



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 614 of 2004**

ZACHARIA MBORI.....	1ST
PLAINTIFF	
BELDINA ACHOLA MBORI.....	2ND
PLAINTIFF	
	VERSUS
REJENDRA RATILAL SANGHANI.....	1ST
DEFENDANT	
PRADEEP KARAMSHI SHAH.....	2ND
DEFENDANT	
PALVI GUDKA.....	3RD
DEFENDANT	
NNK INVESTMENTS.....	4TH
DEFENDANT	

R U L I N G

This is an application by way of a Notice of Motion. It has been made pursuant to the provisions of Order 6 rule 13 (1) (b) or (c) or (d), and Order 16 rule 5 of the Civil Procedure rules.

On the face of the application the 1st, 2nd and 3rd defendants seek the dismissal of the suit as against themselves.

When the application came up for hearing before me, on 16th June 2006, the advocate for the plaintiffs pointed out that the suit had already been set down for hearing on 31st July 2006. That piece of information prompted the court to call for the master diary which is maintained at the Registry. The need for calling up the master diary was that the defendant denied any knowledge about a trial date having been fixed. On the other hand there was a letter from Oraro & Company Advocates, dated 10th November 2005, through which the defendant’s advocates, Messrs A. W. Omolo & Company, were invited to attend at the registry on 6th February 2006, for purposes of fixing a hearing date.

The said letter bears a handwritten endorsement which states that the case had been fixed for hearing on 31st July 2006, and that the said date was fixed by consent. The endorsement indicates that the defendants’ advocates were represented at the registry by a Mr. Biko, whilst the plaintiffs’ advocates were represented by Edward. Each of the said representatives had then signed against their respective names, on the letter.

Notwithstanding the said letter, the defendants’ advocates insisted that they did not know of any hearing date that may have been fixed. It is then that the court decided that the only way of getting to the bottom of the issue, was by perusing the master diary.

Having perused the master diary, I verified that this suit had not been noted therein as scheduled for trial on 31st July 2006. Therefore, notwithstanding the letter dated 10th November 2005, this application then proceeded on the understanding that no trial date had been fixed.

When canvassing the application, Mr. Rach submitted that the plaintiffs' case against the 1st, 2nd and 3rd defendants was so hopeless, it could not possibly succeed. As far as the said applicants were concerned, the plaintiff had no case at all against them. Indeed, they even believed that the Plaintiff was so weak that it could not be cured even by an amendment.

In order to demonstrate how hopeless the case was, the applicants pointed out that the case was founded on an Agreement for Sale, as between the plaintiffs and the 4th Defendant. Therefore, the applicants submitted that there was no privity of contract as between them and the plaintiffs. It was also emphasized by the applicants that the plaintiffs had made it clear that the deposit was paid by them to the 4th defendant.

As the plaintiffs were said to be seeking to enforce a contract for the sale of an interest in land, the said contract had to be in writing; yet no such contract was produced as between the plaintiffs and the applicants herein. Therefore, the applicants insist that the Plaintiff discloses no cause of action against them.

It is also said that whereas the claim for the refund of the deposit sum had been made against all the four defendants, the plaintiffs had only made an earlier demand as against the 4th defendant.

In any event, the title document showed that the suit property had belonged to the 4th defendant only. Therefore, the applicants insist that they could not have contracted with the plaintiffs for the sale of a property which was not even theirs. In effect, the applicants say that the claim against them was not maintainable.

At the tail-end of his submissions, Mr. Rach sought leave to amend the application, so that the prayer would be for the striking out of the suit, rather than the dismissal thereof.

In response to the application, Mr. Odera, advocate for the plaintiff, strongly opposed the application for leave to amend the application in, what he termed, a casual manner. As far as he was concerned, the proposed amendment would make a world of difference.

In relation to that aspect of the application, I wish to emphasize the need for any party who wishes to amend his application, to do so at the earliest possible opportunity. Indeed, the most ideal time to seek leave to make an amendment is before delving into the substance of the application itself. And after putting forward its case for the proposed amendment, the applicant should await the court's decision thereon, as it would enable all the parties know whether or not the court had granted leave. Clearly, the court's decision on that issue would then inform the course of action to be undertaken by the parties.

