

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1864 OF 2000

MARY NJERI NGOWI PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY)

OF KENYA LTD.)

CHERI KENYA LIMITED)..... DEFENDANTS

STEVE NGANGA MUIGAI)

R U L I N G

Two applications are before me. One is an application dated 8th February 1999 filed by the 1st and 2nd Defendants. The second application is dated 11th March 1999 and is filed by the third Defendant. Both applications are seeking similar orders and these are that the Plaintiff's Plaint dated 18th January 1999 be struck out as it discloses no cause of action against each of the Defendants/Applicants. The applications are both brought under Order 6 Rule 13(1)(a) of the Civil Procedure Rules. This ruling is therefore in respect of the two applications.

The grounds in support of the two applications are that the Plaintiff's suit pleads no cause of action that falls within the realm of any legal regime in Kenya that the 3rd Defendant bought the suit property in a lawfully constituted auction bonafide and legitimate and thus the property had been properly transferred to him; that the suit property in law and in fact belong to the 3rd Defendant and the third Defendant is the absolute owner, that the prayers in the plaint are scandalous, and that any claim for the property having been sold at an undervalue cannot be brought against an innocent purchaser but against the mortgagee.

Respondent/Plaintiff opposed the application maintaining that the applications are both misconceived; that the Plaintiff discloses a cause of action against the Defendants since the Defendants are alleged to have sold Plaintiff's property at an undervalued price and this was meant to benefit all Defendants and that is a cause of action.

The decision of Madan J. A. (as he then was) in the celebrated case of D.T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & Leah Wanjiku Mbugwa, Kenya Court of Appeal Civil Appeal No. 37 of 1978 sums up the law as to the approach the courts should adopt when dealing with an application seeking striking out a pleading under Order 6 Rule 13 (1) (a) and in particular the part dealing with striking out a pleading as in this case, the court had earlier on refused amendment of the Plaint which was sought after these two applications had been made, so that although Order 6 Rule 13 gives the court the power to amend a pleading as alternative to striking it out, that power to amend is no longer available as leave to amend had earlier on been refused. Madan J.A. (as he then was) went into great details in a similar matter and considered several authorities. He then stated inter alia as follows:

“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 or being otherwise an abuse of the process of the court. 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 usually fully informed so as to deal with the merits “without discovery”, without

oral evidence tested by cross-examination in the ordinary way. As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact considering itself on a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it. 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 as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not act in darkness without the full facts of a case before it. On the other hand if there is a point of law which merits serious discussion the court should be asked to proceed under Order 14 Rule 2”.

This is the law. The Plaint in this case is badly drafted. It does not spell out what the Plaintiff wants the court to decide upon with precision as is required in law in general. However, as far as the First and 2nd Defendants are concerned the reading of the Plaint in totality and particularly paragraphs 13, 14, and 15 shows that the Plaintiff is stating al beit not clear that security charged to secure loan from the First Defendant was sold by the First Defendant and its agent the second Defendant at a price below the market value and she feels this was not proper. She is therefore challenging the sale of her property at such a low price. As I have said the Plaint is badly drafted but I do feel the Plaintiff is entitled to be heard on that and I cannot strike out the Plaint as against First and 2nd Defendants/Applicants. Thus application by way of chamber summons dated 8th February 1999 is dismissed but as a result of what I have stated hereinabove as to the way the same Plaint is drafted, I will not order costs to the Respondent/Plaintiff and each party in that application will bear its own costs.

As to the third Applicant i.e. as to the application dated 11.3.1999, I do agree with the Applicant that according to the Plaint as is clear on the face of it, he was a bonafide purchaser. There is no allegations of fraud against him as far as the Plaint before me is concerned neither is there any allegation of conspiracy between him and the other two Defendants. The property was bought at a public auction (as the Plaint states) and is already registered in his own name. I do not see any cause of action shown against him in law and on fact. The Plaint stands struck out against him with costs to him. Orders accordingly.

Dated and delivered at Nairobi this 11th day of October 2001.

ONYANGO OTIENO

JUDGE