REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 1552 of 2001

MARY WAMBUI NJURI…………………...…..………… PLAINTIFF

-V E R S U S-

CO-OPERATIVE BANK OF KENYA……...………….1ST DEFENDANT

JOSEPH MUNGAI GIKONYO T/A GARAM INVESTMENTS AUCTIONEERS…..2ND DEFENDANT

JANE NYAWIRA KINYUA………...……………….....3RD DEFENDANT

R U L I N G

This application is brought by way of a chamber summons dated 25th May, 2004 and filed in court on 26th May, 2004. It is expressed to be brought under O.VI rule 13 (1) (c) and (d), O.II rules 3 and 8 of the Civil Procedure Rules, section 3A of the Civil Procedure Act and all other enabling provisions of the law. It seeks from the court the following orders-

1. That the plaintiff's suit herein against the1st and 2nd defendants be struck out with costs.

2. That the costs of the application be provided for

3. That such other and/or further relief be granted as this Honourable Court may deem fit and just.

The grounds upon which the application is based are-

(a) That the suit offends the mandatory provisions of O.II rule 3 of the Civil Procedure Rules in that it has joined a cause of action arising from immovable property(i.e. the suit premises) with a cause of action arising from a tort and a service contract respectively.

(b) The claim for general damages based on an alleged defamation of the plaintiff by the 1st defendant vide the 1st defendant's letters of 10th May and 13th May, 1999 respectively was time barred at the commencement of this suit.

(c) Pursuant to the public sale of the suit premises to the 3rd defendant and the subsequent registration of the transfer in her favour, the plaintiff's suit against the 2nd defendant is totally misconceived and untenable in law.

The application is also supported by the annexed affidavit of KENNEDY K. ABUGA, an advocate employed by the 1st defendant as a Senior Legal Officer.

By an affidavit sworn on 18th June, 2004 and filed in court on 22nd June, 2004 the plaintiff/respondent opposes the application. In that affidavit, she avers that the first plaint in this matter was dated 11th October, 2001. This plaint was followed by an amended plaint dated 24th June, 2002, which was itself followed by a further amended plaint dated 14th October, 2003 which was further amended with leave of the court, and that all these plaints were allowed and the defendants never raised any issue of joinder and of cause of action. The further amended plaint pleads fraud against the 2nd defendant as the purported public auction was, allegedly, fraudulently carried out. The deponent further avers that her medical claim was genuine as evidenced by the receipts from her doctor which are attached to her affidavit. Regarding the allegation that she was summarily dismissed from the 1st defendant's employment following her inability to show cause why disciplinary action should not be taken against her, the respondent states that she was not given ample opportunity to defend herself. And in response to the statement by Mr. Abuga that the suit premises were sold by public auction by the 1st defendant in exercise of its statutory power of sale as the plaintiff was unable to settle the outstanding loan amount, the respondent avers that this came about as a result of the bank charging high interest rates which were fraudulent and illegal. Finally, the respondent states that the action brought under the further amended plaint was not time barred as the suit was filed in time while the subsequent amendments were filed with the consent of the defendants. The latter are therefore estopped from objecting at this stage. She then requests that the defendants' application be dismissed as it is misconceived and is in bad taste.

At the oral canvassing of this application, Mr. Kamau held brief for Mr. Kimondo for the 1st and 2nd defendants, while Mr. Langi appeared or the plaintiff/respondent. Ms. Ontiti held brief for Mr. Miller for the third defendant. In his submission, Mr. Kamau argued that there are three independent causes of action arising from the facts of the case. These causes relate to immovable property, a service contract, and tort (i.e. the alleged defamation of the plaintiff by the first defendant). Mr. Kamau submitted that the suit was bad for misjoinder and offended the mandatory provisions of O.II rule 3 under which no cause of action should be joined with a cause of action arising from immovable property. Referring to ground 2 of the application, Mr. Kamau submitted that the claim for general damages for defamation was time barred as the same should have been brought within 12 months, but the letters upon which the action is founded were written a whole 27 months before the action was commenced. He also submitted that the pleading for defamation was bad as it did not give any particulars as required under O.VI rule 6A.

On the third and last ground upon which the application is based, Mr. Kamau submitted that the suit property has already been registered in favour of the 3rd defendant, and that the plaintiff's remedy lies in damages under the provisions of the Registered Land Act. For these reasons, counsel urged the court to strike out the plaint with costs.

Opposing the application, Mr. Langi for the plaintiff/respondent relied on the replying affidavit of the plaintiff sworn on 18th June, 2004. Counsel then submitted that since this application seeks final orders against the plaintiff's suit, Mr. Abuga's affidavit cannot be relied on inasmuch as paragraphs 18 to 21 thereof show that the deponent avers to matters upon which he received information from the advocates on record. These paragraphs, he further submitted, offend O.XVIII rule 3 of the Civil procedure Rules which states that affidavits supporting final orders must be confined to matters of personal knowledge.

