PLAINTIFF
ROSE ADHIAMBO OKAL.....10TH PLAINTIFF
RISPER A. ODUOGO.....11TH PLAINTIFF
JUDITH OTIENO.....12TH PLAITNIFF
PAUL OLUOCH.....13TH PLAINTIFF

-VERSUS-

KENYA ELECTRICITY GENERATING COMPANY LIMITED.....DEFENDANT

RULING

By an application dated 12th February, 2010 and filed in court on 23rd February, 2010 in the nature of a chamber summons, **Kenya Electricity Generating Company Limited**, hereinafter referred to as ***"the applicant"*** sought the following orders against the 13 plaintiffs hereinafter referred to as ***"the respondents".*** First, that the amended plaint filed on 18th May, 2009 be struck out on the grounds that it was scandalous, frivolous, vexatious and an abuse of the process of the court as it did not disclose a reasonable or maintainable cause of action against the respondent. Secondly, the applicant asked for costs of the application.

The application was expressed to be brought pursuant to the provisions of order VI rules 13(1) (a)(b) (d) and 16 of the **Civil Procedure rules, section 3A of the Civil Procedure Act** and **all other enabling provisions of the law**. The grounds advanced in support of the application were that the suit was time barred, each of the respondents was paid all their rightful sums due and they acknowledged receipt of such payments from the applicant, that the suit was actuated by malice as the respondents' intention was to frustrate the applicant's realization of a public Hydropower Project by filing frivolous claims and finally, that it was in the interest of justice that the entire suit be struck out.

The brief background to this application as can be captured from the amended plaint, amended defence, the grounds in support of the application, the supporting affidavit as well as the grounds of opposition filed appear to be that on diverse dates in 1999, the applicant undertook the construction of Sondu Muriu Hydropower Project. To implement the project the applicant sought and acquired land from the local residents in the area where the project was to be undertaken, the respondents included. However the land was not acquired for free. The local residents whose lands were acquired as aforesaid were

appropriately compensated. To this end, the applicant sought help, assistance and intervention of the provincial administration after identifying the lands to be acquired. Through the provincial administration, the said land owners were summoned to a meeting with the applicant. The question of acquisition of their parcels of land, compensation due and the benefits of the project to the community and to the nation as a whole were extensively discussed. The services of qualified land valuers were thereafter enlisted and romped in. The respective parcels of land were valued by the said land valuers who recommended the amounts so each of those affected would be paid. The applicant duly paid the amounts assessed as aforesaid to the concerned land owners, the respondents included. The respondents duly acknowledged receipt of the compensation amount and had their various parcels of land transferred to the applicant upon obtaining consent to the transfers from the relevant land control board. Ten or so years down the line, the respondents have now instituted this suit against the applicant claiming compensation in the sum of Kshs. 1,100,530/= over the same parcels of land and or that the applicant be compelled to settle them, General damages for breach of agreement and interest.

In response to the application, the respondent filed grounds of opposition to wit, that the application was incompetent, frivolous, vexatious and otherwise an abuse of the court process. The application lacked merit and was calculated to delay the court process. That the applicant had not laid any basis in law necessary for the court to allow the application and finally that the respondent will suffer prejudice if the application was allowed. The respondents did not follow up the grounds of opposition with a replying affidavit though.

When the application came up for interpartes hearing before me on 28th June, 2010, **Mr. Ochoki** appeared for the applicant whereas **Miss Maragia** appeared for the respondents. They are all learned counsel. The two agreed to canvass the application by way of written submissions. They also agreed that this ruling should ***apply Mutatis Mutandis*** to a similar application in **HCCC. No. 70 of 2009** pending in this court. Subsequently, written submissions were filed and exchanged. I have carefully read and considered them alongside cited authorities.

The application before me seeks to strike out a plaint. Striking out a plaint or indeed any other pleading is a step that must be invoked sparingly and with caution as it removes a litigant from the seat of justice. It is trite law that 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 or incurable by an amendment. As long as a suit can be injected with life by amendment, it should not be struck out. See **D.T. Dobie and Company (K) Ltd .v. Muchina (1982) KLRI**. Yet again in the case **of Kassam .v. Bank of Baroda (Kenya) Ltd (2002) 1 KLR 294, Kuloba J** (as he then was) after quoting **Madan J.A** extensively from the case of **D.T. Dobie** (supra) said ***". To resort to the summary power, the suit or defence must appear so hopeless that it plainly and obviously discloses no reasonable cause of action or defence, and is so weak as to be beyond redemption and incurable by a harmless amendment….."***

However there is also the other side of the coin. This came through the case of **Murri .v. Murri and Another (1999) E.A.** at page 216 where the court stated that ***"…the object of the summary procedure of striking out is to ensure that defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts. In principle if there is any room for escape from the law, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called to pay large sums of his own or somebody else's money in an attempt to pursue a cause of action which must fail. It seems to me that when that situation arises the comments of* Lord Balckburn in Metropolitan Bank .B. Pooley(1885) 10 AC 210 at 221 *are applicable."*** He said that ***"a stay or even dismissal of proceedings may after all be required by the very essence of justice to be done. The object is to prevent parties being harassed and put to expense by frivolous, vexatious and hopeless litigation. It would be contrary to the public interest that justice should be shackled by rules of procedure when the shackle will fail to the ground the moment the uncontested facts appear; and that is just this case….."***

