



Civil Practice and Procedure

- *Application for striking out the plaint on basis that it does not disclose reasonable cause of action.*
- *The function of pleadings is to give the opposing party notice of the case they shall meet.*

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI COMMERCIAL DIVISION, MILIMANI

CIVIL SUIT 59 OF 2004

JOSEPH OKUMU SIMIYUPLAINTIFF

VERSUS

EAST AFRICAN BUILDING SOCIETY.....1ST DEFENDANT

S.M. GATHOGO T/A VALLEY AUCTIONEERS.....2ND DEFENDANT

R U L I N G

This ruling relates to two applications by the 1st and 2nd defendants.

Both applications are by summon brought under similar orders; namely Order 6 rule 13 (1) (a) (b) and Order 24 rule 1 of the Civil Procedure Rules and section 3A of the Civil Procedure Act.

The 1st defendant seeks the following prayers: -

1. That the Plaintiff/Respondent's plaint be struck out and this suit be dismissed with costs in so far as it relates to the first defendant/applicant;
2. That alternatively, the name of the first Defendant/Applicant be struck out from the plaintiff and this suit be dismissed with costs in so far as it relates to the first Defendant/Applicant

The 2nd defendants application seeks the following prayers: -

1. That the plaint be struck out and this suit be dismissed with costs in so far as it relates to the second defendant;
2. Alternatively, the name of the 2nd Defendant be struck out from the plaint and this suit be dismissed with costs in so far as it relates to the 2nd Defendant;
3. That the plaintiff do pay the costs of and occasioned by this application and of this suit to the second defendant to be taxed if not agreed.

4. That any monies held by the 1st defendant on behalf of the plaintiff be retained by them as security for costs of the 2nd Defendant pending the taxing and payment of the 2nd Defendant Bill of costs.

The plaintiff brought action against the defendants seeking, an injunction to stop selling, transferring or in any way dealing with the suit property, namely L.R. No. 3734/814; an order that the defendants do render accounts to the plaintiff; a declaration that the sale of the suit property was null, and void, and a prayer for general damages. The plaintiff when filing the plaint simultaneously filed an application for interim injunction, which was granted *ex parte* but was not argued *inter partes* and to date has never been so argued.

It is accepted by all parties that the suit property was transferred to a third party who purchased the same at an auction on or about 20th January 2005. It is in those circumstances that the present applications are made. The defendants argued that there is no reasonable cause of action and that the suit was vexatious since all the issues plead to, have been overtaken by events. That since there are no cause of action the defendants should not be dragged into a long trial. The defendant proceeded to go through issues raised by the plaintiff in various affidavits but which issues had not been pleaded.

The plaintiff in response to both applications began by raising issues that have not been pleaded to. That the 1st defendant gave instructions to the 2nd defendant to sell property L.R. NO. 3374/814 and not L.R. NO. 3734/814 which is the correct property that belonged to the plaintiff. Plaintiff counsel argued that the 1st defendant therefore sold the third party the property not the subject of this suit.

The plaintiff's other argument was that the plaint was seeking for account and accordingly the plaint cannot be said to have been overtaken by events. In expounding this argument counsel said that one could see from the notification of sale that the 1st defendant's debt stood at kshs 2, 022, 082, 77, yet the property was sold at ksh 7, 200, 000/- and to date the 1st defendant had failed to render an account of this amount, he ended by saying that, that was an issue that the court should determine.

Counsel further argued that since the plaintiff had claimed that the sale of the charged property was illegal and irregular the plaintiff was entitled to the claim of damages, which was still available to the plaintiff in the plaint.

In response to the claim for security for costs the plaintiff counsel responded that the difference between the purchase price and the amount of 1st defendant's claim would show that the amount payable to the plaintiff is substantial and accordingly it would not be right for the court to order the whole sum be held as security.

Having considered the parties argument I respond as follows. The plaintiff has stated many wrong doings by the defendant in his affidavits filed in this matter but many of those issued have not been pleaded in the plaint. Indeed going through the file every time the plaintiff filed another affidavit he raised new issues that had not been on record before. The function of pleadings is to give the opposing party notice of the case they shall have to meet; this rule ensures that the other party is not taken by surprise. I accordingly reject the arguments raised by the plaintiff and which are not supported by the plaint. The only issue that I need to examine is the claim that the plaint has prayed for general damages which prayer is still available. The claim for general damages does not stand on its own, it is a prayer that is made and based on certain wrong doings. The plaintiff claims that the sale of the suit property was as a consequence of bad faith, the plaintiff then proceeded to give particulars of that bad faith. Those particulars have been responded to by the defendants in their replying affidavit in response to the plaintiff's injunction application. For example the 2nd defendant successfully proved, by a letter of the postmaster Bungoma that the notification of sale was received by the holder of identity card No. 0128423. The 2nd defendant by annexing the plaintiff's copy of identity card clearly showed that the plaintiff was the recipient. The claim that the 1st defendant failed to give monthly statements of account; the plaintiff in response to the present applications did not show that there was a contractual obligation to give those accounts, but as I recall the plaintiff's counsels argument, he alleged that the account that is not given is the one of the sale proceeds. Now, again there is no proof of liability to so account, and whether such failure is actionable.

Indeed going by the plaint I am left with the distinct acceptance of the argument raised on behalf of the defendants. There is no reasonable cause that has been left surviving in view of the transfer of the suit property to a third party who is not a party in this action.

Accordingly the prayers sought will be granted for failing to disclose reasonable cause of action except that I am of the view that the defendants did not sufficiently argue in support of the prayers for security for costs.

The orders of this court are: -

1. That the plaintiff's plaint as against both defendants is dismissed with costs being awarded to both defendants as against the plaintiff.

2. The defendants are both awarded costs of the applications dated 16th March and 13th April 2005, which costs shall be paid by the plaintiff.

Dated and delivered this 8th day of June 2005

MARY KASANGO

JUDGE