



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI COMMERCIAL DIVISION, MILIMANI
CIVIL SUIT 1489 OF 1999

PETER NGANGA NJONGE & SERAH MWIHAKI NGANGA

(Suing as the Personal Representatives of the

Estate of Fredrick Nganga Njonge).....PLAINTIFFS

VERSUS

EURO BANK LIMITED.....1ST DEFENDANT

JOSEPH MURAGE GATEBU.....2ND DEFENDANT

FELLY GATEBU.....3RD DEFENDANT

MURIUKI NJAGAGUA4TH DEFENDANT

R U L I N G

The plaintiff has come to court by way of chamber summon brought under Order 7 Rule 1 (2) and (3) and 10 of the Civil Procedure Rules, Section 74 of the Registered Land Act.

The plaintiff seeks the following orders:

- (1) That the 1st defendant's counter claim herein be struck out with costs to the plaintiffs;
- (2) That in the alternative that 1st defendant do discharge the charge over plaintiff's property known as **KIAMBAA/WAGUTHU/369**.

The application is based on the grounds that the 1st defendant filed a counter claim against the plaintiff; that the charge over the suit parcel of land which still subsisting, and the 1st defendant has sought to exercise its statutory power of sale therein; that the 1st defendant is pursuing concurrently two remedies against the plaintiff's that the 1st defendant has not verified the counter claim by a verifying affidavit.

The plaintiff's argument in support of the application fall into two parts. Firstly that the 1st defendant has a charge over the suit property and concurrently seeks to sue for the same debt covered by the said charge. The plaintiff annexed Letters of demand taking the form of statutory notices, written on 3rd February 1998 and 3rd September 1999. The plaintiff filed this present suit on 19th October 1999 by which the plaintiff challenges the validity of the charge. The counsel for the 1st defendant responded to this argument by saying that it is clear that the statutory notices were all written before action. She said that the plaintiff had failed to prove that the 1st defendant was attempting to realize its security since the suit was filed. Additionally counsel drew the court's attention to clause 15 of the charge which

specifically excluded the provisions of section 74 R..L.A. That clause in part states:

“.....the provisions of section 74 of the RLA shall not apply to this charge.

The first defendant in its replying affidavit stated that it would be unjust for the plaintiff to be allowed to discharge the charge he challenges in this suit. Having considered those submissions I find that the application on that ground must fail. Indeed the charge document restricts the operations of section 74 RLA. That being the case the plaintiff, until he succeeds in his challenge of the charge, cannot get a discharge of charge. Even if that section was applicable section 74 (3) (c) (ii) reserves discretion to the court to stay a suit where the chargee is following multiple remedies. Its worth noting that the plaintiff failed to prove that the 1st defendant is in the process of realizing its security since the last demand was before the suit was filed and since then there has been any instructions to the auctioneers and nor has there been advertisement.

The plaintiff's other ground was based on Order 7 Rule 1 (2) & (3). These rules require that a plaint be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments in the plaint. Plaintiff's counsel argued that the 1st defendant's counter claim was in nature of a claim and therefore it ought to have been verified. Sub rule 3 provides that where the failure to verify the plaint, on court's own motion, or on application, the same can be struck out. The 1st defendant's counsel opposed this ground by saying the counter claim is not covered by order 7 rule 1 (2).

Counsel relied on the case of STOCKMAN ROZEN KENYA LTD V DA GAMA ROSE GROUP OF COMPANIES LTD (2002) 1 KLR. 572. One of the holdings of this case was that Order 7 does not require a verifying affidavit to accompany an amended plaint. In analogy counsel said that the counter claim also, does not require a verifying affidavit. I accept the submissions made on behalf of the 1st defendant order 7 rule 1 (2) clearly talks a plaint and not any other pleading. It would be wrong on those circumstances to impose that which was not intended in the rule. The 1st defendant's counsel quite rightly stated that if the rules committee had intended for the rule to cover a counter claim they would have stated so.

The plaintiff's counsel additionally raised an objection to the 1st defendant's replying affidavit, that it contravened Order 18 Rule 4. This rule requires every affidavit to state the description of the deponent amongst other things. The plaintiff objected to the deponent describing himself as M.A. Mohamud. The objection I believe is to the use of initials rather than the full names.

The 1st defendant responded by saying that the deponent was sufficiently described but added that if the court was to find otherwise it could receive the affidavit despite the defect under Order 18 Rule 7. Description of a person I believe means, the use of words or phrase for the purpose of identifying or pointing out the person intended. With that definition in mind I find that the description of the deponent to the replying affidavit sufficiently identifies him as the person intended. It may, however, be wise to avoid confusion, where people have similar initials that the full names of the deponent be used.

The upshot of all his is that the plaintiff's chamber summons dated 10th November 2004 is dismissed with costs to the 1st defendant.

Dated and delivered at NAIROBI this 15th June 2005.

MARY KASANGO

JUDGE