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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KITALE

Civil Case 121 of 2007

DAVID JAMES MBOGO.....PLAINTIFF

V E R S U S

ALFRED C. ASIKOYO

STEPHEN O.EKISA

ROSEMARY W. KAMAU

JOSEPH ALLISON.....DEFENDANTS

R U L I N G

The application before me is brought by the defendants, pursuant to the following provisions of the law; -

- (a) ***Sections 3A and 63 (e) of the Civil Procedure Act;***
- (b) ***Order 16 rule 5 of the Civil Procedure Rule ; and***
- (c) ***Order 6 rule 13 (1) (b) and (d) of the Civil Procedure Rules.***

The defendants seek two prayers, in the alternative. First, they ask that the suit be dismissed for being an abuse of the due process of the court, and for not disclosing any cause of action in law.

In the alternative, the defendants ask that the suit be dismissed for want of prosecution.

The application is supported by the affidavit of Oliver Lynton, who shall hereinafter be cited as “***the deponent.***”

It is the deponent’s contention that he is the Country Manager of International Child Care Trust Kenya (ICTK). By virtue of that position in ICTK, the deponent believes that he is competent and also that he has authority to swear the affidavit in support of the application.

According to the deponent, the ICTK is the owner of the property ***L.R. NO. TRANS-NZOIA/LIYAVO/212***, (which property shall hereinafter be cited at “***the suit property***”).

It is the deponent’s case that ICTK had established a Children’s Centre on the suit property, and that the said centre was the home of some 96 destitute children, as at 1/2/2006.

The deponent stated, on oath, that the plaintiff had never been the registered proprietor of the suit property. Therefore, the deponent believes that the courts of law cannot grant a prayer for the registration of the plaintiff as the owner of the suit property, when he had never been the registered proprietor previously.

On the other hand, even though ICTK was not a party to these proceedings, the deponent emphasized that the said organization was deeply involved in the suit.

As the plaintiff has disputed the deponent's authority to swear the supporting affidavit, that is an issue that will need to be resolved herein.

Finally, the applicant pointed out that the matter was last in court on 10/5/2005. From that date, until 1/2/2006, when the current application was filed, the plaintiff is faulted for having not taken steps to set down the suit for hearing.

Therefore, the applicant asked the court to dismiss the suit for want of prosecution. That submission was put forward by the applicant, in the event that this court were to come to the conclusion that the suit disclosed a cause of action.

In a nutshell, I understood the applicant to be saying that the suit did not disclose any cause of action against the defendants. Therefore, the suit should be struck out on those grounds. However, if the court were to come to the conclusion that the suit did disclose some cause of action, the applicant says that the suit should nonetheless be dismissed for want of prosecution.

In answer to the application, the plaintiff submitted that the said application was not only without merit, but was misconceived.

It was common ground that the submissions put forward by the defendants, for striking out the suit, were on the grounds that the suit did not disclose any cause of action.

It was also common ground that under the Civil Procedure Rules, if a party was asking the court to strike out a suit on the grounds that the suit did not disclose any cause of action, the applicant would be seeking to invoke the provisions of Order 6 rule 13 (1) (d).

Furthermore, it is an express requirement of rule 13 (1) (a) of the Civil Procedure Rules that an application made pursuant thereto is not to be backed by any evidentiary material, such as an affidavit.

In this case, the defendants have not invoked Order 6 rule 13 (1) (a) of the Civil Procedure Rules.

When the plaintiff submitted that the court ought to strike out the supporting affidavit, on the grounds that an application under Order 6 rule 13 (1) (a) should not be supported by an affidavit, the defendants invoked the provisions of Order 50 rule 12 of the Civil Procedure Rules. Pursuant to that rule, it is made clear that simply because an applicant had failed to cite the correct legal provisions was not reason enough to warrant the refusal of the prayers sought by the applicant.

At that stage of the application, the court asked Mr. Milimo, learned advocate for the defendants, if he was conceding that the application had not been made under the correct provisions of the law. His answer was to the effect that the application had been brought pursuant to the correct provisions of the law.

