

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
HIGH COURT CIVIL CASE NO. 797 OF 1997

KOBO SAFARIS LIMITED.....PLAINTIFF

V E R S U S

PETER GICHUKI KINGARA.....1ST DEFENDANT

EUSTACE MURURU GATOTO.....2ND DEFENDANT

R U L I N G

This is an application brought under Order VI rule 13 (b), (c) and (d) of the Civil Procedure Rules. In it the Defendants seek to strike out the Plaintiff in this case on grounds that it is scandalous, frivolous and vexatious; that it may prejudice, embarrass or delay the fair trial of another suit between the Plaintiff and other persons; and that it is an abuse of the court process.

The brief facts leading to this application are as follows. The Plaintiff had his goods distressed for rent by the 1st Defendant who is an auctioneer. This was done on instructions of the 2nd Defendant who is an Advocate of this Honourable Court. As a result of that action, the Plaintiff sued the landlords and or principals in the suit already referred to. The Plaintiff also brought this action against the Defendants for unlawful distress.

Mr. Kingara for the Defendants argued that this suit was brought to personalize issues by Mr. Oyatsi Counsel for the Plaintiff because of his personal interest in the Plaintiff Company. In paragraph 21 of his affidavit Mr. Kingara stated that this was being done because he had refused to compromise his client's position in the matter despite "a personal visit by Oyatsi to my office." He argued that the Plaintiff had had "all their applications" struck out yet they persisted on proceeding with this action. In his view, an Advocate is not personally liable where he acts as his client's agent. He also argued that in view of the other suit against the landlords and/or principals for damages for the same action this suit ought to be struck out.

Having failed to file a Replying Affidavit, Mr. Oyatsi for the Plaintiff argued only on points of law. He argued that at this point, the Court could not deal with the merits of the action but only on the question as to whether there was a cause of action. He cited the cases of **Kassamali Bhogadia v. M.A. Nasser** [1963] E.A. 610, and **Kanji Naran Patel v. Noor Essa and Ano.** [1965] E.A. 484 as establishing the liability of an Advocate and an auctioneer in these matters respectively. As to the question whether this suit was *res judicata*, he referred me to the Ruling of OLE KEIWUA, J.A. dated and delivered in this case on 26/5/2000 where he considered the point as had been raised previously. No appeal was filed against that ruling and it is binding on the parties herein.

The only issue which I consider to have been raised is whether the Plaintiff has a reasonable claim against the Defendants. But before I go into this, I would like first to deal with the issue of **res judicata**. That point has been disposed of by OLE KEIWUA, J.A. in his ruling already referred to. He dismissed the Defendants' objection that this suit is **res judicata**. There has been no appeal against that decision and it is binding on the parties.

Now, as to the main issue, I am unable to understand what Mr. Kingara means when he says that Mr. Oyatsi has personalized issues. Is not Mr. Oyatsi entitled to file a case on behalf of his client as instructed? I do not see any merit in that argument. There was no evidence that Mr. Oyatsi had personal interests in the Plaintiff Company. In any event, that is besides the point. Mr. Oyatsi as an Advocate is entitled to pursue a claim for his client as instructed as best as he thinks fit and Mr. Kingara has no right to determine his motives in doing so. Even if it were that Mr. Oyatsi's motive in his representation in this case was relevant, that is not a matter to warrant a summary disposal of this action. He is separate from the Plaintiff and it would be unjust to determine the Plaintiff's cause by reference to its Advocate's motives.

The authorities cited by Mr. Oyatsi are very clear that an Advocate and an Auctioneer may be held liable for wrongful distress, At this point, the Court cannot go into the merits to determine whether the distress was wrongful or not. That is a matter which requires evidence and should be left for the trial judge. In my view, I do not see anything scandalous or vexatious with the Plaintiff's case. Without purporting to determine any matter therein, it appears to raise a substantive claim worth consideration by the trial court. There is nothing in this suit that may prejudice, embarrass or delay the fair trial of the action against the landlords and/or principals. That is a separate cause to be determined without reference to the present one.

I, therefore, dismiss this application with costs.

DATED and DELIVERED at NAIROBI this 5th day of July, 2001.

ALNASHIR VISRAM

JUDGE