In my considered view, the manner in which the applicants sought leave to amend the application herein was most inappropriate. I say so because having not passed a verdict on the said application, one wonders whether the applicants based their submissions on the application as worded, or whether they assumed that leave to amend was to be granted, so that the application was prosecuted on that understanding.

It must also be appreciated that a party who was a respondent to an application is entitled to sufficient notice of that which he is to face. It is only when he is given adequate notice that the respondent can properly prepare for the application.

Therefore, when an applicant serves an application on the other party, then makes submissions thereon, it was not fair on the respondent to allow the applicant leave to amend the application so late in the day, if the proposed amendment would significantly alter the application. However, if the applicant

were to make out a convincing case to justify his belated application for leave to amend the application, the court should be willing to accord the respondent more time, if the same is sought by the said respondent.

So, I must now ask myself if the proposed amendment to the application would have a significant impact on the application, if it were to be allowed.

Basically, the only change that the applicants wished to introduce was to the effect that the substantive prayer in the application be should for the striking out, instead of the dismissal of the suit.

According to the applicants, an order for dismissal of the suit would be no more than the consequence of striking out.

In my understanding of the provisions of Order 6 rule 13 (1) of the Civil Procedure Rules, the applicants do appear to have a point. I say so because that rule states that the court may order to be struck out or amended any pleading, and may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be. Therefore, if the court were to ultimately grant an order to strike out the suit as against the applicants, it could then proceed to have the suit dismissed. In the circumstances, I hold the view that the respondents could not be prejudiced by the amendment of the application in the manner proposed. In any event, if the respondents had felt that they needed more time to reconsider their response to the applicants' submissions, they only needed to have sought an adjournment, and I would have readily granted it. Accordingly, I do now grant leave to the applicants to amend the application, so that it is now seeking the striking out of the suit, instead of the dismissal thereof.

Secondly, the respondents submitted that insofar as the application was brought pursuant to Order 16 rule 5, the same was not proved. In that regard, the respondent is absolutely correct, as the applicants did not even submit that the suit ought to be dismissed for want of prosecution. It is thus my considered view that the applicants must be deemed to have abandoned that particular prayer.

Next, I now move on to determine whether or not the applicants made out a case for striking out the suit, pursuant to the provisions of Order 6 rule 13(1) of the Civil Procedure Rules. In that regard, the applicants went to some length in their endeavour to demonstrate that the claim against them was hopeless.

A perusal of the court records reveals that the Plaintiff was filed on 26th September 2002. Thereafter, the defendants filed their joint Defence and Counterclaim on 4th December 2002. And then the plaintiffs filed a Reply to Defence and Defence to Counterclaim on 10th December 2002.

Now, whereas it does appear that the applicants have a strong legal contention, founded on the apparent lack of privity of contract as between the plaintiffs, on the one hand, and the applicants on the other hand, it is noteworthy that on 2nd April 2003, all the parties to the suit signed and filed a Statement of Agreed Issues. Out of the eight issues listed, the first 2 appear to address the concerns which the applicants raised during the hearing of this application.

Having been signatories to the Statement of Issues, through which all the parties had decided on the matters which were to be placed before the trial court, for determination, the applicants have not explained to this court why they have now decided that the same said issues ought to now be determined summarily.

The unexplained change of heart, on the part of the applicants was even more perplexing as they had also filed their lists of the documents to be adduced at the trial. Thereafter, the suit had been set down for trial on 12th July 2005.

From the court records, the reason for the trial not proceeding as scheduled, on 12th July 2005, was that their advocate was engaged in another case which was going on at the High Court, in Kisumu.

The respondents relied on the authority of **SABAYAGA FARMERS CO-OPERATIVE SOCIETY LTD V MWITA [1969] E.A. 38**, for the proposition that applications to strike out pleadings should be made promptly, and as a general rule, before close of pleadings.

A reading of that decision reveals that it was by the High Court of Tanzania, sitting in an appellate capacity. The HON. SEATON J. was handling an appeal that emanated from the decision of the Resident Magistrate at Musoma, who had struck out the appellant's statement of defence. Although the learned judge found the said defence to have been insufficient, he allowed the appeal, and gave to the appellant time to file an Amended statement of defence.