Frankly, I then failed to understand why the applicants' counsel had called to his clients' aid, the provisions of Order 50 rule 12. The reason for so saying is that if the applicants had cited the correct provisions of the law then they would have had no reason for telling the court that the application should not be disallowed simply because they might have failed to invoke the correct rule.

But perhaps, the applicants were exercising an abundance of caution, in the event that the court should find that they had not invoked the correct rules. For that reason, I will explore both sides to the coin.

The first side to the coin is that which presupposes that Order 6 rule 13(1) (b) and (d) are the correct rules, as submitted by the applicants. If that be the position, the said rules should speak for themselves.

Order 6 rule 13 (1) (b) & (d) stipulate as follows;

“ (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that; -

- (a) it discloses no reasonable cause of action or defence; or**
- (b) it is scandalous, frivolous or vexatious; or**
- (c) it may prejudice, embarrass or delay the fair trial of the action; or**
- (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly; as the case may be.”**

Clearly, neither rule 13 (1) (b) nor (d) come into play when a party is asking the court to strike out a suit, on the ground that it discloses no reasonable cause of action.

Therefore, it follows that the application before the court is incompetent. Had the applicants conceded having invoked the wrong provisions, they would then have become entitled to invoke the provisions of Order 50 rule 12 of the Civil Procedure Rules, which provides as follows;

“ Every order, rule or other statutory provision under or by virtue of which an application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.”

Of course, if the applicants had made the concession, to the effect that the application should have been pursuant to Order 6 rule 13 (1) (a), they would then have fallen foul of Order 6 rule 13 (2), which says that;

“ No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.”

Next, I turn to give consideration to the competence of the affidavit sworn by the deponent, Oliver Lynton.

As already stated herein above, the deponent is not a party to these proceedings. Nor is ICTK, the non-governmental organization of which is the Country Manager. For those reasons, the plaintiff describes the deponent as a stranger to the proceedings, as neither he nor the organization with which he works has any locus to bring the application.

Of course, by virtue of Order 18 rule 3 of the Civil Procedure Rules, a deponent may swear an affidavit on such facts as he is able, of his own knowledge, to prove. Furthermore, if an affidavit was sworn in interlocutory proceedings or by leave of the court, it may contain statements of information and belief showing the sources and grounds thereof.

In so far as the affidavit of Oliver Lynton is based facts which he can prove of his own knowledge, the contents thereof would be admissible in evidence.

But as to whether this application is interlocutory, is doubtful. I say so because if the suit was either struck out or dismissed, as prayed for in the application, the proceedings would have been conclusively determined. In other words, the application does not appear to be one of an interlocutory nature.

In my understanding, the plaintiff was not necessarily challenging the contents of the supporting affidavit, or the admissibility thereof. Instead, the plaintiff was saying that Oliver Lynton, the deponent, was a stranger to these proceedings, just as much as the organization that he is a Country Manager of.

If that issue was to be determined simply on the basis of the deponent and ICTK not being parties to the suit, the matter would be straightforward. Yet, I do not think that the matter is so simple and straightforward.

I say so because, if as the deponent states, ICTK is the registered proprietor of the suit property, then that organization would appear to have some nexus with the subject matter of the case. In effect, if that is the factual position, then in real terms ICTK and the deponent are not strangers per se.

That, however, does not imply that either ICTK or its Country Manager necessarily has locus in this suit.

What I understood the plaintiff to be saying is that the deponent did not demonstrate that either he or ICTK have locus to bring the current application.

A perusal of the application and of the supporting affidavit reveal that the application was brought by the defendants. Nowhere did ICTK or Oliver Lynton say that they or either of them was the applicant. Therefore, I find and hold that the plaintiff had no reason for criticizing the deponent or ICTK for being the applicant herein, whereas none of the two had attributed that role to themselves.

The plaintiff did not provide me with any legal precedent which stipulates that only a party to a suit is entitled to swear an affidavit to support his or her application.

Any person who qualifies to give evidence which is, by law, admissible may give his evidence either orally or by an affidavit. If the evidence is given orally, the witness will have been called by one of parties to the action. Whilst, if the evidence is tendered by way of an affidavit, then again the deponent would have been asked to swear his affidavit, by one of the parties to the action.

