



**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 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> Defendant's advocate.

The background of the Application is this. In a Plaintiff filed on 19<sup>th</sup> July 2004 the Plaintiff avers that the Plaintiffs guaranteed the 3<sup>rd</sup> Defendant for a loan from the 1<sup>st</sup> Defendant on the security of various titles. The Plaintiff further avers that on 28<sup>th</sup> June 2004 the 1<sup>st</sup> Defendant instructed the 2<sup>nd</sup> Defendant to advertise the Plaintiff's property for sale and the 2<sup>nd</sup> Defendant did advertise the land for sale on 21<sup>st</sup> July, 2004. There is also an averment that the 3<sup>rd</sup> Defendant who received the loan did not inform the Plaintiffs neither did the 1<sup>st</sup> Defendant inform the Plaintiffs of the sale. The Plaintiffs have further pleaded that they believe that the 1<sup>st</sup> Defendant has conspired with the 3<sup>rd</sup> 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 1<sup>st</sup> Defendant. The only paragraphs of the plaintiff that come close to blaming the 1<sup>st</sup> Defendant are paragraphs 10 and 11 of the Plaintiff. They read as follows:-

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

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

Paragraph 10 quoted above does not show why the 1<sup>st</sup> 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 1<sup>st</sup> 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 1<sup>st</sup> Defendant. The Plaintiffs did not file any response to the 1<sup>st</sup> 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 19<sup>th</sup> July 2004 and filed in Court on the same date is struck out as against the 1<sup>st</sup> Defendant with costs to the 1<sup>st</sup> Defendant.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY 2005.**

F. AZANGALALA

JUDGE

Read in the presence of:-