



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. E122 OF 2020

CROP HEALTH TECHNOLOGIES.....PLAINTIFF/RESPONDENTS

VERSUS

MR VINCENTE RUBIO.....1ST DEFENDANT/APPLICANT

MR REUBEN WILLIAMS.....2ND DEFENDANT/APPLICANT

AGRITECHNO EAST AFRICA LIMITED.....3RD DEFENDANT/APPLICANT

AGRITECHNO FERTILIANTES.....4TH DEFENDANT/APPLICANT

RULING

This ruling is on two applications, firstly on 13th May 2021 the defendant/applicants filed a notice of motion brought pursuant to Order 5 Rule 1 (6) of the Civil Procedure Rules 2010 seeking for orders that;

- a. The Suit be marked as abated**
- b. That Judgement be entered as a result to (a) above dismissing the suit**
- c. That costs of this application be provided for.**

The application was supported by the affidavit of Reuben Williams, the 2nd defendant. He stated that this suit was filed through a plaint dated 16th September 2020. The plaintiff obtained summons dated 21st April 2021 having paid for them on 12th March 2021. This was more than 30 days that is required by law to obtain and serve the summons to enter appearance. In the circumstances, the suit abated and should be marked as such.

The application was opposed by the replying affidavit of James Okutonyi dated 15th July 2021. In it he stated that he is the Executive officer in the firm of Muhatia Pala & Associates Advocates and on 17th September 2020 he received for the manner herein with instructions to upload them in the E filing system which he did on the same day. At the time it was not possible to access the courts because rules that we put in place to contain corona virus. After insistent calls to customer care they were advised to pay for the summons which they did on 10th December 2020. After payment numerous calls were made to the customer care hotline for assistance but bore no fruits. On 10th march 2021 when the restrictions were eased he visited the high court civil registry where he was advised to pay again for the summons to be reissued and on 12th march 2021 he paid again for the summons in the e filing portal. The summons were thereafter issued to the defendants on record on 26th April 2021. Delay in issuance of the summons was not their part but on the court registry.

In support counsel for the plaintiff cited **Tropical Foods & Another vs Eastern and Southern African Trade and Development Bank & Another [2017] eKLR** where Justice F. Tuiyott stated

“The purpose of the issue of Summons is for the Defendant to appear within the time specified therein. It also serves to give Notice of the existence of a suit against a Defendant. If, therefore, the Defendant gets notice of the suit by other means other than the Summons and participates in subsequent proceedings then the Defendant should not complain of the non-service of Summons unless it can be demonstrated that the non-service has caused some prejudice on the Defendant.”

It was submitted that payment for summons was done on 12th March 2021, the same were issued on 21st April 2021 and served on 26th April 2021. The period between payment and service of summons was one month and five days and the summons are valid for 12 months and the plaintiff is well within the stipulated time frame therefore the suit has not abated.

On 28th July 2021 the defendants filed a notice of motion brought pursuant to Order 2 Rule 15 (1) (a), Order 2 Rule 7, Order 51 rule 1 of the Civil Procedure Rules of 2010 seeking for orders that the suit herein be struck out as it discloses no reasonable cause of action. The application was based on the grounds on the face of the motion where the defendant stated that the plaintiff seeks judgement against the defendants for financial harm suffered by the company and its directors as well as damages. The plaintiffs reproduced a letter dated 18th September 2020 which they claimed to be injurious by express or by innuendos to a large public. That the contents of the letter are not defamatory and the plaintiff has not given particulars of the letter that he considers as defamatory or injurious. Having therefore omitted the particulars, the suit is incompetent as the plaintiff discloses no reasonable cause of action.

Counsel for the plaintiffs in their submissions opposed the application and argued that the allegations by the defendants are baseless and incompetent. That the basis of the defamation is a letter dated 18th September 2019 which the plaintiff outlines the particulars of the defamation in paragraph 8 of the plaint as follows;

“The above material has injured the plaintiff and its directors in the eyes of their customers, public, their supplies personal character if the directors social standing and has brought the company to a halt as the same has depicted the company and directors as dishonest incompetent causing them loss and damage and tainted their personal and professional reputation. Notice to the defendant to amend the situation by making an agreed apology publishing a retraction was issued and the same ignored by the defendant.”

The plaintiff submitted that a clear reading of the above mentioned letter shows injurious words and therefore the plaintiff is not hopeless as the defendant's claim. Even so if at all it does not support the claim, it is curable by amendment.

Analysis and determination

I have carefully perused through the applications, affidavits, submissions and the record in its entirety and the issues for determination are;

- a. Whether the suit herein has abated?
- b. Whether this suit should be struck out?

On the first issue, Order 5 Rule 1 is in respect to issue of summons and provides:-

“Issue of summons.

1. (1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.

(2) Every summons shall be signed by the judge or an officer appointed by the judge and shall be sealed with the seal of the court without delay, and in any event not more than thirty days from the date of filing suit.

(3) Every summons shall be accompanied by a copy of the plaint.

(4) The time for appearance shall be fixed with reference to the place of residence of the defendant so as to allow him sufficient time to appear:

Provided that the time for appearance shall not be less than ten days.

(5) Every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with subrule (2) of this rule.

(6) Every summons, except where the court is to effect service, shall be collected for service within thirty days of issue or notification, whichever is later, failing which the suit shall abate.”

On perusal of the record the suit herein was filed vide a plaint dated 16th September 2020. The plaintiff indicated that they paid for summons on 10th December 2020. At this time due to Covid 19 restrictions it was difficult to access the registry so they continuously called the registry customer care line where they were eventually advised to pay again for the summons to be reissued and they did so on 12th March 2021. The summons herein are dated 21st April 2021 and were issued on 26th April 2021 which is within the time limit set out in order 5 rule 1 (6) and consequently find that this matter has not yet abated.

On the second issue for determination is whether the suit herein should be struck out for failing to disclose a reasonable cause of action. Order 2 rule 15 of the Civil Procedure Rules which provides as follows:-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

a) it discloses no reasonable cause of action or defence in law; or

b) it is scandalous, frivolous or vexatious; or

c) it may prejudice, embarrass or delay the fair trial of the action; or

d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

It is settled law that the court's power to strike out pleadings is to be exercised sparingly and cautiously, because the court exercises the power without being fully informed on the merits of the case through discovery and oral evidence. This was the finding in the case of **D.T. Dobie & Company (Kenya) Ltd. vs. Muchina (1982) KLR 1** at pg 9 where it was stated as follows:

"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 to act in darkness without the full facts of a case before it."

The overriding principle to be considered in an application for striking out a pleading therefore is, whether triable issues have been raised. The plaintiffs submitted that the basis of the defamation is a letter dated 18th September 2019 which injured it in the eyes of the public and their customers. This court of perusal of the record thus finds that the plaintiff has raised a triable issues which are best at hearing in a trial. The application therefore intends to deprive the court of that opportunity of hearing the parties and making a decision on the dispute.

In the end this court finds the applications dated 13 May 2021 and 28th July 2021 to be unmerited and is hereby dismissed with costs to the plaintiffs.

DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF NOVEMBER, 2021.

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S. CHITEMBWE

JUDGE