



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 40 OF 2006**

**AUSTIN SALMON KITOLOLO.....PLAINTIFF**

**VERSUS**

**MIDDLE EAST BANK KENYA LIMITED.....DEFENDANT**

**RULING**

1. The application for determination is the Notice of Motion dated 23<sup>rd</sup> July, 2019 by the Defendant seeking orders that the Further Amended Plaintiff herein filed on 21<sup>st</sup> November, 2018 be struck out with costs. The application is premised on the grounds inter *alia*, that the further amended plaintiff was filed without leave as the leave granted to the plaintiff to amend his amended plaintiff lapsed and ceased to have any effect on 10<sup>th</sup> August 2018. That the further amended plaintiff is an abuse of the process of the court, is scandalous and vexatious and may prejudice, embarrass or delay the fair trial of the suit.

2. The application is supported by the affidavit of Kennedy Ogero Mokaya Advocate, sworn on 23<sup>rd</sup> July 2019 in which he depones inter alia, that in a ruling delivered on 13<sup>th</sup> June, 2014, Tuiyott, J struck out all allegations, contentions or averments in the amended plaintiff challenging the validity of the charge dated 18<sup>th</sup> March, 1999 and held that the plaintiff could not raise the plea of fraud nor question the validity or legality of the charge, sales and transfers of the charged properties, yet the respondent has made references of the same in the further amended plaintiff. The defendant avers that the state of the plaintiff's pleadings make it impossible to determine the issues for the trial and that the further amended plaintiff will embarrass or prejudice a fair trial of the suit. Further, that the plaintiff has not filed a list of his witness or even his own witnesses statement.

3. In opposing the application, the plaintiff filed a replying affidavit sworn by Austin Salmon Kitololo on 8th August, 2019. It is the plaintiff's contention that the application has no merit, is an abuse of the court process and that the proper forum for adjudicating over the issues raised in the application would be during the hearing of the substantive suit.

4. The application was canvassed by way of written submission. The defendant filed submissions on 22<sup>nd</sup> November, 2019 while the plaintiff filed his on 3<sup>rd</sup> December, 2019.

5. I have considered the application and the rival submissions as well as the case law cited by the parties. The principles which guide the courts in determining an application for striking out pleadings are well settled. In the **case D. T. Dobie & Company (Kenya) Limited –v- Muchina (1982) KLR 1**, the Court of Appeal stated:

**“The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing of the case. The court should aim at sustaining rather than terminating suit. A suit should only be struck out if it is beyond redemption and incredible by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”**

6. In the same case, the Court of Appeal stated:

**“No suit ought to be summarily dismissed unless it appears so hopeless that is 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.”**

7. In the case of **Yaya Limited –v- Trade Bank Limited (in liquidation) (2000)eKLR**, the Court of Appeal expressed itself as follows:

**“A plaintiff is entitled to pursue a claim in our courts however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of court, it must be allowed to proceed to trial... it cannot be doubted that the court has inherent jurisdiction to dismiss that which is n abuse of the process of the court.....”**

8. The overriding principle therefore to be considered in an application for striking out of a pleading is whether it raises any triable issue. On 26.7.2018, the court granted the plaintiff leave to amend the plaint. The further amended plaint was filed on 21.11.18. There was no deadline for filing the further amended plaint. On 7/3/2019, the court directed the defendant to file and serve an amended defence, if necessary, within 14 days from that date. There is no evidence that an amended defence was filed. I have looked at the further amended plaint dated 20<sup>th</sup> November, 2018. In it, the plaintiff’s pleaded claim, besides the further amendments, contains averments in the original plaint which the court on 13<sup>th</sup> June 2014 declined to strike out. By asking this court to strike out the further amended plaint, which, as already stated, contains averments the court (Tuiyott, J) declined to dismiss in his ruling of 13<sup>th</sup> June, 2014, the applicant is obviously asking this court to sit on appeal over the decision of a Court of concurrent jurisdiction. I am afraid, I cannot pretend to sit on appeal over the decision of a concurrent jurisdiction. Besides, in my view, there are triable issues between the plaintiff and the defendant worth a trial by the court. I do not need to go into the merits of those issues. It suffices to state that from the pleadings, the suit raises triable issues in the sense of the law.

9. The upshot is that I find the Notice of Motion dated 23<sup>rd</sup> July, 2019 has no merit and the same is dismissed with costs to the plaintiff.

**DATED, SIGNED and DELIVERED at MOMBASA this 10<sup>th</sup> day of March 2020.m**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Nyange holding brief for Kabue for plaintiff

Ms. Naliaka holding brief for Mokaya for defendant.

Yumna Court Assistant

**C.K. YANO**

**JUDGE**