

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

Civil Case 130 of 2003

PIUS OLOO OKELO
PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD
DEFENDANT

RULING

Pius Oloo Okello (herein, the plaintiff) trading as Gumba Contractors instituted this suit against the National Bank of Kenya Limited (herein the defendant) vide a plaint filed herein on the 27th August 2003.

The prayers sought against the defendant are a permanent injunction restraining the defendant from disposing, selling, alienating or advertising for sale or interfering in any manner howsoever with the plaintiff's title number **KISUMU/OJOLA/2682 and KISUMU /DAGO / 1224**, an order directing the defendant to unconditionally discharge the said parcels of land and to unconditionally release to the plaintiff, money held by the defendant in a fixed deposit account number 003661 together with accrued interest at the rate of 13.5% per annum from 10th September 1991 till payment in full.

Lastly, the plaintiff prays for general and punitive damages against the defendant for having created an illegal charge over the plaintiff's property number **KISUMU /DAGO /1244**.

A statement of defence dated 22nd September 2003 was filed by the defendant in response to the plaintiff's claim.

In essence, the defendant denies the allegations made against itself by the plaintiff and contends that the plaintiff did not clear and settle the outstanding loan balances together with accrued interest such that he remains indebted to the defendant in the sum of Kshs. 10,184,800/20cts. In particular the defendant denies the allegations of fraud made against itself by the plaintiff and contends that it exercised its statutory power of sale and was entitled to realize the security created under title number **KISUMU/DAGO/1244** after the plaintiff defaulted in the repayment of the loan.

For those reasons, inter-alia, the defendant prays for the dismissal of the plaintiff's suit.

Prior to the filing of the statement of defence, the plaintiff took out a Chamber Summons under Order 39 of the Civil Procedure Rules for a temporary injunction to issue against the defendant restraining it from selling, disposing, wasting, alienating, advertising for sale or interfering in any manner howsoever with the plaintiff's titles number **KISUMU / OJOLA/2682 and KISUMU / DAGO / 1224**.

The Chamber summons dated 26th August 2003 was heard interpartes and dismissed in a ruling delivered on the 27th February 2004 by Justice Mohammed Warsame.

A further application for a temporary injunction pending the hearing of Nairobi Civil Application (Kisumu Civil Application Number 24 of 2005) number 224 of 2005 was filed on 12th August 2005.

The application was heard ex-parte on the 15th August 2005 and interim orders were granted accordingly. However, the record does not show that the matter was ever heard inter –partes.

Nonetheless, on the 30th September 2005, the defendant filed an application vide a Notice of Motion dated 9th September 2005 for an order that the plaintiff's suit be dismissed for want of prosecution

The record shows that the application was never heard. It was last in court for hearing on the 22nd May 2006 but was not heard. Instead, the plaintiff had the main suit fixed for hearing on the 13th July 2006.

On that 13th July 2006 the matter came up for the hearing of the main suit but did not proceed and was stood over to the 1st August 2006.

The matter did not proceed on that 1st August 2006 and instead, the defendant fixed its application dated 9th September 2005 for hearing on the 25th October 2006 on which date the application was forwarded to the 13th February 2007. The application was however not heard on 13th February 2007 and was fixed for hearing on the 7th June 2007 and thereafter on the 22nd November 2007.

On 22nd November 2007 the application was re-fixed for hearing on the 4th June 2008 on which date both parties appeared in court and intimated that new issues had emerged necessitating that the matter be stood over generally.

Thereafter on the 10th June 2008 the present application was made and filed in court on the 16th July 2008. In the meantime, the defendant's application dated 9th September 2005 remains pending although it would have been prudent to have it heard prior to this application. It has since been overtaken by events. From all the foregoing it is apparent that there has been unnecessary delay in having this matter concluded expeditiously. Both parties have contributed to the delay and more so, the plaintiff.

It would not be far fetched to opine that the present application is a furtherance of the delay even though it is intended to summarily conclude the entire suit without necessary going into a full trial.

Be that as it may, the application is made under Order 6 Rule 13 (b) (c) (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It is mainly for the striking out of the defendant's defence for being frivolous, vexatious and / or otherwise an abuse of the court process and is based on three main grounds viz:-

1. That the respondent / defendant has discharged the plaintiff's property number KISUMU / DAGO / 1224

2. That the respondent / defendant has confirmed that the applicant / plaintiff serviced his loan facility long before the suit was filed.

