

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 97 of 2007

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

JOHNSON JACKSON GITHAKA.....DEFENDANT

RULING

The plaintiff filed an application pursuant to the provision of **Order VI Rule 13 (1) (b) (c) & (d)** of the **Civil Procedure Rules** seeking the defence filed by the defendant on 26th March 2007 to be struck out. The plaintiff further prayed for judgment to be entered in its favour as against the defendant in terms of prayers (a) to (e) of the plaint. In the alternative, the plaintiff prayed for judgment to be entered against the defendant for the sum of Kshs.3,494,638 /= plus interest at commercial rates from 3rd October 2003 until payment is full.

The grounds in support of the application are stated in the face of the application. The plaintiff states that in exercise of its mandate, it investigated allegations of corruption and economic crimes at Kenya Reinsurance Corporation where the defendant was at the time the Managing Director. In the course of its investigation, the plaintiff established that the defendant had fraudulently applied part of the money due to the corporation from Heritage AII Insurance Company Limited to redeem the mortgage that the corporation had advanced to the defendant to purchase a parcel of land known as LR.No.209/359/15. It was the plaintiff's contention that the defendant misrepresented to the corporation that he had deposited the sum of Kshs.3, 494,638 /= into the corporation's bank account towards his mortgage redemption while in the actual fact the said sum had been paid by a third party to the corporation. The plaintiff stated that the evidence unearthed by it revealed that the defendant redeemed his mortgage through fraud.

In the premises therefore, the plaintiff was of the view that the defence filed by the defendant was frivolous and vexatious and meant to delay or frustrate the fair trial of the case. The plaintiff stated that that the defence was filed in abuse of the court process. The application is supported by the annexed affidavit of George Gicibu Makembo, an investigator with the plaintiff.

The application is opposed. The defendant filed grounds in opposition to the application. He swore a replying affidavit in further opposition to the application. In his grounds of opposition, the defendant stated that the application was scandalous, vexatious, an abuse of the process of the court, was bad in law, was misconceived as the defence raised triable issues and that the application sought to embarrass and prejudice the defendant in a matter pending before the Makadara Chief Magistrate's Court vide Criminal Case No.40 of 2007. In his replying affidavit, the defendant denied that he had fraudulently applied the sum of Kshs.3, 494,638 /= to redeem his mortgage and reiterated that the true position was that he had properly redeemed his mortgage. He deponed that the issues raised by the plaintiff in the application had been resolved administratively. He took issue with the plaintiff's reliance on the mortgage analysis account statement which in his view was not an authoritative document which could result in the defendant being held liable. He deponed that the defence raised weighty issues which were meritorious and raised triable issues. He set out the triable issues as whether the suit was competent, whether the plaintiff properly instituted the suit without enjoining the corporation, whether the property was lawfully discharged and the defendant acquired full title, whether the corporation was owed the Kshs.3,494,638 /= and whether the corporation did make the full recovery of all the defendant liabilities including the mortgage. He deponed that the court should dismiss the plaintiff's application and defer the case to full trial in view of the triable issues raised by the defendant.

At the hearing of the application, I heard the rival submissions made by Mr. Rutto on behalf of the plaintiff and by Mr. Wandugi for the defendant. I have carefully the pleadings filed by the parties in support of their respective opposition positions. I have also considered the submissions made by counsel for the parties herein, including the authorities cited thereto. The issue for determination by this court is whether the plaintiff established a case to entitle this court strike out the defence of the defendant. The principle to be considered by this court in determining whether or not to strike out any pleadings are well settled. In **Gohil V Wamai [1983] KLR 489** at page 496, Chesoni JA (as he was then) held that :

“The basis of an application for summary judgment under Order XXXV is that the defendant has no defence to the claim (Zola and Another v Ralli Brothers Ltd and Another [1969] EA 691. Rule 2(1) of order XXXV requires the defendant to show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit. The onus is on the defendant to satisfy the court that he is entitled to leave to defend the suit and he will not be given leave to defend the suit if all he does is to merely show that he has a reasonable ground of defence to the question. A mere denial of the claim will not suffice. If the defendant shows that the application is not one, that should have been brought under Order XXXV then the court must dismiss the application.”

In ***City Printing Works (Kenya) Limited v Bailey [1976 – 80] 1KLR 509*** at page 512, Law V.P held as follows:

“The defendant must show a reasonable ground of defence, or a bona fide defence or facts which may constitute a plausible defence. In deciding whether the defendant has done this, the court must have regard to merits of the application as disclosed in the pleadings and affidavits, and in using the expression “balance of probabilities” Madan J was advertng to the matter before him, that is to say, whether on a balance of probabilities the defendant had satisfied him that his defence was both reasonable and bona fide.”

