



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 206 of 2005

JOHN WACHIRA WANG'OMBE..... PLAINTIFF

VERSUS

BHUPINDER SOUND.....1ST DEFENDANT

AUTAR SINGH SOULD..... 2ND DEFENDANT

DONALD B. KIPKORIRI.....3RD DEFENDANT

MANSUR ISSA.....4TH DEFENDANT

NORAH M. MUTUKU.....5TH DEFENDANT

MARK M. NGARU.....6TH DEFENDANT

J. JOSEPH TITOO.....7TH DEFENDANT

D. MWENDA KIARA.....8TH DEFENDANT

(Defendants Number 3 to 8 all trading as Kipkorir Titoo & Kiara Advocates)

LILIAN NJUGUNA t/a

LILIAN NJUGUNA & CO. ADVOCATES.....9TH DEFENDANT

EQUITY BUILDING SOCIETY *alias* EQUITY BANK LTD....10th DEFENDANT

MOHAMMED AHMED ABDULLE.....11TH DEFENDANT

R U L I N G

The plaintiff, John Wachira Wang'ombe filed suit against the defendants seeking reversal of the transfer of land reference LR No.Nairobi/Block 91/229 (*hereinafter referred to as the suit property*) to the 11th defendant. The suit property was sold to the 11th defendant by the 10th defendant under its purported legal right to sell the said suit property in exercise of its statutory power of sale by chargee. On the 20th March, 2006, Kasango J struck out the plaintiff's suit against the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 11th defendants for being scandalous and vexatious. Prior to striking out the suit against the said defendants, Kasango J allowed the plaintiff to amend its plaint. The plaintiff duly amended its plaint. In the amended

plaint, the plaintiff made allegation of fraud on the part of the 9th and 10th defendants in the transfer of the suit property to the 11th defendant.

On 14th June, 2007, the 9th and 10th defendants filed an application under **Order VI Rule 13 (1) (a) (b) (c) and (d)** and **Rule 16** of the **Civil Procedure Rules** seeking an order of this court to strike out the plaintiff's suit as against them. The 9th and 10th defendants contend that the plaintiff's suit against them was scandalous, frivolous, vexatious and was an abuse of the due process of the court. The 9th and 10th defendants allege that the plaintiff's suit was misconceived and bad in law as it did not disclose any reasonable cause of action. The application is supported by the annexed affidavit of Mary Wangari Wamae and Lilian Njuguna. The application is opposed. John Wachira Wang'ombe, the plaintiff, swore a lengthy replying affidavit in opposition to the application.

At the hearing of the application, I heard the submission made by Mrs. Mbaabu on behalf of the 9th and 10th defendants. She submitted that the further amended plaintiff which was filed in court on the 15th February, 2005 was filed in contravention of the provisions of **Order VI A Rule 7 (1)** of the **Civil Procedure Rules** in that it was not endorsed with the order of the court granting leave to amend. She submitted that the suit against the 9th defendant was misconceived because the 9th defendant was at the material time the advocate of the 10th defendant. She could not therefore be sued for acts which she did as an agent of the 10th defendant. She further submitted that as an advocate, the 9th defendant could not be sued for undertaking instructions of the 10th defendant. She maintained that the allegation of fraud could not be maintained against the 9th defendant because the said alleged fraud related to the 9th defendant's execution of a consent which compromised the suit.

She submitted that the 10th defendant had sold the property which is the subject matter of the suit in exercise of its statutory power of sale as a chargee. She maintained that the transfer of the suit land to the 11th defendant by the 10th defendant could not be impeached nor could the order of rectification of the register be granted by this court. She submitted that the allegation by the plaintiff that he had obtained the consent of the 10th defendant to secure a buyer for the suit property was untrue since the plaintiff had not exhibited any document to support his contention that there was such consent. She explained that the plaintiff could not prove any illegality or fraud against the 10th defendant when it exercised its statutory power of sale as a chargee. She urged the court to consider the plaintiff's suit in light of submission made and make an appropriate order finding that the plaintiff suit ought to be struck out as disclosing no reasonable cause of action against the 9th and 10th defendants.

Mr. Wandaka for the plaintiff opposed the application. He submitted that the failure by the plaintiff to quote a statutory provision when filing the further amended plaintiff was a technical issue which should not invite the drastic sanction of this court of strike out the plaintiff's suit. He submitted that the 10th defendant had fraudulently sold the suit property even after it became aware that the plaintiff had secured a buyer for the said property. He maintained that the 10th defendant had given its approval for the sale of the suit property to a third party and had even executed a discharge of charge in respect of the charge which had been registered in its favour.

