



## **CIVIL PRACTICE AND PROCEDURE.**

### **STRIKING OUT A PLEADING ON GROUNDS OF BEING SCANDALOUS FRIVOLOUS AND VEXATIOUS**

- Order VI rule 13 (1) (b) of Civil Procedure Rules.
- Exposition of terms scandalous, frivolous and vexatious.

#### **REPUBLIC OF KENYA**

#### **IN THE HIGH COURT OF KENYA MILIMANI**

#### **COMMERCIAL COURTS NAIROBI**

#### **CIVIL SUIT NO.318 OF 2000**

**MPAKA ROAD DEVELOPMENT CO. LTD.....PLAINTIFF**

**VERSUS**

**ABDUL GAFUR KANA t/a ANIL KAPURI PAN**

**COFFEE HOUSE.....DEFENDANT**

#### **RULING**

By an application in the form of a Summons in chambers filed in court on 29.3.2001, the plaintiff seeks the striking out of the defendant's statement of defence and counterclaim as well as the counterclaim by a limited liability company of which the defendant is a director. Summary judgement is also sought against the defendant. The application is expressed to be brought under Order VI rule 13 (1) (b) and Order XXXV rule 1 of the Civil Procedure Rules. The former gives the court discretion at any stage of the proceedings to strike out or amend any pleading on the ground that it is scandalous, frivolous or vexatious and the latter allows a plaintiff to apply for summary judgement suits where the relief claimed is a liquidated demand or recovery of land, with or without a claim for rent or mesue profits.

The genesis of the application is a plaint filed in court in which the plaintiff claims from the defendant , one Abdul Gafur Kana t/a Anil Kapuri pan Coffee House the sum of Ksh.l,119,349.00 being arrears of rent due and owing from the defendant under a lease. The lease between the parties is pleaded in paragraph 3 of the plaintiff to have been for five years and six months with effect from 1st January, 1994.

The defendant has filed a defence. He has also pleaded a set off and counterclaim. In the set off and counterclaim he is joined by Anil Kapoori Pan Limited, of which he is a director. In the defence, the defendant admits the existence and particulars of the lease pleaded by the plaintiff. He also pleads that the defendant instructed Eastern Auctioneers to levy distress against the defendant for the recovery of amounts due and owing in respect of arrears of rent who in executing those instructions placed padlocks

on the outer doors and changed the locks to the demised premises thereby denying the defendant access there to resulting in the constructive eviction of the defendant from the premises. The defendant further pleads, in the alternative, that by denying him entry and access to the demised premises, the plaintiff purported in effect to forfeit the lease illegally. The defendants further plead loss and damage arising from alleged illegal distress and forfeiture. He also denies that he is indebted to the plaintiff as claimed in the plaint or at all. Then in paragraph 13, the defendant pleads that in the alternative and without prejudice to the above averments which are contained in paragraphs 2-12, he is not liable to the plaintiff as claimed in the plaint for the reason that subsequent to the execution of the admitted lease the defendant incorporated Anil Kapoori Pan as a limited liability company for the express purpose of carrying on the business of a restaurant and coffee shop previously carried on by him and the said company with the knowledge and implicit consent of the plaintiff continued to carry on business in the demised premises thereby becoming a controlled tenant within the meaning of the Landlord and Tenant Act, Cap.301 of the Laws of Kenya. He therefore prays for the dismissal of the suit.

In the counterclaim, the defendant in the original action sues as the first plaintiff and his limited liability company sues as the second plaintiff. The plaintiff in the original action is sued as the first defendant and Eastern Auctioneers is sued as the 2nd defendant. The plaintiffs repeat paragraphs 3 to 13 of the defence by way of set off and counterclaim. It is then averred that the distress against the 2nd plaintiff was unlawful and excessive. It is further averred that the defendants locked the demised premises and changed locks thereby denying the plaintiffs access thereto and the 2nd plaintiff was thereafter unable to continue with its business of a restaurant and coffee shop. Constructive eviction of the 2nd plaintiff and unlawful forfeiture against it are also pleaded. In paragraphs 27,28 and 29, the plaintiffs aver that they have been prevented from carrying on their business and have suffered loss and damaged, they have been humiliated and they have suffered mental anguish and stress. They claim aggravated damages, damages for unlawful distress, damages for unlawful forfeiture and eviction, general damages and costs of the counterclaim.

