



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 1488 OF 2000

A. J. LIMITED & ANOTHER ..... PLAINTIFF

VERSUS

CATERING LEVY TRUSTEES ..... DEFENDANTS

RULING

There are two applications which were argued before me as follows:

1. The Chamber Summons dated 29. 10. 2001 which was taken out by the 2nd defendant in the main suit. It seeks one prayer “That the Plaintiff filed herein be struck out or otherwise Amended by the dismissal or removal of the second defendant from these Proceedings.” Learned Counsel Mr. Lubullehah represents the 2nd defendant.

2. The Chamber Summons dated 11. 01. 2002 taken out by the 1st Defendant seeking the prayer “That the Plaintiffs Plaintiff dated 7 th day of September, 2000 as against the 1 st defendant be struck out. Accordingly the suit as against the 1 st defendant be dismissed as prayed in the defence.” Learned Counsel Mr. Oraro represents the 1 st defendant.

In both applications Order 6 rule 13 1(a) Civil Procedure Rules is relied on. The Applications are virtually identical although filed by different parties and I will therefore consider them simultaneously.

The two grounds relied on are that the Plaintiff discloses no reasonable cause of action and secondly, the action is time barred under the Limitation of Actions Act, Cap 22 Laws of Kenya.

The principles to be applied in such a case have been considered many times over and were examined at length by Madan JA (as he then was) in D.T. DOBIE COMPANY (K) LTD VS JOSEPH MACHARIA & OTHERS CA 37/78, where, citing REPUBLIC OF PERU VS PERUVIAN GUANO CO. 36 CH. DIV. 489 he stated:

*“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.”*

In summing up the many authorities he reviewed, Madan JA stated:

*“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. At that stage the Court ought not to deal with any merit 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 or al evidence tested by cross examination in the ordinary way.” “No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak to be beyond redemption and incurable by amendment.”*

I will revert to those propositions of law shortly.

In issue in the main suit are two plots of land known as LR No. 209/297 and LR 209/296/1. There is no dispute that the plots were owned by and were registered in the name of the 1st plaintiff, a Limited Liability company, upto and including 07. 10. 1988. It would appear that there were only two shareholders and Directors of the 1st Plaintiff: the 2nd Plaintiff and one Kisinane Njau now deceased. The cause of action pleaded is that through fraudulent dealings perpetrated by the said deceased Director/Shareholder and the 3rd Defendant, the plots were sold and transferred to the 1st Defendant for Shs.20 million on 28. 9. 88. On 21. 8. 95 the 1st defendant sold and transferred one of the plots to the 4th defendant for Shs.70 million and 30 days later on 22. 9. 95, the same plot was sold and Transferred to the 2nd defendant for Shs.225 million. All these transactions, it is averred, were made without authority, illegally and were null and void ab initio. The Plaintiffs seek a declaration to that effect and a retransfer of the properties to the rightful owner. Alternatively they seek compensation, general damages and mesne profits.

As is clear from the wording of sub-rule 2 of Order 6 Rule 13 no evidence is admissible in considering an application under sub-rule 1 (a). Secondly only the plaint is to be looked at: See NYAGAH VS NYAMU (1976) KLR 75. Thirdly the application should be made at a very early stage of the proceedings preferably before the filing of any defence. In DRUMMOND – JACKSON VS BRITISH MEDICAL ASSOCIATION & 4 OTHERS (1970) 1 ALL ER 1101 it was stated at page 1102:

*“.....An application for the statement of claim to be struck out under this rule is made at a very early s tage of the action when there is only the statement of claim without any evidence at all. The Plaintiff should not be driven from the Judgment seat at this very early stage unless it is quite plain that his alleged cause of action has no chance of success .”*

The Supreme Court Practice 1995 Vol. 1 has a similar commentary on the time of filling the Application:

*“Although the rule expressly states that the order may be made*

*“at any stage of the proceedings, still the application should always*

*be made promptly and as a rule before the close of pleadings.*

*Where the statement of claim is being attacked the application*

*may be made before the defence is served. ”*

In this case there are not only defences filed but also an interlocutory judgment entered against the 4th defendant.

Both Learned Counsel M/s. Lubulellah and Oraro dissected the Amended Plaintiff and the defences filed to demonstrate, firstly, that the suit was time-barred; secondly that there was no cause of action pleaded against the 1st and 2nd defendants; and thirdly that the 2nd plaintiff had no locus standi in the whole matter.