I will address an issue that was raised by the defendant in his response to the plaintiff’s application as to whether the plaintiff has the requisite jurisdiction to file suit in respect of a property of a public body without enjoining such public body as a party to the suit. It is common ground, and indeed it has not been denied, that the Kenya Reinsurance Corporation is substantially owned by the Kenya government. In the Kenyan parlance Kenya Reinsurance is referred to as a parastatal. Under **Section 7 (1) (h) of the Anti-Corruption and Economic Crimes Act, Act No. 3 of 2003**, the plaintiff has been granted the power to institute civil proceedings against any person for the recovery of a public property or for appropriate compensation. The plaintiff filed the present suit on behalf of Kenya Reinsurance Corporation, a corporation substantially owned by the public. I therefore hold that the plaintiff had power and the requisite *locus standi* to institute the present suit against the defendant.

The facts of this case are more or less not disputed. The defendant purchased a parcel of land known as L.R No. 209/359/15 Nairobi in 1998 (*hereinafter referred to as the suit property*). The defendant borrowed a sum of Kshs.5.1 million from Kenya Reinsurance Corporation to pay a substantial part of the purchase consideration. The corporation advanced the said amount to the defendant on security of the said property. The suit property was mortgaged to the said corporation to secure the said sum. There is no dispute that the defendant was required to repay the said mortgage in monthly installments until payment in full. On 3rd of October 2003, an amount of Kshs.3,494,638 /= was deposited into the defendant’s mortgage account. The mortgage of the defendant was reduced to that extent. The plaintiff was subsequently informed of suspicion of corrupt activities that were allegedly being undertaken by the management of Kenya Reinsurance Corporation. The defendant was at the material time the managing director of the corporation.

Upon investigation, investigators from the plaintiff, including the deponent George Gicibi Makembo, made a discovery of a cheque which had been deposited on account of Kenya Reinsurance Corporation by Heritage AII Insurance Company Ltd. The said cheque was dated the 3rd of September 2003 and was of the amount Kshs.3,494,638/=. The investigators obtained the deposit slip which had an entry that the payment was made by the said Heritage AII Insurance Company Ltd. to settle the defendant’s mortgage account. In actual fact, the said amount was paid by Heritage AII Insurance Company Ltd. for the benefit of Kenya Reinsurance Corporation. This amount was reflected on the defendant’s mortgage account on 3rd October 2003 as an amount paid in redemption of the mortgage. Apart from denying that he had paid the said amount to redeem his mortgage from a cheque that was meant to be for the benefit of the corporation, the defendant did not offer any explanation on how a cheque issued in the name of the corporation was applied to redeem his mortgage with the corporation.

I carefully scrutinized the defence of the defendant including the affidavit he swore in opposition to the plaintiff’s application. It was clear that the said defence contains averments in the nature of general denials. It does not answer the averments made by the plaintiff in its plaint. The said defence, in my considered view, in so far as he does not clearly explain how a cheque of the sum of Kshs.3,494,638 /= payable to the corporation was diverted into the mortgage account of the defendant, does not raise any triable issues. The issues raised in the said defence, and in the replying affidavit of the defendant are of a peripheral nature and does not offer any defence to the main plank of the plaintiff’s case that the defendant defrauded the corporation by diverting the sum of Kshs.3,494,638 /= to redeem his mortgage account.

I therefore hold that the plaintiff has established a case to entitle this court strike out the defence filed by the defendant on 26th March 2007. The said defence is accordingly struck out. The said defence is sham and is meant to delay the just determination of this suit. It does not raise any triable issues. The plaintiff established that the defendant defrauded a public corporation of Kshs.3,494,638 /= and therefore should be compelled to refund it. The prayers sought by the plaintiff in prayer (a) to (e) of its plaint cannot be allowed at this stage of proceedings without formal hearing. However, I hold that the plaintiff established that it is entitled to judgment in terms of prayer (f) of the plaint. Judgment is

therefore entered for the plaintiff as against the defendant for the sum of Kshs.3,494,638 /= plus interest at court rates from 3rd October, 2003 until payment in full. The plaintiff shall have the costs of the application as well as costs of the suit to the extent of the judgment.

DATED AT NAIROBI THIS 12TH DAY OF JUNE 2009.

L. KIMARU

JUDGE