3. That the defence raise no triable issues.

The grounds are supported by the facts contained in a supporting affidavit deposed by the plaintiff which was in opposition replied to by an affidavit dated 28th December 2008 deposed by the defendant's manager.

In his submissions on behalf of the plaintiff learned counsel, **Mr. Anyul**, placed more emphasize on paragraphs 4, 5, and 7 of the supporting affidavit which are more concerned with title number KISUMU / DAGO / 1224. He submitted that the defence recognizes that the charge was proper and in the course of time, all the transactions between the defendant and the plaintiff were concluded by the registration of a discharge of charge on the 25th May 2006 as proved by a copy of the relevant green card (Annexure marked P003). The same green card shows that there was a charge created on the 20th September 1995 and a further charge on the 20th November 1995 both of which were seemingly discharged on the 25th May 2006.

It is the plaintiff's contention that title number KISUMU / DAGO / 1224 has since been transferred to one SUSAN ADOYO and a charge created over it by the Co-operative Bank of Kenya. Therefore, the defence is of no use as the subject matter of the suit is no longer the plaintiff's property, a fact known to the defendant. It is further contended by the plaintiff that the defendant has not counter claimed for the sum of close to Kshs. 9 Million allegedly owed to the itself and since the defence was challenging the charge, there is no longer a defence since the material charge is non – existent. The plaintiff also contends that although fraud is alleged there is no evidence whatsoever.

On its part, the defendant through learned counsel, **Mr. P. J. Otieno**, reiterated the contents of its replaying affidavit and contended that it is owed over Kshs. 10 Million by the plaintiff and that there has been no discharge of the material charge as alleged by the plaintiff.

The defendant contends that there was no compliance with the lawful procedures pertaining to a discharge of charge, the necessary instruments were not executed and none of the documents relating to the discharge of charge were traced at the lands office or exhibited by the plaintiff. The defendant further contends that the plaintiff came to court to forestall its right to exercise its statutory power of sale and that there is no discharge of charge which has been filed with its knowledge.

On the green card, the defendant contends that the entry showing that there was a discharge of charge was irregular and fraudulently done.

For all the foregoing reasons the plaintiff is of the view that the defence field herein is invalid thereby rendering a full trial of the case unnecessary. The defendant on the other hand is of the view that the

defence is valid as it raises crucial and germane issues. The courts have always recognized that much as Order 6 Rule 13 of the Civil Procedure Rules provides for the striking out of pleadings, the remedy is a very strong and draconian summary remedy which would normally be granted in the clearest cases with extreme caution.

Herein, all that the defendant was required to show is that the averments in the defence fortified by those in the replying affidavit do raise issues which are triable.

A triable issue is an issue which would raise “**prima – facie**” defence and which should go to trial for adjudication. (See , **Patel =vs= E. A. Cargo Handling Services [1974] EA 75**).

Invariably, an issue which is crucial to the whole suit such as the validity or otherwise of the alleged discharge of charge would be triable.

The driving force to the plaintiff’s claim that the material charge was discharged is the green card (Annexure marked “P003”) showing that title number KISUMU / DAGO / 1224 has since changed hands and is now a subject of a separate charge created by another banking institution. The entries in the green card are not denied by the defendant but it contends that the same were done fraudulently as there was no discharge of charge.

The allegation of fraud made against the plaintiff is a valid triable issue which would best be disposed off by a trial of the suit. Although the allegation is made in the defendant’s replying affidavit it may nevertheless be co-opted into the defence by necessary amendment.

In effect, matters relating to the validity of the discharge of charge and to the alleged fraudulent entries in the land register cannot be viewed as being scandalous, frivolous, vexatious or as matters which could embarrass or delay the fair trial of the suit or as constituting abuse of the court process.

Consequently, the present application is clearly without merit and is hereby dismissed with costs.

Ordered accordingly.

Dated, signed and delivered at Kisumu this 23rd day of September 2010.

J. R. KARANJA
JUDGE

In the presence of Mr. Okoth holding brief for Mr. Anyul for the Plaintiff and Mr. Orengo holding brief for Mr. P. J. Otieno for defendant.

JRK/aao