He thereupon referred the court to **GENERAL (RTD) J.K. MULINGE** v. **LAKESTAR INSURANCE CO. LTD**., Milimani HCCC No.1275 of 2001, in which the court struck out an entire application and affidavit on the grounds that the affidavit was not confined to such facts as the deponent was able, of his own knowledge, to prove. Secondly, Mr. Langi submitted that striking out a pleading is a drastic remedy which the court should not resort to unless it is quite clear that the pleading does not disclose an arguable case. He then argued that the pleadings herein raise triable issues which cannot be decided on affidavit evidence. Counsel further referred to **WACHIRA WARURU & Anor**. v. **FRANCIS OYATSI**, Civil Appeal No.111 of 2000 for the proposition that a pleading should not be struck out where there is an arguable case. He also cited **D.T. DOBIE (K) LTD., v. MUCHINA** Civil Appeal No.37 of 1978 to the effect that striking out should be resorted to sparingly and cautiously.

With regard to misjoinder, Mr. Langi submitted that this is not a ground for striking out a pleading and thereby giving final orders on the suit. Rather, he said , a misjoinder can be cured by amendment.

On the issue of unlawful termination of employment, Mr. Langi submitted that even though the respondent was served with a notice to show cause, she was dismissed before she could do so, and that this was contrary to natural justice. While admitting that the prayer for damages for defamation was time barred, Counsel submitted that that alone cannot be a ground for striking out the entire pleadings. The court can allow a party to amend or strike out that particular prayer but not the entire suit.

In reply, Mr. Kamau reiterated that there was a misjoinder of causes of action which cannot be cured by amendments. He also referred to **WACHIRA WARURU & ANOR**. v. **FRANCIS OYATSI** (*supra)* and submitted that it was distinguishable as it involved the non-attendance of parties. Mr. Kamau then referred to paragraphs 18 to 21 of Mr. Obuga's affidavit and submitted that these were not on information, and that this was a regular affidavit. He finally referred to the issue of summary dismissal and contended that the plaintiff was given a chance to show cause why she should not be dismissed and that she was unable to give a satisfactory answer. He requested the court to dismiss the suit costs.

On her part, Ms. Ontiti for the 3rd defendant applied for costs whichever way the ruling goes. She also requested that if the application is allowed, the 3rd defendant be awarded the costs of the suit.

After considering the above submissions of the respective counsel, it seems to me that the main issues that fall for adjudication are (a) whether there is a misjoinder of causes of action within the meaning of O.II rule 3 of the Civil Procedure Rules; (b) whether the claim for damages for defamation is time bared; (c) whether the affidavit in support of the application offends O.XVII rule 3 of the Civil Procedure Rules; (d) whether pursuant to the public sale of the suit premises to the 3rd defendant, the suit against the 2nd defendant is totally misconceived and untenable.

The applicant's case is that the suit offends the mandatory provisions of O.II rule 3 of the Civil Procedure Rules in that it has joined a cause of action "**arising from immovable property"** with causes of action arising from a tort and a service contract respectively. O.II rule 3 aforesaid provides as follows-

"No cause of action shall, except with the leave of the court, be joined with a suit for the recovery of immovable property, except …"

The phrase used in this rule is "**recovery of immovable property"** , and all the rule prohibits is any cause of action from being joined with a suit for recovery of immovable property, except with leave of the court. Unless a suit is for the recovery of immovable property, it may, therefore, be joined with another cause of action without leave of the court and without offending the letter and spirit of O.II rule 3. In other words, it is not every suit arising out of immovable property as portrayed by the applicant which should not be joined with another cause of action. Only suits for the recovery of immovable property may not be so joined.

In the case before the court, the plaintiff/respondent seeks a permanent order of injunction to restrain the defendants from advertising for sale or disposing L.R.No. MUGUGA/MUGUGA/T.440 until this suit is heard and determined, and a mandatory injunction to the defendants from evicting the plaintiff from the

suit premises pending the hearing and determination of this suit. The circumstances of this case are that the plaintiff is in possession of the suit property, and all she is seeking to establish is her title thereto. Even though none of the counsel cited any authorities on the point, the import of the old English case of **GLEDHILL** v**. HUNTER**, (1880) 14 Ch.D.492 is that an action to establish title to immovable property, not claiming possession, is not an action for the recovery of immovable property within the meaning of O.II rule 3 so as to require the leave of the court for its joinder with another cause of action.

