



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 300 OF 2004

FRANCIS KAMAU SIMON.....PLAINTIFF

VERSUS

TRANS-NATIONAL BANK LTD.....1ST DEFENDANT

LEGACY AUCTIONEERING SERVICES.....2ND DEFENDANT

RULING

The second defendant filed an application by way of chamber summons brought under **order VI rule 13(a)** and **16** of the **Civil Procedure Rules** and prayed that the plaintiff's suit as against itself be dismissed with costs as it does not disclose any reasonable cause of action. The application was made on the grounds that:-

- (i) That the plaint does not disclose any tortious, statutory contractual or otherwise unlawful acts committed against the plaintiff by the second defendant.
- (ii) That the second defendant is non suited in these pleadings.
- (iii) That the plaintiff's application is a classic example of the abuse of the process of the court.

In the suit, the plaintiff stated that he is the registered owner of residential premises known as **L.R. 12096/21 I.R. NO. 72568 NAKURU** hereinafter referred to as the "**suit premises**". The plaintiff further stated that he obtained from the first defendant certain banking facilities secured by a charge on the suit premises. The plaintiff further averred that the first defendant started writing letters to him demanding that he pays back the funds that had been advanced to him and it instructed the second defendant to issue a redemption notice and notification to sell the suit premises. He further stated that the action by the defendants was improper, arbitrary and unlawful. He sought *inter alia*, a permanent injunction to restrain the defendants from selling or disposing of the suit premises.

In his submissions, Mr. Ndolo for the second defendant/applicant submitted that the plaintiff's suit as against his client did not disclose any reasonable cause of action. He said that a reasonable cause of action means "**a cause of action with some chance of success when only the allegations in the pleading are considered**". This definition is contained in **BULLEN AND LEAKE – PRECEDENTS AND PLEADINGS 12TH EDITION PG 142.** Counsel submitted that the second defendant as an auctioneer, in issuing the redemption notice and notification of sale was acting as per the provisions of the **Auctioneers Act** and there was nothing illegal that he did on his part. He further submitted that there were no triable issues between the plaintiff and the second defendant. He said that the second defendant should not have been made a party in the said suit.

Mr. Ghai for the plaintiff conceded that there was no independent cause of action against the second defendant but submitted that the plaintiff had a cause of action against the first defendant and the second defendant jointly since the second defendant was acting on instruction of the first defendant. He said that the second defendant had properly been sued under the law of principal and agent. He further stated that the second defendant had to be brought into the suit for clarity and procedure.

I have carefully considered the pleadings herein as well as submissions by counsel and I agree with the second defendant that there is no cause of action that has been disclosed by the plaintiff's suit as against itself. The second defendant was acting as an auctioneer and received instructions to issue the redemption notice and notification of sale against the plaintiff. It is not in doubt that as at the time of filing the suit there was an admitted sum of not less than Kshs.650,000/- that was due and owing by the plaintiff to the first defendant even though the plaintiff was saying that the amount that was being demanded from him by the first defendant was over Kshs.2,100,000/- . In the said circumstances, the first defendant was entitled to instruct the second defendant to issue the said notices and I do not see how the second defendant can be faulted for lawfully undertaking the first defendant's instructions.

From the pleadings on record the plaintiff's suit has no chance of success as against the second defendant. Even if he succeeds in his suit against the first defendant, the second defendant is an independent party and unless it is shown that there was any wrongful act that was committed by itself, which in my view has not been shown, the plaintiff's suit against it would be an abuse of the court process.

I therefore allow the application and strike out the plaintiff's suit against the second defendant and award the costs of the suit and the application to the second defendant.

DATED, SIGNED AND DELIVERED at Nakuru this 31st day of March, 2006.

D. MUSINGA

JUDGE

31/3/2006

Ruling delivered in open court in the presence of Mr. Gekonga holding brief for Mr. Gai for the respondent and N/A for the applicant.

D. MUSINGA

JUDGE

31/3/2006