In deciding this application therefore, I have to bear in mind these competing interests that are at variance. The application in the main is brought under order VI rules 13(1),(a),(b) and (d) of **the Civil Procedure rules.** However no evidence is admissible on an application under sub rule(1) (a) aforesaid. This is where the application as in the instant case has been brought on the grounds that the suit discloses no reasonable cause of action or defence. In that case the applicant is expected to state concisely the grounds on which the application is made. Much as the entire application is based on several grounds and is supported by an affidavit sworn by one, **Dennis Omwonga**, the legal manager of the applicant, I think that the only ground which may support the assertion by the applicant that the suit as filed does not disclose a reasonable cause of action against it is that the suit is time barred. I will revert to this issue later. Otherwise it would appear that the main focus of the application is that the amended plaint is scandalous, frivolous, vexatious and is otherwise an abuse of the process of court. On these grounds, the applicant is at liberty to adduce evidence. Such evidence may be in the form of affidavits with the annextures thereon as is in this case.

So when is a pleading scandalous, frivolous, vexatious and an abuse of the process of court? **Onyango J** (as he then was) attempted an answer to the above in the case of **Kenya Airports Authority .v. Queen Insurance Agency (2001) KLR 441** thus:

"The category of what may be described scandalous include either indecent, offensive, improper or a denial of a well known fact. A pleading or an action is frivolous where it is without substance or groundless or fanciful and it is vexatious where it lacks bonafides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense".

In this case it is common ground that the respondents were approached to surrender their parcels of land to the applicant. The applicant wished to acquire those parcels of land for its Sondu Miruiu Hydro-electric Power Project. The respondents were consulted and voluntarily agreed to surrender their various parcels of land upon appropriate compensation being paid to them. Land valuers were enlisted to advise both parties involved on the appropriate compensation payable. There is nothing to suggest that the transaction was fraudulent and or that the parcels of land were undervalued. Nor are the respondents saying that at the time of the valuation, their objections to the valuations were not taken into account. Indeed in paragraph 9 of their plaint they categorically state that they invited the applicant into their respective homesteads where it conducted the survey and evaluated the property and all other improvements. The applicant even in addition to the amount of compensation assessed, offered the respondents a further purchase incentive set at 22.5% over and above the purchase price. Following the valuation, the applicants were paid their respective amounts in compensation and thereafter attended the land control board voluntarily for the consent to the transfers and had their respective parcels of land transferred and registered in the name of the applicant. Much as the respondents claim that they were not amenable to the valuation reports and were desirous to receive a counter offer from the applicant, it bears no logic at all how they could have accepted the compensation and signed for the same. It also bears no logic at all to how, they would have expected the applicant who was compensating them on the basis of valuation reports prepared to again make a counter offer. I think that the respondents are not being candid when they claim that they are yet to be compensated for their properties and inconveniences by the applicant and that they are on the verge of destitution. Evidence is a galore that compensation payments were made to them pursuant to the mutually agreed prices which the respondent acknowledged by duly signing payment receipts and they thereafter relocated. To my mind this suit is an afterthought upon perhaps the respondents belatedly realizing that perhaps they ought to have demanded for more money than they were given at the time. The suit is thus frivolous and scandalous.

The plaint as framed and filed is full of complaints which are not justiciable in my view. Infact majority of those complaints are irrelevant and without substance. The respondents have not filed this suit in good faith. It is as correctly submitted by counsel for the applicant merely calculated to extort and blackmail the applicant into paying out more money. In the end therefore it is calculated to cause the applicant unnecessary anxiety, trouble and expense. The respondents having willingly, voluntarily and transparently participated in the process leading to their compensation, cannot now be heard to claim that the process was oppressive to them and or that they were not adequately compensated. The process of compensation was in 1998 and 1999. Is it therefore possible that the respondents only came to realize that their compensation was inadequate 10 or so years down the line with the filing of this suit? I do not think so. Taking into account all the foregoing I have no doubt at all in my mind that the amended plaint is scandalous, frivolous without legal or factual basis and is merely intended to vex the applicant.

How about the abuse of the court process. An abuse of the process of the court means misuse of the court machinery or process. This is what the respondents have done in the circumstances of this case. Indeed a careful reading of the amended plaint does not disclose exactly what is that they are claiming from the applicant. The claim is too general in nature. Is the claim based on a breach of a contract or fraud? The pleadings as filed contains irrelevant allegations and is too ambiguous. If the suit be a breach of contract it is time barred. The same argument would apply if the basis of the suit is fraud. The respondents are further guilty of abuse of the court process in the nature of laches. Their allegation of breach of contract and fraud having been filed out of time. Clearly then this suit is an abuse of the court process.

