



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 872 OF 1999

JOYCE NUNGARI MWAURA PLAINTIFF

VERSUS

GODFREY KAGURU MWAURA 1ST DEFENDANT

KENYA COMMERCIAL BANK LTD 2ND DEFENDANT

DISTRICT LAND REGISTRAR, NAIROBI 3RD DEFENDANT

RULING

Before me is an application by the 2nd defendant seeking one primary order of the court that the plaintiff's suit as against the 2nd defendant be struck out and/or dismissed. The application is expressed to be brought under the provisions of Order VI Rule 13 (1) (b), (c) and (d) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all Other Enabling Provisions of the Law.

The application is premised upon the main grounds that the plaintiff's suit is scandalous, frivolous and vexatious; that the plaintiff's suit commenced by Originating summons is not supported by any affidavit and that the suit as it stands does not disclose any claim or reasonable cause of action to which the defendant can reply.

The application is supported by an affidavit sworn by one Simon J. N. Gathiari, the 2nd defendant's Credit Analyst. It is deponed that the original plaintiff is now deceased. It is further deponed that the Originating Summons is unsupported by affidavit evidence thus making it impossible for the 2nd defendant to file any response to the summons. In the premises the 2nd defendant contends that the plaintiff's suit is legally and factually embarrassing and an abuse of the process of the court. It is further contended that the suit is scandalous, frivolous, vexatious serves no useful purpose and should be struck out and/or dismissed with costs.

The application is opposed on the basis of one ground of opposition that the application is untenable in law.

The application was canvassed before me on 30.10.2007 by Mr. Otieno Learned counsel for the 2nd defendant and Ms. Githui learned counsel for the plaintiff. The basis of the 2nd defendant's objection to the Originating Summons is the want of a supporting affidavit. It is counsel's view that in the absence of such a supporting affidavit it is not possible for directions to be taken.

Counsel for the plaintiff holds a contrary view. She contended that directions can still be taken in the

absence of a supporting affidavit. In her view it is on the giving of directions that the manner of proceeding will be determined. In that regard the plaintiff had, in a pending application, sought directions of the court.

Having considered the rival submissions of counsel and further having carefully considered the application the supporting affidavit and the single ground of opposition, I take the following view of the matter. The originating summons has been brought under the provisions of Order XXXVI Rule 13 and 7 of the Civil Procedure Rules. Those provisions do not require the filing of a supporting affidavit. It is sufficient that the plaintiff specifies the relief sought and the question for the determination of the court. Indeed the format of an Originating Summons provided under rule 7 of Order XXXVI of the Civil Procedure Rules makes no mention of a supporting affidavit.

It appears also that under the same order and rule a party served need only enter appearance. No other documents is mentioned. Under rule 8A any party to a suit commenced by Originating Summons may apply to a judge in chambers for directions and under Rule 8B, procedure is provided for attendance at the hearing of the Summons. Even at that stage it would appear that a party served need not have filed any document. However at the giving of directions, a judge may order the filing of further documents and give such directions as he may think just for the trial of any issues arising.

On a plain reading of the rules therefore it would appear that the 2nd defendant's application is premature as the plaintiff may, at the giving of directions, seek to file further documents. The plaintiff's Originating summons cannot therefore be struck out or dismissed for being frivolous or vexatious. I have also not detected anything scandalous or embarrassing in the Originating Summons. It is also in my view not an abuse of the process of the court.

The upshot is that the 2nd defendant's application fails. It is dismissed. Costs shall be in the cause.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER 2007.

F. AZANGALALA

JUDGE

Ruling read in the presence of Enondo holding brief for Muturi for the plaintiff.

F. AZANGALALA

JUDGE

20.11.07