The only way that I am aware of, for demonstrating that the deponent had been duly authorized is through compliance with the provisions of Order 3 rule 2 of the Civil Procedure Rules.

In the case of **MICROSOFT CORPORATION Vs MITSUMI COMPUTER GARAGE LTD & ANOTHER [2001] KLR 470**, the Hon. Ringera J. (as then was) had occasion to delve into the subject of the kind of authorization required by a deponent, so as to render his affidavit competent and admissible.

In that case, Ms. Pearman swore the verifying affidavit. The said Ms. Pearman was the Country Manager of the plaintiff, Microsoft Corporation.

The learned judge did make a finding to the effect that Ms. Pearman was an officer of Microsoft Corporation. Notwithstanding that fact, the court went on to hold as follows;

“ However, while she may indeed be authorized to make the affidavit she does not depone to that fact. That is a substantial defect in her affidavit.”

In this case, the deponent, Oliver Lynton, did expressly depone to the fact that he was authorized to make the supporting affidavit. Therefore, his affidavit can be differentiated from that in the case of **MICROSOFT CORPORATION V MITSUMI COMPUTER GARAGE LTD & ANOTHER [2001] KLR 470**, to that extent.

The only difficulty is that the deponent never indicated that he had been duly authorized by the defendants or any of them.

As the application itself was brought by the defendants; and as it is the said defendants who seek to

rely on the supporting affidavit, I hold the considered view that it may be justifiably presumed that they did authorize the deponent to make the supporting affidavit. Therefore, in the circumstances of this case, I find that the supporting affidavit is valid. I decline to expunge it from record, as asked for by the plaintiff.

Next I address the issue as to whether or not the suit discloses a reasonable cause of action.

In the case of ***NITIN PROPERTIES V JAGIR SINGH KALSI, NBI C.A. NO.132 OF 1989***, the Court of Appeal said;

“ 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 case and that such jurisdiction must be exercised with extreme caution.”

And, in the celebrated case of ***D.T. DOBIE & CO., LTD V JOSEPH MUCHINA [1982] KLR 1***, the Court of Appeal said;

“ 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 determining whether or not this case ought to be struck out and dismissed, I will, as was done by the Court of Appeal in ***ABUBAKAR Z. AHMED V PREMIER SAVINGS AND FINANCE LIMITED & 4 OTHERS, MSA CIVIL APPEAL NO. 109 OF 2004***, ask myself;

“ was this a clear and obvious case in which the learned judge could invoke the so called ‘draconian’ powers of striking out?”

On the face of the documents filed by the plaintiff, it is clear that the plaintiff was evicted from the suit property pursuant to an order which was issued in a criminal case.

Consequent upon that order, the defendants were also registered as the proprietors of the suit property. However, the plaintiff subsequently challenged the propriety of the orders, and the same were set aside.

Following the setting aside of the orders which had given the title of the suit property to the defendants, the plaintiff brought this action, with a view to reversing the registration of the defendants as proprietors to the suit property.

In my considered opinion, the claim put forward by the plaintiff is not plainly and obviously hopeless. If anything, the claim shows more than a mere semblance of a cause of action. I would say that it discloses a reasonable cause of action.

Accordingly, the suit is not for striking out.

And as regards the prayer that the suit be dismissed for want of prosecution, it is clear that the application before me was filed in court on 1/2/2006.

It is also evident from the court records that on 5/12/2005, the plaintiff had filed an application for the transfer of the case from Bungoma to Kitale.

Ultimately, the parties consented to the transfer of the case to Kitale, on 16/7/2007. Before the case was transferred, the plaintiff had listed his application for hearing on 9/5/06. On that date, the application for the transfer of the suit was adjourned, by consent, to 9/11/06.

In the light of the fact that this application, (for striking out the suit), was filed only about two months

after the plaintiff had filed his application for the transfer of the suit. I find that the defendants moved too soon in seeking to have the suit struck out. I say so because the plaintiff was already taking steps to prosecute the suit, before the defendants brought the application to have the suit dismissed for want of prosecution.

In the result, the application is dismissed with costs.

Dated and Delivered at Kitale, this 27th day of November, 2007.

FRED A. OCHIENG

JUDGE