

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL DIVISION – MILIMANI
Civil Case 403 of 2004

PETER KIMONYE PLAINTIFF

VERSUS

BARCLAYS BANK OF KENYA LTD DEFENDANT

RULING

This is an Application by the 1st Defendant in the suit to have the suit against it struck out. It is expressed to be under Order 6 R. 13 (1) (a) of the Civil Procedure Rules.

The grounds for the Application are that the Plaintiff does not disclose any reasonable cause of action against the 1st Defendant; that the Plaintiff consists of mere suspicions and belief unsupported by necessary particulars and that the Plaintiff's suit has lost its substratum following the ruling of this Court delivered on 1.10.2004 leaving nothing to go to trial. The Application having been made under Order 6R.13 (1) (a) of the Civil Procedure Rules no affidavit evidence is admissible. I will therefore consider the Application in the light of the pleadings and the submissions of the 1st Defendant's advocate.

The background of the Application is this. In a Plaintiff filed on 19th July 2004 the Plaintiff avers that the Plaintiffs guaranteed the 3rd Defendant for a loan from the 1st Defendant on the security of various titles. The Plaintiff further avers that on 28th June 2004 the 1st Defendant instructed the 2nd Defendant to advertise the Plaintiff's property for sale and the 2nd Defendant did advertise the land for sale on 21st July, 2004. There is also an averment that the 3rd Defendant who received the loan did not inform the Plaintiffs neither did the 1st Defendant inform the Plaintiffs of the sale. The Plaintiffs have further pleaded that they believe that the 1st Defendant has conspired with the 3rd Defendant to have the properties sold secretly. On the basis of the above averments the Plaintiffs claim accounts, damages, and restraining orders.

It is not surprising that the Plaintiffs' claim as pleaded provoked the present application by the 1st Defendant. The only paragraphs of the plaint that come close to blaming the 1st Defendant are paragraphs 10 and 11 of the Plaintiff. They read as follows:-

**“10. The 3rd Defendant who received the loan did not inform the Plaintiff's
neither did the 1st Defendant inform the Plaintiffs of the sale**

**11. The Plaintiffs believe that the 1st Defendant has conspired with the 3rd
Defendant to have the properties sold secretly”**

Paragraph 10 quoted above does not show why the 1st Defendant's failure to inform the Plaintiffs of the sale is an actionable wrong. The pleading is a mere statement that does not blame the 1st Defendant nor does the pleading show that failing to inform the Plaintiffs of the sale was wrong or actionable.

Paragraph 11 on the other hand is the Plaintiffs' belief. The basis of the belief is not disclosed nor are particulars of the conspiracy given. There is no foundation laid for any cause of action against the 1st Defendant. The Plaintiffs did not file any response to the 1st Defendant's application. The Plaintiff have therefore not shown that they have another cause of action that may be introduced by an amendment. They were also not represented at the hearing hereof.

The jurisdiction to strike out a pleading should be exercised in obvious cases. However, in the case

at hand, on a consideration of the allegations in the plaint my conclusion is that no reasonable cause of action is disclosed. The upshot is that the Plaint dated 19th July 2004 and filed in Court on the same date is struck out as against the 1st Defendant with costs to the 1st Defendant.

DATED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JULY 2005.

F. AZANGALALA

JUDGE

Read in the presence of:-