To complete the state of pleadings, it should be indicated that the defendants in the counterclaim have filed a defence and a reply to the said counterclaim. The said defence and counterclaim were said to be out of time but in any case, as will presently appear, the determination of this application does not turn on the contents of the said defence and reply to the counterclaim. Having set out the background of the application, it is now convenient to consider the application itself.

The application is supported by the affidavits of Dr. Fitzval Remedios Santana De Souza, the Managing Director of the applicant company, and Mr. Josephat Musila Mutua who carries on business under the name and style of Eastern Auctioneers, the second defendant in the counterclaim. There is a replying affidavit by Abdul Gaful Kana, the respondent.

The application was canvassed before me on 2.5 .2001 by Mr. Oyatsi, counsel for the applicant, and Mr.Ohaga, counsel for the respondent. The detailed submissions are on record and there is no need to reproduce them here. The thrust of Mr. Oyatsi's submissions was that as the respondent's pleadings stand, they apparently disclose the concurrent existence of two tenancies over the same premises, that both tenants were victims of illegal distress and forfeiture by the landlord and its auctioneer, and that damages for those trespasses are sought by the two tenants. In his submissions, such a state of affairs was not tenable in law. It was not open to the defendant to plead the existence of a lease between himself and the plaintiff and seek damages on account of alleged illegal distress and unlawful forfeiture of such a lease and at the same time plead an implied surrender of the same lease to another entity. The pleadings were self-contradictory. In his view, both the defence and the counterclaim were in the premises scandalous, frivolous and vexatious and should be struck out. As regards the claim for summary judgement, he submitted that the contents of paragraphs 1-20 of Dr. De Souza's affidavit in support of the application, which paragraphs detail how the amount claimed in the plaint is due to the plaintiff how it came to be so, and how the defendant admitted the same and sought indulgences are not controverted in the replying affidavit. In his view, there was no triable issue on the quantum of the rent in arrears. He further submitted that the distress was levied in accordance with the law and the same was regular as shown in the affidavits in support of application.

The thrust of Mr. Ohaga's submissions on the other hand was that there was nothing scandalous, frivolous

and vexatious about the defence and counterclaim. He submitted that a matter would only be scandalous if it would be inadmissible in evidence to show the truth of any allegation which is material to the relief sought. He pointed out that there was nothing in the defence and counterclaim which amounted to an imputation on the plaintiff. He cited THE SUPREME COURT PRACTICE 1988, VOLUME I, paragraph 18/19/14 in support of his proposition. He further submitted that a pleading would only be frivolous or vexatious if the case disclosed therein was obviously or plainly unsustainable. A court does not have to delve into the merits of each party's case to determine whether a matter is frivolous and vexatious. He cited THE SUPREME COURT PRACTICE (Supra), WENLOCK V. MOLONEY [1965] 1 W.L.R. 1235 and D.T. DOBIE V. JOSEPH MBARIA MUCHINA [CIVIL APPEAL NO.37 of 1978] to support his contention. In his view, the application herein was unsustainable under Order VI rule 13 (1) (b).