The submission on the first issue is that the cause of action pleaded arose on 28. 9. 1988. The suit was filed on 08. 09. 2000. It was therefore time barred under section 7 of the Limitation of Actions Act. The section limits actions for recovery of land to 12 years. As I think it is a simple matter of arithmetic, the issue may quickly be disposed of. It is simply not beyond 12 years, as submitted by Counsel, between 28. 9. 88 and 08. 09. 2000. certainly a long time of waiting it is. But not the operative period under Section 7 of the Act.

The submission on the second issue is that there is no pleading that the two defendants were part of or were aware of the fraud alleged to have been perpetrated in respect of the plots in issue. Without such pleading there is absolute protection of the titles transferred to the two defendants under section 23 and 24 of the Registration of Titles Act. The prayers sought in the plaintiff are also misconceived as they cannot apply to the two defendants who no longer hold the Titles.

Defending the pleadings Learned Counsel Mr. Mureithi submitted that the material on record constitutes a reasonable cause of action against the two defendants. Queries are only raised because defences and reply thereto have been filed to challenge the pleading. But these or any other evidence should not be looked at. At all events if there was any defect or doubts in the pleading, it can always be amended or it can await oral evidence for clarification. The plaintiff on record is not so bad that new life cannot be breathed into it.

That submission echoes the caution by Madan JA in the D. T. Dobie case above which I now revert to. Is the suit “so hopeless that it plainly and obviously discloses no reasonable cause of action and is it so weak to be beyond redemption and incurable by amendment?” Even if it was curable by amendment, is it part of the Court’s function to force a party to amend his pleadings? It is a pertinent question. Omolo JA raised it in The Town Council of Ol Kalou vs Ng’ang’a General Hardware CA 269/97 (UR). Referring to the D.T. Dobie Case , he stated:

*“I would myself not be so manner -less as so challenge*

*the wisdom and experience of Madan JA. Cases ought to*

*go on when they have a cause of action as the Learned*

*Judge put it and so long as “Real life” can be injected into*

*them by ammendment. The question is: who is to inject real*

*life in pleading the amendment? Is it the parties th emselves or the Courts?*

He answered that it was the parties who in an adversarial system should know best what their respective cases are. In that view however Omolo JA was alone. The majority (Gicheru and Shah JJA) held that it is part of the provisions of Order 6 rule 13 Civil Procedure Rules for a Court in its discretion to either strike out or order to be amended any pleading.

Per Shah JA:

*“What it boils does is this: whilst considering Order*

*6 rule 13 (1) applications the court has a discretion to*

*order an ammendment in a proper case rather than strike*

*out a pleading as striking out is normally a drastic remedy.”*

I am of the view that the suit filed herein is not “*obviously unsustainable.*” It may appear so when the defences filed are considered but that factor is for ignoring. The applications should have been filed before such material was put on record. Counsel for the Applicants referred to such material to demonstrate their objections. There ought not to be a protracted examination of documents and facts of the case to see whether the Plaintiff really has a cause of action. The Plaintiff, particularly the 1st Plaintiff has only made averments, that it was a lawful owner of some property which it lost fraudulently and it contends the named defendants are liable for that deprivation. The Plaintiff can only aver and allege at that stage. The rest is for proof at the trial. Once all the pleadings are in, the remedy of Amendment is also always available.

The stronger argument was made in respect of the 2nd Plaintiff who, it would appear, seems to think that he had an interest in the two plots of land in issue and that he owned the 1st Plaintiff company. The fundamental principle of company law is of course that a shareholder has no property, legal or equitable in the assets of the company. The two are distinct legal entities in the absence of a contract of Agency between them. There are procedures to follow when it is the company that desires to sue in respect of its property. Whether those procedures were followed however is again a matter of evidence. The 2nd Plaintiff pleads that his signature was forged and used to perpetrate the fraud on the 1st Plaintiff and himself. There may or may not be any truth in that and in the circumstances, I would balance the desirability of striking out the 2nd Plaintiffs suit against the two defendants only to find in the end that he may have had a valid case, and allowing the suit to proceed at the pain of payment of costs by the 2nd Plaintiff if there was no case at all. The latter option is less painful and I would adopt it.

The upshot is that the application by both defendants is refused. The Plaintiffs may amend their plaint further if so inclined on application. Costs to the Plaintiff/Respondents.

Dated this 23rd day of October, 2002.

**P. N. WAKI**

**JUDGE**

23. 20. 2002

Waki J.

Cache for Oraro for 1st Defendant Ashimosi for 2nd defendant Wanyundi h/b Mureithi for Respondent/Plaintiff

No appearance for 3rd Defendant CC: Mulinge

Ruling delivered dated and signed in Chambers.

**P. N. WAKI**

**JUDGE**