REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

CIVIL CASE NO. 39 OF 1997

NATIONAL BANK OF KENYA……....RESPONDENT / PLAINTIFF

VERSUS

GEORGE OGWENO WANGA……..……APPLICANT /DEFENDANT

RULING

(Notice of Motion dated 27th July, 2012)

1. Through the notice of motion application dated 27th July, 2012 George Ogweno Wanga (the Defendant/Applicant) prays that the suit filed herein by the National Bank of Kenya Ltd (the Plaintiff/Respondent) be struck out and dismissed. He also seeks a discharge of the charge.

2. In brief, the Applicant's case is that the suit does not disclose a cause of action and is incompetent. It is the Applicant's case that the Respondent did not plead condition precedent to entitle it file the suit and that it had not exhausted its statutory powers of sale under the now repealed Registered Land Act.

3. The Respondent opposed the Application through an affidavit sworn by one of its managers Benard Mwanga on 29th April, 2014. It is the Respondent's case that the application lacks merit and is an abuse of the court process.

4. The Respondent's case is that by a letter of offer dated 15th March, 1991 it agreed to advance the Applicant, at his request, banking facilities of Kshs.200,000 and the said amount was secured by a legal charge over the Applicant's land parcel No. Bukhayo/Bugengi/2421. It is the Respondent's case that the Applicant breached the terms and conditions of the loan agreement and at the request of the Applicant the indebtedness which stood at Kshs. 500,000 on 24th May, 1994 was converted into a term loan for easy payment but the Applicant did not comply with the restructured repayments.

5. It is the Respondent's averment that on or about 6th February, 1993 through the firm of Manwari & Company Advocates it issued and served a statutory notice upon the Applicant for the then outstanding sum of Kshs. 649,666.10 in full compliance with Section 74 of the now repealed Registered Land Act. This was long before the filing of the instant suit but the Applicant failed or neglected to comply with the notice.

6. It is the Respondent's case that it made several attempts to sell the charged property by public auction but the attempts were thwarted either for failure to get reasonable bids or through orders of temporary injunction obtained by the Applicant. The Respondent contends that it had therefore fully exhausted the

statutory powers of sale under the repealed Registered Land Act and the allegation that it did not comply with the provisions of the said Act is a triable issue that can only be determined at the trial and not by way of summary procedure.

7. The Respondent deposed that in a ruling delivered on 19th December, 2013, Tuiyott, J decided that Muchemi, J in her decision of 2nd May, 2012 declared the Respondent's plaint incompetent for failure to demonstrate that Section 74 of the repealed Registered Land Act had been fully complied with and not for any other reason.

8. According to the Respondent, the Applicant does not deny being indebted to it and the only way the bank may extinguish its right as a chargee is on redemption of the outstanding debt by the Applicant in accordance with Section 102 of the Land Act.

9. In support of the application, the Applicant's counsel relied heavily on the ruling delivered by Muchemi, J on 2nd May, 2012 in which she allowed the Applicant's request to review the judgment entered against him. It is the Applicant's position that in that ruling Muchemi, J had concluded that judgment had been entered against him based on incompetent pleadings.

10. On his application to have his title discharged the Applicant submitted that he had exhibited documents showing that he had fully repaid the principal sum plus interest.

11. On the part of the Respondent, it was submitted that the application is bad in law as it was brought under the wrong Order of the Civil Procedure Rules, 2010 (CPR). It is the Respondent's case that the application was brought under Order 45 Rule 1(1) instead of Order 2 Rule 15(a), (b) and (c) of the CPR. It is the Respondent's case that rules of procedure are meant to serve specific purposes and they must be followed lest this invention of equity will be relegated to mere provisions with no force of law. In support of this argument the decision of Dulu, J in **Bayusuf brother & another v Mathew Mureithi [2005] eKLR** is cited. In that case the Court held that:

> **"The provisions of the law for applications for dismissal of an appeal for want of prosecution are under Order XLI Rule 31 of the Civil Procedure Rules. Such an application has to be made by summons and not by way of Notice of Motion, as was done in this case.**
>
> **Rules of procedure are meant to serve specific purposes, and they must be followed. This application was brought under the wrong procedure and is therefore incompetent and must be dismissed."**

12. Turning to the substance of the application, the Respondent asserts that its plaint dated 11th September, 1997 raised triable issues of breach of contract and claim for special damages. It is therefore the Respondent's case that a dismissal of its suit under Order 2 Rule 15(a) (b) and (c) of the CPR is not available to the Applicant as the conditions set down for a successful invocation of the provision have not been met.

