



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
CIVIL CASE NO 2184 OF 2000

KENYA AIRPORTS AUTHORITY..... PLAINTIFF

VERSUS

QUEEN INSURANCE AGENCY..... RESPONDENT

JUDGMENT

This application is brought to court under order 6 rules 13(1) (b) and (d), order 7 rule 1(3), order 18 rule 6 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. It is seeking mainly two orders and an order for costs, and an alternative order.

The orders it is seeking are as follows: -

- “1. That the plaintiff’s plaint be struck out on the ground that it is scandalous, frivolous and vexatious and/or that it may prejudice, embarrass or delay the fair trial of this action or that it is otherwise an abuse of the process of the Court.
2. That in the alternative, the plaint be struck out for failing to comply with the provisions of order VII rule 1(2) of the Civil Procedure Rules and on the ground that the verifying affidavit contains false, scandalous and offensive matter.
3. That accordingly, judgment be entered for the defendant against the plaintiff for the costs of this suit.
4. That the costs of this application be awarded to the defendant in any event.”

The grounds for the application is that the respondent/plaintiff is not telling the truth when it states in its plaint that there has been no previous proceedings and there is no suit pending in the Court between the same parties on the same subject matter because the truth is (according to the applicant) that previously there was a High Court Civil Case No 1430 of 2000 between the same parties on the same subject matter but that the respondent withdrew the claim and that left counter-claims and set off still pending the hearing in the Court. The applicant therefore, maintains that that being the case, the filing of the current suit by the plaintiff is therefore scandalous, frivolous, vexatious and is an abuse of the Court process merely aimed at delaying and embarrassing the fair trial of the action between the parties. The application has been supported by an affidavit sworn by one Regina Ndinda Makau who is trading as Queen Insurance Agency, named as the defendant in this suit.

The respondent opposed the application and filed replying affidavit sworn by Keriako Tobiko, who is the advocate for the respondent. In that affidavit, the respondent admits that it did file a plaint HCCC No

1430 of 2000 against the applicant. It also admits that a defence, set off and counterclaim were filed by the applicant and that after the same were filed, the respondent did discontinue the same suit as there was a default in the verifying affidavit. Having discontinued its suit, the respondent admits that the counter-claim continued to exist and is still pending in court for determination. It however, maintains that the present suit is not scandalous, frivolous, vexatious or an abuse of the Court process. It also denies that the suit is brought to prejudice embarrass or delay the fair trial of the suit.

It denies these allegations because according to it the withdrawal or discontinuance of the former suit is not a bar or a defence to the present suit; that the cause of action in the former suit and the applicant's counterclaim were separate, distinct and different; that the subject matter in the present suit is not covered in its entirety by the defendant's counter-claim; that the defendant's counter-claim can be conveniently consolidated and tried together with the present suit and that would eliminate the alleged hardship to the defendant, and that the hardship can in any event be adequately compensated by an award of costs and that paragraph 9, if found to be false, can be cured by an appropriate amendment.

I have considered the application, the grounds for the same application, the affidavit in support and the annexures to the same affidavits, the replying affidavit and the able submissions by the learned counsels. I have also considered the various authorities to which I was referred as well as the law.

The brief history of the entire matter is (as can be gathered from the affidavits and annexures before me) that the plaintiff/respondent filed a plaint against the applicant on 10th August 2000, that was HCCC No 1430 of 2000. In that plaint, the plaintiff/respondent was claiming Kshs 734,386 together with interest hereon at 32% from September 1999 until payment in full, costs and further or other relief. That claim was in respect of the monies the plaintiff/respondent allegedly remitted to the defendant for onward transmission to the insurer being renewal premium of the policy described in the same plaint. Plaintiff claimed in that suit that the same amount was not remitted to the insurer. The defendant/applicant filed defence, set off and counter-claim to that suit in which it raised the question of their relationship having been guided by a contract of agency which the defendant/applicant claims was breached by the plaintiff/respondent.

The plaintiff/respondent filed defence to set off and counter-claim, but vide a Notice of Withdrawal of Suit dated 30th November 2000 and filed on 1st December 2000, the plaintiff/respondent discontinued that suit. That left the counter-claim still alive in that suit. On 11th December, 2000, the plaintiff/respondent filed this suit and stated at paragraph 9 of the plaint as follows:

"There is no other suit pending and there have been no previous proceedings in any court between the plaintiff and defendant over the same subject matter." And in the verifying affidavit sworn by Jane Ongira, the Deputy Managing Director/Corporation Secretary of the plaintiff/respondent, the plaintiff/respondent states at paragraph 2 as follows:

"I have read the plaint filed hereinwith and do hereby verify and confirm that the averments therein contained are true and correct."

The applicant says the averments at paragraph 9 are not true and correct as there is a suit pending (namely the counter-claim) and there has been previous proceedings namely the HCCC No 1430 of 2000. I do agree that discontinuance of a case under order 24 rule 1 is not a bar to any subsequent suit, but under such circumstances the discontinued case remains a previous proceeding and cannot, in my humble opinion, be treated as having never existed for purposes of order 7 rule 1(1) (e) and order 7 rule 1(2). In this case, there was clearly a counter-claim which was still pending and which is between the same parties. Mr Tobiko says the counter-claim is not on the same subject matter, but is clear to me that the subject matter between the parties even in respect of the main suit is the interpretations of and the effect of a contract of agency between the parties and whether it has been breached or not.

