



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1475 of 2000

IRARU HOLDING LIMITED.....

.....PLAINTIFF

VERSUS

CANADIAN FOODGRAINS BANK.....1ST DEFENDANT

TRANSAMI (KENYA) LIMITED (now known as SDV TRASAMI (K) LTD)..

.....2ND DEFENDANT

SOCIETE GENERALE DE SURVEILLANCE (SGS)

KENYALIMITED.....3RD DEFENDANT

RULING

The Chamber Summons dated 23.8.2001 is brought by the 3rd Defendant and the same is based on Order VI Rule 13 [1] [b] [c] and [d] of Civil Procedure Rules. The 3rd Defendant seeks an order that:

“Paragraph 6, 7, 8, 9, 10, 11, 12, 13 and 14 of the plaint dated 21st August 2000 and filed in court the same day be struck out with costs to the 3rd Defendant.”

The application is anchored on the following grounds: -

- (a) The said paragraphs are prolix, contradicting and confusing.
- (b) Unnecessary material has been pleaded in those paragraphs.
- (c) Evidence and arguments are pleaded in the paragraphs
- (d) They are scandalous, frivolous and vexatious.
- (e) They prejudice, embarrass and will delay the fair trial of the action.
- (f) The pleaded paragraphs are an abuse of the process of the court.
- (g) The plaintiff does not occupy the suit premises.
- (h) The suit premises area disused quarry used as a dumping site.

3rd Defendant's counsel in submissions stated that although power of striking out of pleadings was draconian and should only be used sparingly however where there is merit to strike out the court should exercise its discretion and strike out. He concluded by saying that the grounds on the chamber summon spoke for themselves and the court should proceed to strike out the afore stated paragraphs.

The application is opposed by the plaintiff. The plaintiff filed grounds of opposition which stated therein that the paragraphs, the subject of this application, show reasonable cause of action, that the paragraphs constitute an honest claim and contain necessary material facts which are not scandalous. In submissions plaintiff's counsel stated that the plaintiff's suit relates to a claim of pollution of environment and that it accordingly comes under Environmental Management and Co-ordination Act 8 of 1999. That the actions therefore should be looked at from the stand point of view that statute. That the 3rd defendant's plea that the Plaintiff's action is vexatious or frivolous should be considered in the light S 1 [1] and 3 (e) of that Act. That the Plaintiff's pleading was consistent with environmental pleading. Plaintiff requested the court to rely on the following cases:-

(i) CIVIL APPEAL NO. 102 OF 1998 NITIN PROPERTIES LTD V JAGJIT SINGH KALSI & ANOTHER, where the court of appeal had the following to say: -

“Striking out is a drastic remedy and it has been held time and again that striking out procedure can be invoked only in plain and obvious cases and that such jurisdiction must be exercised with extreme caution.”

The court of appeal in that case also quoted with approval from the case of D.T. DOBIE (K) CO. LTD – V – MUCHINA & ANOTHER C.A. NO. 37 OF 1976 as follows: -

“A court of justice should aim at sustaining a suit rather than terminating it by a summary dismissal. Normally a law suit is for pursuing it.”

(ii) KASSAM – V – BANK OF BARODA (K) LTD [2002] I KLR 294 where Hon Mr. Justice Kuloba (RTD) stated: -

“Similarly the court has an inherent, as well as a statutory, jurisdiction to strike out a pleading which is an abuse of the process of the court; but even there, too, it is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases. It is not exercised merely because the story told in the pleadings is highly improbable and one which it is difficult to believe, it is only in plain and obvious cases and where the party's stand point cannot prevail.....”

I have considered the application the submissions of counsel and I will be guided by the statement of law to be found in Halsbury's Law of England, 4th Edition vol. 36 paragraph 73 as follows: -

“In judging the sufficiency of a pleading for this purpose, the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that an absolute defence exist, the court will strike it out. A pleading will not however be struck out if it is merely demurable, it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases.”

With that caution I need to consider whether the plaint is scandalous, frivolous or vexatious or may embarrass or delay the fair trial of the action or in otherwise an abuse of the process of the court. The definition of these terminology is to be found in the case **HCCC NO. 2180 OF 1994 DR. MURRAY WATSON V RENT-A-PLANE LTD AND OTHERS**. A pleading was said in that case to be scandalous if **“it alleges indecent, offensive or improper acts omissions or motives against the adversary which are unnecessary in the proof of the action pleaded”**. I have looked at the paragraphs the subject of the present application and I do not find them to be scandalous at all. The paragraphs are not indecent, offensive or improper. The case of DR. MURRAY WATSON (supra) also defined frivolous and vexatious. The definition was stated to be **“lacking in seriousness and tending to**

annoy.” In considering that definition I find that the latter part of paragraph 7, paragraph 13 (iii) and 13 (IV) are frivolous. The latter part of paragraph 7 was quite correctly stated by 3rd defendants counsel to be more fitting to be a political speech than a pleading. I find that that portion ought to be struck out. The portion of that paragraph that the court orders to be struck out is as follows: -

“.....received very wide local and worldwide media coverage and they became an issue that was widely discussed throughout the world and caused a ministerial statement to be issued by a cabinet minister in the parliament, of the Republic of Kenya. The said sad events unfortunately depicted Kenyans and Africans in general to the whole world as persons who are so hungry, poor and hopeless that they are willing to scramble for contaminated foodstuffs that have been dumped on the ground by donors and multinational agencies with no or little consideration to their health and their well being.”

Paragraph 13 (iii) which the court hereof orders that it be struck out relates to another action filed in the high court namely **HCCC NO. 2873 OF 1997**, which the Defendants have not been joined or sued and the court finds that to seek indemnity on the possible award of damages which might be made against the plaintiff does nothing but seeks to tend to annoy. Indeed how can a person who is not a party to an action be ordered to pay costs of a suit they are not party to. That paragraph 13 (iii) is therefore ordered to be struck out. Similarly paragraph 13 (IV) is also found to be frivolous since the plaintiff has not pleaded that it was charged in the **CRIMINAL CASE NO. 7354 OF 1997** (City Hall) but that rather it was the 2nd Defendant who was charged. The Plaintiff therefore fails to justify in the plaint why it was necessary for it to be legally represented at that criminal trial. The claim for reimbursement of those legal fees can only be taken to be frivolous lacking in seriousness and only tending to annoy. That paragraph 13 (IV) is hereby ordered to be struck out.

The remainder of the paragraphs of the plaint they may not have been drafted in the best form possible the sort of draftsmanship that is expected of an advocate but in the courts view, they do not render themselves to be prejudicial or causing embarrassment to result in their striking out.

The plaintiff's argument that an environmental action is not subject to Civil Procedure Rules is rejected. It is after all a civil action subject to those very rules.

The 3rd defendant has only partially succeeded as shown in hereinbefore. The orders are granted as stated herein before and the costs of the Chamber Summons dated 23.8.2001, half of its costs are awarded to the 3rd defendant to be paid by the Plaintiff.

Orders accordingly.

Dated and delivered this 26th day of January 2007.

MARY KASANGO

JUDGE