



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 269 of 2000

HOUSING FINANCE CO. (K) LTD.PLAINTIFF

VERSUS

CAPT. JAMES N. WAFUBWADEFENDANT

RULING

Application dated 14/8/2006 brought under Order VI Rule 13 (1) (b) and (d) and Section 3A of the Civil Procedure Code. Orders sought:-

- 1. That plaintiff and its verifying affidavit be struck out for scandal and abuse of court process;*
- 2. That costs be awarded to the defendant on the grounds that the plaint is scandalous as it states the defendant threatened to shoot or maim or kill its agents, auctioneers, advocates or potential bidders when actually the sale on 8th November went on uninhibited and was successfully executed.*

The plaintiff also states the plaint is an abuse of court process since it

does not disclose that Misc. Suit No. 660 of 1997 is pending in another court. And that the plaintiff being the judgment-creditor in Misc. No. 660/1997 cannot seek another decree without completing and accounting the auction dues from the sale dated 8/11/1996.

The application is supported by the applicant's affidavit sworn on 14/8/2006. In the plaintiff's plaint paragraph 10 thereof, the plaint states and I quote:-

“That the plaintiff has in exercise of its statutory power of sale held auctions on 8/11/96 and 13/11/98 when the said auctions were unsuccessful by reason of the fact that the defendant threatened to shoot, maim or kill the agents and advocates of the plaintiff, its auctioneers, interested parties and potential buyers before, at and during auction after thereby denying the plaintiff the opportunity to realize its security owing to the threats, the highest bidder in the auction held on 8/11/96 withdrew from the sale and the highest bidder at the auction held on 13/11/1998 also withdrew upon the fall of the hammer as the defendant threatened him with harm and that the loss of deposit was imminent.”

The allegations made in the plaint imply that the applicant/defendant has committed the criminal offences of threatening people with death and injury. These acts do not give rise to the plaintiff's cause of action. In this case the plaintiff pleads that the right to obtain vacant possession of the defendant's property is under the provision of the Mortgages (special provisions) Act, Cap.304 Laws of Kenya on the ground that the defendant has defaulted.

The matters alleged are quite clearly scandalous being matters made for the mere purpose of abusing or prejudice the defendant, the matters are immaterial and unnecessary which contain criminal imputation on the defendant that he is a criminal minded person. It is proof to violence. In his defence these charges are denied and it is clearly intended to embarrass the applicant at the hearing of his case. The allegations are not disclosed from where they are sourced and the same amount to hearsay.

The other ground advanced is that the plaint and its verifying affidavit should be struck out for non disclosure that at the time of filing suit there was in existence suit No. 660 of 1997. A perusal of the plaint dated 31/1/2000 does not refer to that suit. The affidavit in verification of the plaint was filed on 24/3/2000 having been sworn on 31/1/2000. It is not in the prescribed form and does not disclose the existence of the other suit.

In its ground of opposition the plaintiff/respondent admits that this suit arose because the applicant refused to comply with orders made in HCC No. 660 of 1997. And that the issues in this suit are different. The above allegations are merely admitting the non disclosure of the second suit. It is denied that allegations under paragraph 10 of the plaint are scandalous.

The plaintiff relies on the authority of Francis Kamende vs. Vanguard Electrical Services Ltd. – Civil Appeal No. 152 of 1996 in which an embarrassing pleading is discussed. It was held that (judgment of J.A. Madan). No suit ought to be dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action and is so weak as to be beyond redemption and incurable by amendment.

In this case, it cannot be said that matters alleged under paragraph 10 of the plaint are not scandalous. On the issue of non disclosure it is clear that plaintiff did in fact fail to disclose the existence of that suit which was disclosed by the defendant.

In the circumstances, the plaint is defective and not in compliance with the rules of procedure. In the circumstances, the application is allowed. This suit is dismissed for being scandalous and failing to comply with rules of procedure.

All costs to be paid to the applicant/defendant.

Orders accordingly.

DATED, SIGNED and DELIVERED at Nairobi this 30th day of September 2009.

JOYCE N. KHAMINWA

JUDGE