In an effort to amend the plaint, the respondents have purported to claim special damages of **Kshs. 1,450,970,000/=.** This global and or an aggregate sum in respect of all the respondents. It has not been shown how much each respondent is claiming. This is an omnibus figure without specific pleading and particulars. In my view it is a claim in the nature of special damages. It is trite law that special damages must not only be specifically pleaded but must be strictly proved. The principle was enunciated in the celebrated case of **Coast bus Services Limited.v. Sisco E. Murunga Ndanyi and 2 others Nairobi C.A.no. 192 of 1992(UR**) thus:

"It is only when the particulars of the special damages are pleaded in the pliant that a claimant will be allowed to proceed to strict prove thereof."

The mere plucking of figures from the air in a plaint as in this case would not normally be adequate where special damages are alleged. The court of appeal did not envisage such a pleading when it said in the case cited that particulars of special damages should be specifically pleaded. For the plaintiff to succeed on a claim of special damages **Justice Chesoni** (as he then was) in the case of **Ouma .vs. Nairobi City Council (1976) KLR 304**, said after quoting the following passage from **Bowen L.J's judgment on pages 532-533 from the Ratcliffe .vs. Evans (1892) 2 Q.B 524** .

"***The character of the acts themselves which produce the damage and the circumstances under which those acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much as certainty and particularity must be insisted on both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."***

In the instant case, special damages are pleaded at paragraph 14 (a) of the amended plaint in the following terms:-

"14 (a) the plaintiffs contend that as a result of the aforementioned acts of the Defendants, they have suffered a lot of loss, damage and injustice the rest of their lives in so far as they have not been adequately compensated and/or resettled as contracted*…."*

Particulars of loss, damage and injuries to the plaintiffs.

i) Loss of only land belonging to the plaintiffs.

ii) Inadequate or non compensation for the land illegally acquired.

iii) Surrender of only land out of fraudulent deals/promises of the defendant.

iv) Inconveniences on relocation and/or looking for new land to settle on

v) Total and absolute disturbance generally.

Particulars of damage in respect of all plaintiffs.
Kshs. 1,450,970,000/= (each plaintiff to adduce his/her loss and damage at the hearing hereof. This cannot by any stretch of imagination amount to proper pleading of special damages. Indeed in the case of **Coast Bus Service Ltd .V. Sisco Murunga Ndanyi, and others, civil appeal number 192 of 1992** the court of appeal observed:-

"It is not enough to simply aver that special damages will be supplied at the hearing…." Yet this is what the respondents have exactly done.

The requirement that special damages must be explicitly pleaded and proved is not merely a procedural necessity but is a mandatory legal requirement whose object is to enable the party against whom they are sought to know what case he has to meet at the trial and to avoid allowing parties to be taken by surprise. The particulars must therefore be precise. They must leave nothing to conjecture, imagination or speculation and the plaintiffs must plead the particulars of the facts which make such a calculation possible, which means that the formulae that the respondents relied on in arriving at the global figure claimed ought to have been shown clearly.

Further the respondents allege misrepresentation of facts on the part of the applicant. That they have not been adequately compensated or resettled by the defendant under contract. The respondents have also alleged in paragraph 14 A of the amended

plaint that they surrendered their parcels of land as a result of fraudulent deals from the applicant. It is trite law that he who alleges fraud and misrepresentation must not only specifically plead the same but also particularize grounds he is relying on. That is the essence of Order VI rule (8) (1) of the **Civil Procedure rules**. It provides:-

"*8*(1) subject to subrule (2) every pleading shall contain necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing.
(a) Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies:-

This suit must fail again since the respondents are in contravention of these mandatory procedural requirements. The amended plaint offends the rules of pleadings and the same cannot be sustained. It is thus bad in law.

The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant's supporting affidavit, means that the respondents have no claim against the applicant. In this regard, the court held in **Kipyator Nicholas Kiprono Biwott .v. George Mbuguss and Kalamka Ltd Ciivil case no. 2143 of 199** ***"…….From the facts and the law I have analyzed in this case, I do find the Defendants have no defence to this suit……having filed no replying affidavit to rebut the averments in the plaintiffs affidavit in support of the application. I therefore have no alternative but to strike out paragraphs 3,4,5,6 and 10 of the defence and enter judgment for the plaintiffs on liability…"***

Further the court concluded that failure to file a replying affidavit amounts to an admission of facts on the applicant's application. This was the holding in the case of **Crown Berger Kenya Ltd .v. Kalpech Vasuder Devan** and **another civil case no. 246 of 2006 (UR**).

In their submissions the respondents have taken the position that the applicant has not demonstrated that their suit is beyond redemption by an amendment. The respondents have already amended the plaint at least once. However those amendments did not help to breath life into the suit. If anything they seem to have sounded the final death knell in the suits coffin considering the pleading as to the special damages. In any event, the respondents have not remotely suggested in their submissions that they are intending to amend their plaint further .

In the end I have come to the inescapable conclusion that this application must be allowed. It is accordingly allowed in its entirety.

As already indicated, this ruling shall apply ***Mutatis Mutandis*** to a similar application filed in **Kisii HCC.No. 70 of 2009, Patrick Okech Olewe & 13 others V. Kenya electricity Generating Company Limited.**

Ruling dated, signed and **delivered** at Kisii this 30th July, 2010.

ASIKE-MAKHANDIA

JUDGE