REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 277 OF 2000

GRACE N. KARIANJAHI …… APPELLANT

VERSUS

DR. SIMON KANYI MBUTHIA ……RESPONDENT

J U D G E M E N T

On 23rd February, 1999, the plaintiff, now appellant filed a suit in the court of the Principal Magistrate at Nairobi and sought a court order to compel the defendant-respondent to raise partly walls of his house as necessary and to put appropriate loping stones and metal finishing so as to avoid the loss of aesthetic beauty and to control the see page of water which was causing damage to the said appellant's cause. The parties own adjacent plots in Nairobi otherwise known as NAIROBI/BLOCK 82/2267 Donholm II and NAIROBI/BLOCK 82/2268.

While the plaintiff owns the former, the defendant owns the latter.

They have constructed residential houses on their respective plots and the plaintiff's complaint is that the defendant has constructed his house on his plot of title number NAIROBI/BLOCK 82/2268 in such way that some level of its roof are lower while other are higher than the plaintiffs with the result that they have dug into the plaintiff's walls to mix metal flushing which has ruined aesthetic beauty of the plaintiff's house.

That the flushing is not well done such that it had caused rain water to seep into the plaintiff's house and cause damage to the paint work and cause a risk of causing further damage to the electrical works.

That while constructing the defendants roof, his servants and/or agents have used the plaintiff's roof as a platform and caused damage to the roofing tiles and timber works.

That the plaintiff had requested the defendant to align his roof properly and to use suitable loping stone and metal flushing so as to restore the aesthetic beauty and also seal the areas of weakness through which water is seeping into the plaintiff's house but the defendant had refused or neglected to do so; hence this suit.

But before the suit was heard, the defendant filed an application in the same court on 21st October 1999 to have the suit struck out for being scandalous, frivolous and vexatious and an abuse of the process of the court.

This application was supported by the grounds stated thereon and the supporting affidavit. They are all based on the averments in the plaint as already reproduced herein before.

The application was placed before the Senior Principal Magistrate, (C.O. Kanyangi) for hearing on 7th December 1999. He heard it then and fixed a ruling for 21st December, 1999.

But before the court wrote the ruling there was a visit made to the scene of the dispute on application by counsel for the applicant, which the magistrate did on 28th March 2000. The ruling was then delivered on 8.5.2000 striking out the plaint which was then dismissed. This ruling is what gives rise to this appeal. The memorandum of appeal listed 6 grounds of appeal, namely that the learned magistrate erred in failing to apply the law cited to him on striking out of pleadings thereby deciding the case on the basis of affidavit evidence only, that he erred in finding that the plaint as filed was frivolous, vexatious and an abuse of the process of the court and thus dismissing it, that he erred in dismissing the plaint based on his observations at the scene without calling evidence of experts; that he erred in treating his observations and conclusions based on information gleaned from the parties that had not been given on oath and that was not tested in cross-examination, that he erred in visiting the site of the subject matter of the suit after hearing the application with no intention of taking viva voce evidence resulting in a travesty of justice and that the magistrate erred in failing to consider the claim of special damages contained in the body of the plaint the existence of which would be proved by evidence.

The appeal was heard in this court on 20th May 2002 with counsel for the appellant repeating what was contained in the memorandum of appeal. He stated that the plaint was not good for striking out as it raised triable issues. That the plaint was not frivolous, vexatious or an abuse of the court process.

That this was not a case to be decided or affidavit without hearing evidence and that it should have gone to full trial. He prayed for the appeal to be allowed.

For the respondent, counsel opposed the appeal and stated that prayer 1 of the plaint was not capable of being granted as it would force the respondent to construct a building not in accordance with approved plan or interfere with his freedom to construct a house in the manner he would like.

Counsel did not find any fault in the site visit by the Magistrate because the respondent applied for it and there was no objection to this by counsel for the appellant.

According to counsel the plaint did not disclose a proper cause of action; warranting it to go to full trial. He prayed for the appeal to be dismissed. The site visit by the Magistrate on 28th March, 2000 appears to have been done irregularly. No notes were taken down during this visit and even if they were, they were not so done on oath.