Plaintiff's plaint in this suit contends that on 29th July, 1999, it appointed defendant/applicant as its agent. The defendant's defence is that she was appointed agent on or about 29th July 1999 for a period between 1st July 1999 to 30th June 2000. Disputes between them whether by way of plaint or counter-claim arise

as a result of the same alleged contract. Under those circumstances, I do not with respect agree with Mr Tobiko that the subject matter in the counter-claim is so different and distinct that the plaintiff/respondent was right in its allegations that there is no other suit pending and that there had been no previous proceedings in any court between the plaintiff and the defendant over the same subject matter. That allegation was in my humble opinion, not correct and the verifying affidavit confirming that it was correct was clearly confirming a lie. It is unfortunate that before me, Mr Tobiko maintained that, that assertion was deliberate and was not made by mistake. Be that as it may, what is the effect of making a wrong assertion in the plaint; and what is the effect of a verifying affidavit that confirms as correct what is not correct? Would the two render the plaint scandalous, frivolous or vexatious? Would one say the plaint in such a situation would prejudice, embarrass or delay the fair trial of the action or that then amounts to an abuse of the Court process?

In the case of *J P Machira vs Wangethi Mwangi & Nation Newspaper*, Court of Appeal Civil Appeal No 179 of 1997, Omolo J stated as follows, after quoting Ringera J in the case of *Dr Murray Watson vs Rent-A-Plane Limited & 2 others* HCCC No 2180 of 1994:

“While I would broadly agree with the judge, I can find no warrant for restricting the meaning of the term scandalous to only that which is indecent, offensive or improper. Surely if everybody who knows a man, including his parents know his name to be Tom Njuguna Onyango and when he is sued under these names he pleads “I deny that my names are Tom Njuguna Onyango”, that kind of denial apart from being frivolous and vexatious can also be properly described as scandalous. What I am saying is that the category of what may be described as scandalous cannot be limited to the indecent, the offensive and improper. Denial of a well known fact can also be rightly described as scandalous.”

Thus the applicant has to demonstrate that the plaint is either indecent, offensive, improper or that it amounts to a denial of a well known fact. As I can see it is only paragraph 9 of the plaint which can properly be described as improper and is a denial of what is to me clear, namely that there had previously existed a suit between the same parties on the same subject matter and that part of that suit, namely the counter-claim was still pending in a court of law in Kenya. Can that paragraph alone, lead to the entire plaint being scandalous? I do not think so. If that paragraph is struck out, the remaining parts of the plaint would still sustain a case except that the plaint will now not comply with order 7 rule 1(1) (e).

In the 12th Edition of *Bullen and Leak’s, Precedents of Pleadings* on Chapter dealing with striking out pleadings at page 145, it is stated:

“A pleading or an action is frivolous where it is without substance or groundless or fanciful and it is vexatious where it lacks bonafides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.

And a pleading tending to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matter and so raises irrelevant issues which may involve expenses, trouble and delay and that will prejudice the fair trial of the action and so is the pleading which contains unnecessary or irrelevant allegations. Abuse of the process of the Court means in brief, misuse of the Court machinery or process. The offending paragraph 9 of the plaint, in my mind would be rightly described as scandalous. I cannot see it or for that matter, the whole plaint as frivolous and vexatious. However, as I have stated hereinabove, the whole plaint and the substance of it cannot be described as scandalous.

It cannot be described as frivolous, or vexatious as looking at it as a whole cannot be said to be without substances or groundless or fanciful or that it lacks bonafides. It is as a whole not unintelligible, or ambiguous, neither can one say that the plaint looked at in respect of the material aspects raises immaterial or irrelevant matter. No doubt the plaint, having been filed afresh after the first one was withdrawn will involve expenses, but I understand from the parties that the expenses in respect of the withdrawn plaint is being taken care of as the defendant is already taxing its costs of the same. In any event, the mere fact that the relevant rule under which it was withdrawn allows a fresh plaint to be filed, in itself means that extra expenses alone cannot be a ground for striking out the plaint. On the same score,

I cannot strike it out on grounds of delay or abuse of the process of court as the same rules guiding the process of court allows a party to discontinue a suit and to file another one afresh. I thus, cannot strike out the plaint under order VI rule 13 (1) (b) (c) and (d).

The alternative prayer is seeking that it be struck out under order 7 rule 1(2) of the Civil Procedure Rules on ground that the verifying affidavit contains false, scandalous, and oppressive matter. I have already found that indeed the verifying affidavit is confirming as correct an assertion in the plaint which is not correct.

I have also found that, that confirmation can be described as scandalous. The respondent says through its counsel that it was deliberate because, according to the plaintiff/respondent there was indeed no suit, pending or previously instituted between the parties. Thus the assertions in the plaint and the confirmation in the verifying affidavit were both carried out by the plaintiff knowingly.

The replying affidavit depones on contentious matters at paragraph 9. That should not have been done as it has been stated over and over again that advocates should not swear affidavits on contentious matters. Under order VII rule 1(3), I have discretion to strike out or not to strike out a plaint which has not been accompanied with a verifying affidavit. Here, the plaint was accompanied with what is called a verifying affidavit only that the same verifying affidavit is confirming what is not correct. I now end up with a plaint which in fact does not comply with order VII rule 1 (1)(e) and a verifying affidavit which is confirming that plaint and all this was, I am told, deliberately done. I cannot under such circumstances exercise my discretion. Court's discretion can only be exercised in favour of a party with clean hands.

I will allow this application under order 7 rule 1(2) of the Civil Procedure Rules. This plaint is struck out with costs to the applicant. I will not enter judgment in default as the plaint has not been dismissed, it has been struck out.

Orders accordingly.

Dated and delivered at Nairobi this 7th day of June, 2001

J.W.O. OTIENO

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