IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 456 of 2004

THE REGISTERED TRUSTEES OF THE DIOCESE OF MOUNT KENYA

ANGILICAN CHURCH OF KENYA.....……PLAINTIFF/ RESPONDENT

VERSUS

CHARLES WACHIRA NGUNDO.....DEFENDANT/ APPLICANT

RULING

The Defendant has by chamber summons dated 21st February 2007 sought to have the case against him struck out with costs. The application is expressed to be brought under Order VI rule 13(1)(a) (b) and (d) of Civil Procedure Rules and Section 3A of Civil Procedure Act. However Mr. Maina for the Applicant asked to abandon reliance on Rule 13(1) (a) and (d). The Applicant therefore relies on Rule 13(1)(b) which provides:

*"**Rule 13(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-***

***(b) It is scandal**ous, frivolous or vexatious."*

The gist of the grounds that the Applicants relies on to support the Application is that there is no privity of contract between the Plaintiff/Respondent and the Applicant/Defendant that the Applicant is a total stranger to the suit and that therefore the Plaintiff has no cause of action against him.

The Application is opposed. The Respondent has filed two replying affidavits sworn by Paul Karanja the Adminstrative Secretary of the Diocese of Mt. Kenya South, the Plaintiff in the suit, dated 18th April 2007 and 19th June 2007, both affidavits have been considered together with the annextures thereto. The gist of these affidavits reveal the involvement of the Plaintiff and Defendant in a transaction in which the Plaintiff, Respondent herein, was to buy a parcel of land L.R 11781/9 in Kikuyu. The affidavits reveal that payments were made to the Applicant and that after purchase fell through the Applicant undertook to refund part of the purchase price which he failed to do and therefore the suit.

It is expedient at this stage to give a brief summary of the case. I see from the plaint that the Defendant acted as the Plaintiff's agent with the duty to receive all payments made by the Plaintiff for the said purchase. As for the Plaint the Defendant retained Kshs.11,958,000/= remitted to him by the Plaintiff between April 1997 and January 1998. The Plaint further reveals that due to inability by Defendant to secure a loan for the Plaintiff to enable it purchase the property, the Plaintiff was unable to proceed with the sale and therefore rescinded the contract. The Plaintiff has now sued for a refund of Kshs7,625,000/=

being the refund amount due to it from the Defendant after deducting agency fees, disbursements and incidentals as agreed between the parties. The Plaintiff avers further that the Defendant admitted liability and undertook to refund the amount within 90 days from the time agreed which he has neglected, ignored and or refused to do.

The Defendant's defence was a denial of the Plaintiff's claim and an admission that the amount the defendant received of Kshs.11,958,000/= was paid to third parties and remainder utilized by him as agency fees, disbursements and incidentals.

The Applicant seeks to strike out this suit on grounds it is scandalous, frivolous and vexatious. Mr. Maina for him relies on the **HCCC NO. 661 OF 2001, NOAH KIPNGETICH OMANGA** vs **TELKOM KENYA LIMITED & OTHERS** where **Ringera, J** as he then was, relied on the statement of law in **Halsbury Laws of ENGLAND 4TH EDITION Vol. 36** at paragraph 73, which I also find instructive, where it states:-

"***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 bar exists, the court will strike it out. A pleading will not however be struck out if it is merely demurrable, 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".***

Sir Udo Udoma J, in MISANGO vs MUSIGIRE 1966 E.A 390 while considering the question of the courts power to strike out a pleading for not disclosing a reasonable cause of action cited with approval the case of DYSON vs A. G. [1911] IKB410 at page 418 and 419 where FLETCHER MOULTON, LJ said:-

"*Now it is unquestionable that, both under the inherent power of the court, and also under a specific rule to that effect made under the Judicature Act, the court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be very sparingly used, and rarely, if ever, excepting in cases where the action is an abuse of legal procedure. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the Defendant challenged the validity of the Plaintiff's claims as a matter of law…To my mind it is evidence that our judicial system would never permit a Plaintiff to be 'driven from the judgment seat' in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad."*

Going by these two citations I would summarize the test to be applied to a plaint challenged by a Defendant as being fit for striking out as;- one, that the paint shows on the face of it that the action is not maintainable or that an absolute bar to it exists,

two, that the plaint is so bad that even an amendment would not cure it,

three, the action or suit is baseless and wantonly brought without the shadow of an excuse and that to allow it to proceed to trial will only allow the Defendant to be vexed.

four, the action is an abuse of legal procedure.

The Applicant has submitted that there is no privity of contract between him and the Defendant and therefore the Plaintiff has no reasonable cause of action. The issue is whether there was anything binding the Plaintiff and the Defendant contractually. As stated in Halsbury's Laws of England, 3rd Edition Volume 8 at paragraph 110:-

"***As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."***

Paragraph 3 of the plaint states thus:-

"**1) In or about March 1997, the Plaintiff's appointed the Defendant as agent to facilitate and recommend a suitable property for purchase and development. Defendant was to procure financial loans for the same. In pursuance thereof defendant recommended and the Plaintiff executed an Agreement for sale in 1997 to purchase L.R. 11781/9 from Stirling Civil Engineering (K) Limited at a consideration of Kshs.32 Million.**

The Plaintiff in paragraph 3 of the plaint avers that it had Principle/Agent relationship with the Defendant which was quite apart from the sale of land agreement subsequently entered between it and Stirling Civil Engineering (K) Ltd. The Defendant has not denied that such a relationship existed between him and the Plaintiff in his statement of defence. Paragraph 2 of the defence which refers to paragraph 3 of the Plaint denies only the existence of a sale agreement and remittance of any money under it. That averment did not address the issue of a Principle/Agent relationship between the parties and in the circumstances it remains an issue for the court to determine at the trial. I am guided by the Court of Appeal observation in the case of **CASSAM** vs **SACHANIA 1982 KLR 191** thus:-

"***3. An issue between the parties to an interlocutory application should not be decided at the application stage unless the material facts are capable of being fully established and the law is capable of being fully argued without the benefit of a trial."***

I do find that the plaint herein raises triable issues and that therefore there is a reasonable cause of action disclosed. I do find that there are issues of both law and fact arising from the pleadings in this case which cannot fully be established at an interlocutory application.

The Applicant has failed to demonstrate that the case is scandalous, frivolous, vexatious or an abuse of the court process.

The application is therefore dismissed with costs to the Plaintiff/Respondent.

Dated at Nairobi this 21st September, 2007

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:-

Mutuga holding brief for Maina for applicant.

LESIIT, J.

JUDGE