Yet when the learned Magistrate wrote his ruling it almost all depended on this site visit. But the learned Magistrate had heard submission of both counsel for the parties on the application and it would be expected he would make his decision based on those submissions, but this is not what happened.

The application subject to this appeal was made under Order VI Rule 13(1)(b) and (d) of the Civil Procedure Rules.

For a plaint to be termed scandalous, frivolous or vexatious, the supporting affidavit should be able to establish matters therein which are indecent, offensive, allegations made in the plaint for the mere purpose of abusing or prejudicing the opposite party; immaterial or unnecessary matters which contain certain prejudicial imputation on the opposite party; allegations which charge the opposite party with bad faith or misconduct, degrading allegations on the opposing party or matters which are necessary but are accompanied by unnecessary detail; unless of course, though scandalizing, the matter is relevant and admissible in evidence to prove the truth of some allegations in the plaint.

> ***- See Christie vs Crhistie [1973] L.R. 8 CH.499, Markham vs Werner Beit & Co. (1902) 18 TLR. 763 and Blake vs Albion L ife Ass. Society [1876] L.J. Q.B. 663.***

The plaint can also be frivolous if it has no substance, it is fanciful or that the party is simply trifling with the court or wasting the courts time.

The pleading is also vexatious if it has no foundation in law, it is filed for the mere purpose of annoying the other party; it is leading to no possible good and has no chance at all of succeeding.

On the other hand, pleadings are otherwise an abuse of the court process when they are filed in court simply to waste its time or when they are otherwise worthless or to delay the due process of law.

In the case subject to this appeal, paragraph 1 of the application stated:

> 1. The plaintiff's plaint dated 23rd February, 1999 do be struck out as being scandalous, frivolous, vexatious and an abuse of the process of the court; emphasis mine.

In ***D.T. Dobie & Co. Kenya (Limited) vs. Joseph Mbaria Muchina and Lea Wanjiku Mbugua (Civil Appeal Number 37 of 1978)*** where an affidavit sworn by the General Manager of the second defendant, a Mr. Nassir Ahmed in support of the second application under sub-rule (d) of Order VI of the Civil Procedure Rules,that the plaintiff's suit was only an abuse of the process of the court, the late Judge of Appeal C.B. Madan remarked:

> ***"By itself, th is part of the application is also defective for sub -paragraph (d) requires that the pleading is otherwise an abuse of the process of the court".***

As regards an equivalent to Order VI rule 13 generally Chitty J in ***Republic of Peru vs Peruvian Guano Compan y 36 Ch. Div. 489*** at P.495 and 496 had this to say:

> ***"It has been said more than once that the rule is only to be acted upon in plain and obvious cases, and in my opinion, the jurisdiction should be exercised with extreme caution".***

And Lord Justice Swinfen Eady in ***Moore vs Lawson and Another at page 419*** said this in a similar situation as the case subject to this appeal:

> ***"It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved".***

And when the late Madan J.A summed up in Civil Appeal No.37 of 1978 (ibid) he said at page 9.

> ***"It is relevant to consider all averments and prayers when assessing under order V Rule 13 whether a pleading discloses a reasonable cause of action, and also the contents of any affidavits that may be filed in support of an application that a pleading is otherwise an abuse of the process of the court".***

Then he continued at page 10

> ***"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 fully informed so as to deal with the merits without discovery, without oral evidence tested by cross examination in the ordinary way".***

In the case subject to this appeal the pleadings raised a fairly technical issue which would not have been a subject of a decision on affidavits or a visit to the site and to say in the Magistrate's ruling:

> ***"After considering the observation at the scene the court finds that prayers sought for by the plaintiff are not capable of being granted".***

There was no basis for making this decision without oral evidence being adduced and tested in cross examination.

That the defendant had built his house as per approved plans was not here nor there given that this issue was not the subject of a test during the submissions. No averments or submissions were demonstrated to establish that the pleadings were scandalous, frivolous and vexatious or that they were otherwise an abuse of the process of the court.

I allow this appeal and set aside the lower court order with a direction that the case be remitted back to the lower court and to be heard on its merit. Costs of this appeal will be paid to the appellant.

Delivered this 19th day of June, 2002.

D.K.S AGANYANYA

JUDGE