13. The Respondent contends that the Court cannot strike out the suit without the benefit of *viva voce* evidence and the screening of the documents forming the basis of the main suit. It is the Respondent's position that an order striking out a suit should be issued sparingly and in the clearest of cases.

14. In support of its arguments the Respondent cited the decisions in the cases of **Mosi v National Bank of Kenya [2001] eKLR**, **D.T. Dobie & Co. (Kenya) Limited vs Joseph Mbaria Muchina[1980] eKLR** and **Yaya Towers Limited v Trade Bank Limited(In liquidation [2003] eKLR.**

15. On the question as to whether the charge should be discharged, it is the Respondent's case that according to Section 85(1) of the Land Act, a discharge of charge can only occur upon payment of all money secured by the charge and the performance of all other conditions and obligations under the charge. It is the Respondent's assertion that the Applicant has not fulfilled his obligation under the

charge and the same should not be discharged. Further, that a chargee cannot be stopped from exercising its statutory power of sale when the same has crystallized. In support of these arguments the Respondent cited the decisions in **Schalatica Nyaguthii Muturi v HFCK HCCC No. 10 of 2010** and **Thugi River Estate Ltd & another v Citi Bank N.A. Ltd [2014] eKLR.**

16. The Respondent posits that another reason why the Applicant's case should not be allowed is that the same is not brought in good faith. The Respondent submits that the Court's discretion is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

17. According to the Respondent, the Applicant is relying on procedural technicalities in order to evade payment of a debt and the court should not come to his aid. Cited in support of this argument are the decisions in **Stallion Insurance Company Ltd v Rosemary Olao Nairobi Civil Appeal No. 85 of 1998**; **Samson Aliton Okello v Barclays Bank [2009] eKLR** and **Francis J.K. Ichatha vs HFCK EA Civil Appeal No. 108 of 2005.**

18. In reply to the Respondent's submissions, the Applicant conceded that he had indeed cited the wrong order of the CPR but such mistake does not warrant the dismissal of his application. The Applicant cited the decision of the Ugandan Court of Appeal in **Saggu v Roadmaster Cycles (U) Ltd [2002] 1 EA 258** in which it was stated that failure to date an affidavit or cite the correct law or any law at all are mere errors and lapses which should not necessarily debar an application from proceeding. This Court has therefore been asked to ignore the lapse on the part of the Applicant and proceed to determine the application.

19. On the question as to whether its application is merited, the Applicant insists that it is. His position is that the Court in its ruling of 2nd May, 2012 declared the suit incompetent and an incompetent suit cannot proceed to hearing.

20. The first issue is whether there is a competent application before this Court. The Respondent has urged the Court to dismiss the application for citing the wrong provisions of the law. The Applicant thinks his application can be saved. In the **Mosi case,** Dulu, J stated that citing the wrong provision of the law would render an application incompetent. In the **Saggu case** it was held that such lapses should not lead to the dismissal of an application.

21. My view is that the **Saggu case** speaks to the current position on the issue. Failure to cite the correct provision of the law is not a matter that should deny an applicant an opportunity for the disposal of his application on merit. Such an error is curable by Article 159(2)(d) of the Constitution which requires justice to be done without undue regard to technicalities. Where a lapse is not likely to result in substantial injustice to the other party, a court should not be hypnotized by mere rules that are only meant to assist it in attaining justice for the parties before it. Its focus should be in doing substantive justice. Considering what I have stated, I find the Respondent's averment that the application is defective unmerited and I reject the same.

22. One of the key issues in this application is whether the Respondent's case is one for dismissal under Order 2 Rule 15(a), (b) and (c) of the CPR. In the **Mosi case,** A.G. Ringera, J (as he then was) explained the meaning of Order VI Rule 13 of the Civil which was replaced by similar provisions contained in Order 2 Rule 15 of the CPR, 2010. He stated that:

> **"Order VI rule13 specifies four distinct grounds on which an application to strike out a pleading may be grounded. These are that it discloses no reasonable cause of action or defence; that it is scandalous, frivolous or vexatious; that it may prejudice, embarrass or delay the fair trial of the action; or that it is otherwise an abuse of the process of the Court. If the application is made under the first ground, no evidence shall be admissible thereon but the grounds on which it is made shall be stated concisely. It is established practice that an application could be grounded on any or all of the grounds prescribed in rule 13(1). All that is required is that the grounds relied on be specified in the application and that if they be**

other than the first one, then affidavit evidence is expected."

