

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL CASE NO. 227 OF 2002

SAID ABDALLA AZUBEDI.....PLAINTIFF

VERSUS

CHRISTINE WANGARE GACHEGE.....1ST DEFENDANT

ELIZABETH WANJIRU EVANS.....2ND DEFENDANT

MARY WANJIKU GACHEGE.....3RD DEFENDANT

PETER NJOGU GACHEGE.....4TH DEFENDANT

RULING

This is an application brought under the provisions of **Order VI Rule 13(1) of the Civil Procedure Rules**. The Defendants are seeking the orders of this Court that the Plaintiff be struck out with costs. The Defendants have further prayed that the Plaintiff's suit be dismissed with costs. The Application is based on the grounds that the Plaintiff did not disclose any reasonable cause of action. The Defendants contend that the claim filed by the Plaintiff was bad in law and an abuse of the due process of the Court. The Defendant further contend that the Plaintiff's claim was scandalous, frivolous and vexatious. The Application was not supported by any affidavit presumably due to the fact that the Defendants were relying on the provisions of **Order VI Rule 13 1(a) and Rule 13(2) of the Civil Procedure Rules** which provides that when an application is made under **Order VI Rule 13 1(a)** no evidence is admissible. The Applicants (Defendants) were however required to state concisely the grounds upon which the Application is made, which unfortunately was not done in the instant application.

The Plaintiff filed a replying affidavit to the said application. The Plaintiff, said Abdalla Azubedi, swore an affidavit in reply to the Defendants application opposing the same. In the said affidavit the Plaintiff deponed that the suit which he had earlier filed against Rahab Wanjiru Evans who is now deceased (and whose estate is now represented by the Defendants) related to the ownership of parcel number Nakuru Municipality/Block 10/197. The Plaintiff further deponed that when he attempted to take possession of the suit land, the late Rahab Wanjiru Evans incited people to prevent him from taking possession of the suit land. As a consequence of the said incitement, the Plaintiff contends that he suffered loss and damage hence he sought advice from his Counsel and was advised to file this suit. The Plaintiff further deponed that Nakuru HCCC No. 44 of 1 999 and the current suit, though filed against the same person was completely different from the current suit as the subject matter was completely different.

Mr Gai for the 1st, 3rd and 4th Defendants supported by Miss Mathenge for the 2nd Defendant submitted that the Plaintiff's suit was based allegedly on words which were uttered by Rahab Wanjiru Evans (hereinafter referred to as the deceased) which incited people and prevented the Plaintiff from taking possession of the suit land. Mr Gai submitted that the Plaintiff claimed Kshs 42 million as damages arising out of the said incitement. Mr Gai submitted that the Plaintiff's Plaintiff did not disclose any reasonable cause of action as the said amount was not specifically pleaded nor particularised as required by the law. The Defendants further submitted that the Plaintiff had filed another suit against the deceased which basically raised the same matter in issue and which had previously been conclusively determined. Mr Gai therefore submitted the Plaintiff's suit was Res judicata. Mr Gai further submitted that in so far as the Plaintiff's suit was based on incitement, the said suit could not survive the death of the deceased. The Defendants submitted that the Plaintiff ought to have filed the suit against the tenants on the said parcel of land and not the deceased's estate. Mr Gai urged this Court to allow the Application to strike out the suit.

Mrs Ndeda, Learned Counsel for the Plaintiff submitted that the Plaintiff raised triable issues. Learned Counsel submitted that paragraph 4 to 10 of the Plaintiff's suit provided the basis of the Plaintiff's suit. The said paragraphs, according to her submission, disclose a reasonable cause of action. On the issue of Res judicata Counsel for the Plaintiff submitted that Nakuru HCCC No. 44 of 1999 was not of the same cause of action as the present suit. She further submitted that the Defendants in the said suit were different from the present suit. Mrs Ndeda further submitted that the Defendants cannot invoke Res judicata as the two suits were different, involving different parties and were further of a completely different subject-matter. The Plaintiff further submitted that the three suits referred to concerned ownership of the suit land, a suit for eviction and finally the current suit was for damages. The Plaintiff therefore prayed that Defendants application be dismissed.