The plaintiff took issue with the fact that the 10th defendant had purportedly sold the suit property to the 11th defendant even when, at the material time, it was aware that it had no property which it could offer for sale in a public auction. He submitted that the sale of the suit property was fraudulent since the same was sold at a gross undervaluation and after the 10th defendant had declined to accept payment of the purchase consideration that had been offered by the buyer who had been secured by the plaintiff. Mr. Wandaka insisted that the 9th defendant fraudulently compromised the suit to defeat the plaintiff's claim against the 10th defendant. He submitted that this was not a suitable case which could be struck out on the grounds that it raised no reasonable cause of action. He urged the court to order that the suit against the 9th and 10th defendants go to full trial. He urged the court to dismiss the application with costs.

I have carefully considered the rival argument made by the respective counsel for the 9th and 10th defendants and the plaintiff. The issue for determination for this court is whether the 9th and 10th defendants have established a case to enable this court to strike out the plaintiff's suit for being frivolous, vexatious and abuse of the due process of the court. In **DT Dobie & Co. (K) Ltd –vs- Muchina [1982] KARI**, Madan JA held that:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

In the present application, the 9th and 10th defendants allege that the plaintiff's suit ought to be dismissed because it is frivolous, vexatious and an abuse of the process of the court. In the suit against the 9th and 10th defendants, the plaintiff is seeking particulars in the register in respect of parcel No. LR Nairobi Block 91/229 to be rectified and instead the suit property be registered in the name of the plaintiff. The plaintiff averred that the register in respect of the said parcel of land was fraudulently and illegally changed by the 9th and 10th defendants acting in collusion with others.

The plaintiff alternatively prayed for judgment for the sum of KShs.2.8 million which he claims to be the difference between the purchase price which he had obtained in respect of the suit property before the same was unlawfully sold by the 10th defendant in purported exercise of its statutory power of sale as chargee. The 9th and 10th defendants denied the averments made by the plaintiff in his plaint. They insisted that the 10th defendant sold the suit property in exercise of its statutory power of sale as chargee. They denied that they had committed any fraud or any acts of illegality when they sold the suit land. The 9th defendant specifically submitted that she could sue on account of the acts that she undertook as an advocate on behalf of the 10th defendant. She therefore asked this court to specifically strike out her name from the pleadings in this case.

I have read the further amended plaint. It is evident that the plaintiff is challenging the exercise of the statutory power of sale by the 10th defendant in regard to a property which he had charged to the 10th defendant. According to the plaintiff, he had secured a buyer for the suit property, which buyer had even paid a deposit pending the conclusion of the conveyancing transactions. The plaintiff was aggrieved that before the said sale could be concluded, the 10th defendant, in purported exercise of its statutory of sale, sold the suit property at a consideration that the plaintiff considered a gross undervaluation. The plaintiff set out the particulars of fraud on the part of the 9th and 10th defendant. I am of the opinion that the issues raised by the plaintiff are such that they can only be ventilated in a full trial. The issues raised are triable.

The circumstance of the sale of the suit property is such that this court shall grant the plaintiff leave to argue the same before court in a full trial. The 9th and 10th defendants will have a chance to disprove the allegation of fraud made against them. Even if this court were to find that the sale of the suit property cannot be reversed, it may find that the plaintiff is entitled to be paid damages on account of the wrongful exercise by the 10th defendant of its statutory power of sale. Similarly, the circumstance under which the 9th defendant participated in the entire transaction leading to the sale of the suit property may be subject to be questioned. This issue can only be resolved in a full trial and not an application to strike out pleadings. This court can only strike out the plaintiff's suit if it is of the opinion that the same is so hopeless that it cannot be redeemed by amendment. In the present suit, the plaintiff raised several issues which are triable and should therefore go for trial.

As to whether the further amended plaint was filed contrary to the rules, I hold that the plaintiff's failure to state that the amendment was made pursuant to an order of the court of a particular date is not fatal. As was held by the Court of Appeal in **Gladys Wanjiru Ngacha –vs- Teresa Chepsaat & 4 others CA Civil Appeal No. 119 of 2001 (Nyeri) (unreported)**, while it was good practice for the order granting

leave to be stated, failure to state so did not render such amendments incompetent. The court held that:

“We consider that it is certainly best practice to so mark up the proposed amendment. However the Rules do not stipulate that it must be done at that stage and, that being so, we do not consider that the failure to do so was a valid ground for the learned Judge to dismiss the application to amend.”

The upshot of the above reasons is that the application filed by the 9th and 10th defendants to strike out the plaintiff’s suit is unmeritorious. The same is hereby dismissed with costs to the plaintiff.

DATED at NAIROBI this 8th day of APRIL, 2008.

L. KIMARU

JUDGE