23. In order for one to say that no reasonable cause of action is disclosed by a plaint, such conclusion should be apparent from the pleadings without the need to resort to any evidence. As was stated by A.G. Ringera, J (as he then was) in the cited case, **"[t]he pith and marrow of it is that where on a consideration of only the allegations in the plaint the Court concludes that a cause of action with some chance of success is shown then that plaint discloses a reasonable cause of action."**

24. A perusal of the plaint dated 11th September, 1997, without the benefit of any other evidence, would disclose that the Respondent has an arguable case. There would be need for further evidence beyond the text of the plaint in order to reach any other conclusion.

25. If a plaint discloses a reasonable cause of action, then unless material is placed before the Court to suggest that there is reason to conclude that the same is an abuse of the court process, it would be difficult to say that such a matter is an abuse of the court process.

26. Is the suit frivolous or vexatious? A matter is frivolous if it has no content and as such it becomes vexatious as it will achieve nothing. In her ruling of 2nd May, 2012 Muchemi, J expressed herself as follows:

> **"In the case before me, no situation existed to give good ground to sue the chargor. The reason for this scenario is that the chargor had secured his mortgage loan and that the remedies under Section 72 and 74 of the Act were available…. The Respondent has not shown that he undertook the process of redemption as provided by the law. The bank will only sue the charger in any of the three situations provided for by Section 74(3). I have already pointed out that none of those situations was in existence at the time this suit was filed. Even if it did, the bank had an obligation to issue a statutory notice to the chargor before the decision to sue was made. It was also a requirement that the applicant should have given an undertaking to pay the amount owing. There was no proof of such an undertaking in order to justify the filing of the suit."**

The Judge continued:

> **"In this case, it is not in dispute that the plaint was misleading and gave a false impression that the bank's claim against the applicant was a commercial one. The omission by the bank to produce the charge in evidence was not an act of good faith. It may have been designed to conceal some material particulars to the court. The judgment of the court was therefore based on flawed pleadings and was likely to occasion injustice to the applicant."**

The Judge then concluded:

> **"I come to a conclusion that the judgment of Justice Mbito delivered on the 9th February 2000 was based on an incompetent suit and that the evidence adduced failed to disclose the actual dispute between the parties."**

27. In a ruling delivered on 15th March, 2015, Tuiyott, J upholding the Applicant's preliminary objection to the Respondent's application to stay this matter, held that:

> **"Clearly, the determination that the suit is incompetent was part of the rationale for the Decision of the Learned Judge. For that reason, I willagree with the defendant that the question as to whether or not the suit was incompetent for non-compliance with the condition set out in the proviso to Section 74(3)(i) was determined in the said Decision of 2nd May 2012…. As I have already held herein, one of the reasons why the Judge allowed the Application for Review was that the suit herein was incompetent."**

The Judge was referring to the ruling of Muchemi, J delivered on 2nd May, 2012.

28. The Respondent's attempt to amend the plaint hit a brick wall on 19th December, 2013 when Tuiyott, J delivered a ruling rejecting the Respondent's application to amend its plaint.

29. The Respondent's suit has already been declared incompetent. Nothing useful can come out of it and it is thus a frivolous and vexatious suit. The Applicant's application to strike out the suit therefore succeeds.

30. The other prayer by the Applicant is for an order discharging the charge. The question as to whether or not the Applicant is indebted to the Respondent has never been determined. The Court cannot accede to the Applicant's request in a situation why the Applicant's claim is yet to be submitted to hearing.

31. It is also ironical that the Applicant seeks to benefit from proceedings which he has tirelessly sought to declare incompetent. The application for discharge of the charge has no basis and the same is rejected.

32. The key outcome of this application is that the Respondent's suit is struck out. Costs follow the event. The Applicant will have the costs of the proceedings from the Respondent.

Dated, signed and delivered at Busia this 16th day of February, 2017.

W. KORIR,

JUDGE OF THE HIGH COURT