I have anxiously considered the rival arguments made by Counsels for the Defendant and the Counsel for the Plaintiff. I have already read the pleadings filed by the parties in this case. The issue for determination by this Court is whether the Plaintiff's suit is such that it discloses no cause of action and therefore should be struck out. The other issue for determination is whether the Plaintiff's suit is Res judicata. As stated earlier, the Defendants application to strike out the Plaintiff's suit was not supported by an affidavit pursuant to the provisions of **Order VI Rule 13 (1) (a) and Rule 2 of the Civil Procedure Rules**. The Defendants were required to state concisely the grounds upon which they intended to rely on the application. Unfortunately, apart from repeating the provisions of Order VI rule 13(1) (a) of the Civil Procedure Rules, the Defendants did not state anything that could give a pointer as to what they intended to argue in support of their Application. Mr Gai in his oral submissions attempted to explain the Defendant's application.

I understood Mr Gai's submission to be that the Plaintiff's suit being based on incitement by a person who is now deceased, cannot survive the death of such a person. Such claim, according to Mr Gai, dies with the deceased Defendant. It was further his submission that the Plaintiff's suit was Res judicata having been filed after two suits, previously filed, had been determined. The Plaintiff, naturally, was of a different view. It was his submission, through Counsel, that his suit should not be struck out as it discloses a reasonable cause of action. The words "reasonable cause of action" in **Order VI Rule 13(1) (a) of the Civil Procedure Rules** were defined by the Court of Appeal in **D. T. Dobie & Company (Kenya) Ltd –versus- Muchina [1982] K.L.R. 1** to mean an action with some chance of success when the allegation made in the Plaintiff's suit are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayed. Madan JA at page 9 paragraph 5 in the above case stated as follows:-

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross examination in the ordinary way No suit ought to be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”

I have looked at the Plaintiff's suit that is sought to be struck out. The said Plaintiff's suit cannot be said to be a hallmark of good draftmanship. Infact the said Plaintiff's suit was poorly drafted. However upon perusal of the same, it is clear that the Plaintiff is basing his case on the fact that the Defendants (as the administrators of the deceased estate) appear to have been in control of the tenants who were residing on the Plaintiff's parcel of land. The Plaintiff alleged that as a result of being obstructed from taking possession of the said suit land, he suffered loss and damage to the tune of Kshs 43 million. The Plaintiff has not particularised this claim. It could have been a figure plucked from the thin air. I do not know.

However, at this stage no material has been placed before me to make me be persuaded that the Plaintiff's suit discloses no reasonable cause of action. The Plaintiff's suit as it is displays lack of clarity. This may however be rescued by suitable amendments being made. I am not prepared to find that the Plaintiff's

filed by the Plaintiff is so hopeless as to be beyond redemption or incurable by amendment. As stated in the D. T. Dobie Case (Supra) an application to strike out a suit under the provisions of **Order VI Rule 3(1) (a) of the Civil Procedure Rules** can only be allowed in the most plain and obvious of cases where the suit does not disclose a reasonable cause of action elucidated by the Court in the said case referred to.

This case is not obviously one of those clear cases where the suit does not disclose a reasonable cause of action. Matters were not helped by the fact that the Application filed by the Defendants to strike out did not itself disclose the concise reasons why the Plaintiff should be struck out. In the circumstances therefore the Application filed by the Defendants is hereby dismissed.

I have not considered the other grounds raised by the Defendants on Res judicata , as, in my considered view, the suit filed by the Plaintiff is not Res judicata. The Plaintiff shall have the costs of this application.

DATED at NAKURU this 22nd day of October, 2004.

L. KIMARU

AG. JUDGE