With regard to the action for damages for defamation and injurious falsehood, the plaintiff claims that the damaging allegation was contained in a letter written by the first defendant to the plaintiff dated 10th May, 1999, and a second letter dated 13th May, 1999. Section 4 (2) (a) of the Limitation of Actions Act, Cap. 22 of the Laws of Kenya states-

"An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.

Provided that an action for libel or slander may not be brought after the end of twelve months from such date."

The offensive letters were written on 10th May, and 13th May, 1999. The law is very clear that an action for libel founded on the two letters may not be brought after the end of twelve months from 10th May, 1999, or 13th May, 1999 in respect of the two letters. This suit was first filed in court on 11th October, 2001. This was a good twenty seven months from the date on which the cause of action accrued, by which time the action had clearly been time barred. The plaintiff cannot now seek to pursue that remedy.

The third issue is whether the supporting affidavit of Kennedy K. Abuga offends the provisions of O.XVIII rule 3 (1) of the Civil Procedure Rules. That rule prescribes the matters to which affidavits shall be confined, and is in the following words-

"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the court, an affidavit may contain statements of information and belief showing the sources and grounds thereof."

In interlocutory proceedings, then or by leave of the court, it is permissible for a deponent to aver to matters of information and belief, provided the sources and grounds of such information and belief are shown. There is no dispute that leave of court here was not obtained. As to whether these are interlocutory proceedings, a ready answer is to be found in **GENERAL (RTD) J.K. MULINGE** v. **LAKESTAR INSURANCE CO. LTD.** Milimani HCCC No. 1275 of 2001, in which it was held that where an application seeks final orders on the ultimate rights of the parties, such an application is not interlocutory. In the instant matter, the applicants ask the court to pronounce final orders by striking out the plaintiff's suit altogether. If that happens, it would come with such finality that nothing else would remain to be done. These, therefore, are not interlocutory proceedings, and the affidavit in support of the application should adhere strictly to the requirements of O.XVIII rule 3 (1). Paragraphs 18,19, 20 and 21 of Mr. Abuga's supporting affidavit refer to matters of information and belief and to that extent they contravene O.XVIII rule 3 (I).

However, I am doubtful about the propriety of striking out the affidavit altogether. On 26th June, 2004 the plaintiff raised a preliminary objection to this application, and the offending affidavit was still on record. Nevertheless, instead of attacking that affidavit, Mr. Langi went about arguing that the application and the supporting affidavit sworn by Kennedy Abuga were defective as the affidavit and annexures contravened Rule 9 made under s.6 of the Oaths and Statutory Declarations Act, Cap.15, Laws of Kenya. He submitted that the affidavit had no exhibits at all and should be expunged from the record as it contravened a fundamental requirement as to the sealing of exhibits. Mr. Langi now says that this application should be struck out on the basis that the affidavit offends O.XVIII rule 3 (I). Why didn't he take up this point at that time? It is a point which was directly and substantially in issue at that time, and

it might and ought to have been made a ground of attack in that preliminary objection. That was not done. In my view, although the affidavit appears to be, prima facie, offensive, this matter is *res judicata* as it might and ought to have raised when canvassing the preliminary objection in June, 2004. It should not be raised now.

Finally is the issue as to whether the suit against the 2nd defendant is misconceived and untenable in consequence of the sale of the suit premises to the 3rd defendant. Section 77(3) of the Registered Land Act, Cap 300, Laws of Kenya, provides as follows-

"A transfer by the chargee in exercise of his power of sale shall be made in the prescribed form…. And any person suffering damage by an irregular exercise of the power shall have his remedy in damages only against the person exercising the power."

Where the chargee exercises it statutory power of sale irregularly, anyone suffering damage by reason thereof has recourse only to damages against the chargee. This much is clear. When, however, one visits paragraphs 22 and 23 of the further amended affidavit, one finds serious allegations of illegality, fraud and collusion between the 2nd and 3rd defendants. Whereas S.77 (3) of the Registered Land Act is quite plain, a subsequent registration which is obtained fraudulently might be subjected to the provisions of S.143. While S.77(3) is that clear, I don't think that the amnesty accorded thereby to chargees extends to others, such as auctioneers who are also governed by another and different legislation. Should auctioneers commit such offences as are alleged in paragraphs 22 and 23, I don't think that action against them on account thereof would be misconceived or untenable, nor would they take refuge under S.77.

Arising out of the above observations, and given the serious allegations levelled against the 2nd and third defendants, I don't think that this is a proper case for striking out. It raises serious issues for argument, and the plaintiff should have her day in court. In the circumstances, only those paragraphs in the further amended plaint which touch upon the claim for damages for defamation are hereby ordered struck out. The rest of the suit should proceed to hearing. It is so ordered.

Each party will bear its own costs of this application.

Dated and delivered at Nairobi this 18th day of January 2005

L. NJAGI

JUDGE