REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

CIVIL CASE NO. 15 OF 2016

HUMPHREY MBAKA NANDI T/A

NYATI DISTILLERS LIMITED.....PLAINTIFF

VERSUS

EQUITY BANK(K) LTD.....1ST DEFENDANT

EQUITY INSURANCE AGENCY LTD.....2ND DEFENDANT

BRITISH AMERICAN INSURANCE

COMPANY (K) LTD.....3RD DEFENDANT

RULING

The question whether a claimant has a cause of action against a defendant is not unusual in day-to-day civil litigation. More often than not a defendant will plead, in opposition to the claim, that the claimant's suit does not disclose a cause of action against him and, for this reason, it ought to be either struck out or dismissed altogether. Having been litigated upon for a considerable period, courts do no better than reflect on prior decisions in which this question has been discussed whenever it emerges. The oft-cited precedent in our local jurisprudence in this regard is the Court of Appeal decision in **D.T. Dobbie Kenya Co. Ltd versus Joseph Mbaria Muchina & Leah Wanjiku Mbugua (1982) KLR 1** where this issue was discussed, relatively at length.

In this case the plaintiff, who was the 1st respondent in the appeal, owned a car which he took to the appellant's garage for repairs. While in this garage, the Criminal Investigations Department (C.I.D) took the car and detained it apparently as part of its investigations of some crime. The same car was also a subject of attachment proceedings in a separate suit where the 2nd respondent had sued one Kasila Mulindwa for recovery of a sum of money. She believed the car to belong to Mulindwa and therefore obtained an order for conditional attachment of the vehicle. The car was attached on the strength of this order; it is also on the basis of the same order that the C.I.D released it to the 2nd respondent.

The 1st respondent instituted a suit against the 2nd respondent (who was the 1st defendant in the suit) and the appellant (the 2nd defendant), jointly and severally, for, *inter alia*, wrongful attachment and detention of the plaintiff's vehicle.

The appellant invoked Order VI rule 13 of the Civil Procedure Rules (now Order 2 Rule 15 of the Civil Procedure Rules, 2010) and sought to have the suit against it struck out because, in its view, it disclosed 'no cause of action' against it and also because it was 'an abuse of the process of the court.' This Court dismissed the application. Its appeal against the ruling in the Court of Appeal was also dismissed. In dismissing the appeal, the appellate court considered several English decisions on this subject and came to the conclusion that:

> ***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." (Sellers LJ supra)). As far as possible indeed, 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 is right.***
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> ***If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in 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 lawsuit 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 to 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 a serious discussion, the court should be asked to proceed under order XIV rule 2. (Per Madan JA at page 9)

The motion before me seeks to strike out the name of the 1st defendant from the plaintiff's suit on, amongst other grounds, that it does not disclose any reasonable cause of action against it. According to the 1st defendant, there is no issue for determination between it and the plaintiff, the plaintiff having repaid the loan due to the 1st defendant pendente lite; in its view, therefore, the 1st defendant is not a necessary party to this suit.

In an earlier ruling I delivered on an application by the plaintiff for an injunction seeking to restrain the 1st defendant from exercising its statutory power of sale, I laid out the background of the plaintiff's suit against the defendants. For the sake of the present application I have to rehash the facts, if not for anything else, to appreciate the basis of the application.

On 10th November, 2014, the plaintiff charged his property known as **Title No. Karingani/Ndagani/1923** to the 1st Defendant ("the Bank") as security for repayment of a sum Kshs 2,000,000/= borrowed from the Bank. The formal charge executed between the plaintiff, the Bank and Nyati Distillers Limited (described in that charge as "the borrower") was eventually registered against the title to the suit property on 18th November, 2014.

The plaintiff and the borrower covenanted to repay the principal sum borrowed together with interest in the manner prescribed in the charge and more particularly in clauses 1 and 2 where it was provided that in the event of default on their liabilities, the Bank reserved the right to set in motion the process of recovery of the money due under the charge. This it could do by either of the three options; it could sue the plaintiff and the borrower for the money due; it could appoint a receiver of the income of the suit property; it could also lease or sub-lease the suit property; it could take possession of the property; or, finally the Bank could dispose of the suit property altogether. In exercising any of these options, the Bank was bound by the provisions of the Land Act No. 6 of 2012 under which the charge was registered.

This suit was provoked by the 1st defendant's move to sell the suit property in exercise of its statutory power of sale after the plaintiff and the borrower apparently defaulted in their obligations to the Bank. In suing the Bank, the plaintiff questioned, inter alia, its right to exercise of the statutory power of sale.