As regards the claim for summary judgement, Mr. Ohaga submitted that there were several triable issues. He pointed out that at paragraph 4 of the defence there is an allegation that the plaintiff and the auctioneer locked up the defendant's premises. That was an issue of fact from which illegal forfeiture arose as an issue of law. There was also the issue of whether the distress was excessive. In response to Mr. Oyatsi's submission that the defendant's pleadings were inconsistent and contradictory, counsel submitted that the pleas were in the alternative as permitted by Order VI rule 6 (2) of the Civil Procedure Rules. He further submitted that an implied surrender of a lease was known in law. He cited SHAH PANACHAND & CO. V. VELJI & ANOTHER [1969] E.A. 194. He submitted that in the circumstances of this case, where a tenant had incorporated a limited liability company to carry on his business in the demised premises, a surrender of the lease by operation of law could be inferred and if that was done, it would follow that the company became a controlled tenant within the meaning of the Landlord and Tenant Act, Cap.301 of the Laws of Kenya. That scenario raised issues of both law and fact. As regards the alleged admission of rent due, Mr. Ohaga submitted that the written admission was on a letter head of a limited liability company and was thus not an admission by the defendant. He pointed out that the exhibit containing the admission as well as the cheques made to the plaintiff showed that the plaintiff was aware of the presence of Anil Kapoor Pan Ltd in the demised premises. Accordingly the issue of whether it was the company or the defendant as an individual who was the plaintiff's tenant was raised. He rounded off by submitting that an attempt to have the suit determined by affidavits is an usurpation of the function of the trial court.

From those submissions I think two issues arise for determination. First; whether the defence and counterclaim as drawn are scandalous, frivolous or vexatious, and secondly, whether the same disclose bona fide triable issues. As regards the first issue, I accept the exposition of the words scandalous, frivolous and vexatious contained in the SUPREME COURT PRACTICE. As the exposition is of an English rule which is in pari materia with our Order VI rule 13 (1) (b), I would hold that a matter would only be scandalous if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned. Such would be the case where an imputation is made on the character of a party when the character is not in issue. And I would say a pleading is frivolous if it lacks seriousness. If it is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matter which were irrelevant to the action or defence. In short, it is my discernment that a scandalous and/or frivolous pleading is ipso facto vexatious.

Now looking at the pleading sought to be struck out herein, namely the defence and counterclaim, I must say that I detect no paragraph or combination of paragraphs which can be said to be scandalous within the meaning of the law as expounded above. There is nothing irrelevant to the defence or counterclaim sought to be advanced. And there is no imputation on the plaintiff. So the pleading cannot be struck out as being scandalous. Is it frivolous or vexatious? Mr. Oyatsi has in a detailed and lucid submission sought to show that the respondent is metaphorically speaking running with the hares and hunting with the hounds at the same time. He is resisting the plaintiff's claim by averring that he was not the tenant as his lease had impliedly been surrendered to a limited liability company of which he is a director while at the same time he claims the relief of damages arising from an unlawful distress and forfeiture of the same lease on the basis, of course, that he was the tenant. The limited liability company is also claiming damages for inter alia illegal distress and forfeiture. Mr. Ohaga submits that these claims are in the alternative and accordingly quite proper. On a careful consideration of the matter I accept Mr. Oyatsi's submission that

the matters pleaded in the defence and set off and counterclaim are not in substance alternate pleas. To my mind, two persons cannot plead in the alternative in respect of the very same cause of action as the defendant and the limited liability company of which he is a Director seek to do here. In my opinion, the pleas in this matter are contradictory pleas which are plainly unmaintainable. There can't be concurrent tenancies in respect of the same premises and I cannot contemplate the existence of tenants in the alternative. The proposition is not a serious one, it is pretty much imaginary. As such it is frivolous. And it cannot but vex any Landlord to have a situation where two entities claim relief from him as tenants in his premises and yet at the same time , a claim is resisted by one who had executed a lease on the basis that such lease had been surrendered to another. In the premises, I find the statement of defence and the set off and counterclaim to be frivolous and vexatious. And although striking out a pleading is a drastic remedy to be exercised only in plain and obvious cases, I consider this to be such a case and accordingly order the said defence and the set off and counterclaim to be struck out with costs to the applicant. I further order that judgement be entered for the plaintiff as prayed in the plaint. That being the view I take of the matter, it would be the vainest pedantry to proceed to consider the summary judgement aspect of the application. That I refrain from doing.

Those, then, are the orders of this court.

DATED at Nairobi the 29<sup>th</sup> day of May 2001

**A.G. RINGERA**

**JUDGE**