In arriving at that decision the learned judge observed that the plaintiff (who was the respondent at the appeal) had made the application to strike out the defence, when the case came up for hearing. By that time, the statement of defence had already been on the court file for a period of six months.

It is in that context that the learned judge stated that an application to strike out a pleading under Order 6 rule 6 of the Civil Procedure Code (of Tanzania), should be made with reasonable promptitude, and as a rule, before the close of pleadings.

After a perusal of our Civil Procedure Rules, I failed to trace any requirement that was similar to the one in Order 6 rule 6 of the Tanzanian Code. If anything, our Order 6 rule 13(1) states expressly that the court may order to be struck out any pleading, **at any stage of the proceedings**. Therefore, I hold that the decision in the case of **SABAYAGA FARMERS' CO-OPERATIVE SOCIETY LTD V MWITA**, does not have application before our courts, as we do not have similar provisions.

However, when there is a delay in bringing an application to strike out pleadings, such delay may nonetheless work against the applicant. As I have already demonstrated, the applicants had, before bringing this application, signed a Statement of Agreed Issues. They had also filed their list of documents. All those steps which were taken by the applicants were inconsistent with their current contention, that there were no triable issues.

In the well known case of **D.T. DOBIE & COMPANY (KENYA) LIMITED V. JOSEPH M. MUCHINA & ANOTHER, CIVIL APPEAL NO. 37 of 1978**, the Court of Appeal quoted, with approval, the following words of DENMAN J. in **Kellaway V Bury (1892) 66 L.T. 599 at pp 600 and 601**:

“That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim or in such affidavits as he may file with a view to amendments.”

In my view, once the parties to the suit had themselves already formulated a list of eight issues, which were to be placed before the trial court, I find it hard to then say that the plaintiffs have no case at all. If it had been so clear and beyond doubt that the plaintiffs herein did not have any case at all, the parties would have had no reason to formulate the eight issues.

I know that the applicants have asked me to go through the documents filed herein, with a view to verifying that the plaintiffs' case was hopeless. However, I believe that it is important for me to find assistance from the following words of SELLERS L. J., in **Wenlock V Maloney & Others (1965) 1 W.L.R. 1238 at pp 1242**, which words were cited with approval by the Court of Appeal in the **D.T. DOBIE CASE**:

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.”

Bearing in mind that wise counsel, I note that on the Statement of Agreed Issues, the one numbered 4 reads as follows:

“whether the Defendants acted fraudulently against the Plaintiffs as pleaded in paragraph 14 of the Plaintiff.”

A reading of paragraph 14 of the Plaintiff indicates that the act of fraud which is attributable to the defendants was the sale of the suit property to third parties, after the same had already, allegedly, been sold to the plaintiffs.

Whilst, it is true that the applicants could not sell something which was not their property, in the first instance, it is instructive to note that the plaintiffs have alleged that there was fraud perpetrated by the defendants. If the applicants were directors of the 4th defendants, and if the said 4th defendant were ultimately held to be liable for selling and transferring the suit property to third parties fraudulently, it is just possible that the applicants or any of them who may have been carrying out the actions on behalf of the 4th defendant could also be personally liable.

In the case of **STANDARD CHARTERED BANK V PAKISTAN NATIONAL SHIPPING CORP. & OTHERS (No. 2) [2002] 2 ALL E.R. 931**, the House of Lords held that a director of a company could not escape liability for deceit on the ground that his or her act had been committed on behalf of the company. They also held that the liability of such a person was not due to the fact that he was a director, but was by virtue of his having committed a fraud.

In the light of that authority, if the plaintiffs were able to adduce evidence to prove that the applicants did commit fraudulent acts, the applicants could be liable. Therefore, I cannot conclude that the plaintiff's case herein was hopeless. And, on that ground alone, the application fails.

Accordingly, the application dated 9th March 2006 is dismissed with costs.

Dated and Delivered at Nairobi, this 26th day of September 2006.

FRED A. OCHIENG

JUDGE