The rest of the defendants were sued because, as the plaintiff averred, it was a condition precedent for disbursement of the loan that the plaintiff obtains an insurance cover for both the loan and the security. In this regard, it was compelled by the 1st defendant to take the cover from its subsidiary, the 2nd defendant which in turn procured it from the 3rd Defendant. The 2nd defendant appears to have been an agent of sorts. The risks covered under the insurance policy included fire, explosion, earth quake (fire, shock and volcanic eruption) riot, strike, malicious damage and special perils specified in the insurance policy.

According to the plaintiff, the suit property together with the plant and machinery were eventually destroyed in circumstances that it believes are covered by the insurance policy. This destruction, so it averred, disrupted its business and for this reason it could not meet its obligations under the charge. Since the destruction of the property and business were insured events the plaintiff sought compensation from the 3rd defendant; however, in breach of the insurance contract, the 3rd defendant failed or refused to indemnify the plaintiff against the ensuing loss as a result of which he defaulted in settling its debt to the 1st defendant.

As much as it admitted the loan default, the plaintiff attributed its failure in this regard to the three defendants. The 1st and 2nd defendants' share of the blame has been particularised in the plaint in the following terms:

"a) failing to call up for payment of the cover from the 3rd defendant.

b) Failing to defer payment of the payment of the plaintiff's facility until payment by the 3rd defendant of the policy.

c) Receiving payment from the plaintiff and not issuing a cover.

d)Not issuing a policy as per the risk note

e) Misrepresentation

f) failing to act in the Plaintiff's best interest by acting in bad faith"

It is therefore apparent in the suit that, apart from seeking to stop the 1st defendant from realising its security, the plaintiff also has a bone to pick with 1st defendant for breach of the insurance contract. How far the plaintiff's contentions against the 1st defendant on the insurance policy will go is not an issue that can be determined at this stage; it would, in my humble view, be premature for this court to determine whether there is any merit in these allegations on the basis of affidavit evidence only. In this regard it suffices to echo the words of Madan J.A. in D.T. Dobbie & Company (Kenya) Ltd (supra) that '*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.' In my opinion, the allegations against the 1st defendant fit what the learned judge described as a 'semblance of a cause of action'.

It may well be that in moving the court the way it has done, the applicant was buoyed by the ruling I delivered on 31st July, 2017 dismissing the plaintiff's application for injunction. This shouldn't be the case. One of the reasons why I dismissed the application was because, based on the material before me, I was not satisfied that the plaintiff's suit against the Bank had a probability of success. All I meant was that the application for injunction had fallen short of the threshold spelt in Giella versus Cassman Brown & Co. Ltd (1973) E.A. 358 for grant of a temporary injunction. I did not rule out the possibility that the plaintiff's suit has a 'semblance of a cause of action' and that in future the plaintiff may probably 'inject it with real life by amendment.' It is in this context that my decision must be understood; I must not be mistaken to have endorsed the notion that failure to meet the conditions for grant of an injunction under Order 40 rule 1 is a reason enough to strike out or dismiss a suit before subjecting to a full trial. Such notion has no basis in law.

I am also minded that unlike in the D.T. Dobbie & Company (Kenya) Ltd (supra) case where the application for striking out was made under the then Order VI rule 13 of the Civil Procedure Rules, the 1st defendant invoked Order 1 Rule 10(2) which gives the court the power either on its own motion or an application by any of the parties to a suit to strike out the name of any party improperly joined to the suit or to order any person to be joined if, in the courts view, such a person is necessary for it to adjudicate upon and settle all the questions in the suit effectually and completely. I am convinced, however, that the rationale behind the decision in the D.T. Dobbie & Company (Kenya) Ltd favouring sustenance rather than dismissal or striking out of a suit based on the affidavit evidence is as much relevant to an application seeking to strike out the name of a party from a suit under Order 1 Rule 10(2) of the rules.

In any event, as much as the 1st defendant cited order 1 Rule 10(2), it sought to have its name struck out from the suit because '*the suit does not raise any reasonable cause of action'* against it. Non-disclosure of a reasonable cause of action or defence in law is one of those grounds prescribed by Order 2 Rule 15 (previously order VI rule 13) for striking out a suit at any stage of the proceedings. What amounts to 'a reasonable cause of action' in its technical sense was the central theme in D.T. Dobbie & Company (Kenya) Ltd and to this extent that decisions is equally relevant to the present application.

For all I have said I am inclined to come to the conclusion that the 1st defendant's motion dated 29th December, 2017 has no merits and it is hereby dismissed with costs.

Signed, dated and delivered in open court this 6th day of July, 2018

NGAAH JAIRUS

JUDGE