



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 592 OF 1998**

**MOHAMMED BARAKA.....1<sup>ST</sup> PLAINTIFF**

**FRANCIS SABWA.....2<sup>ND</sup> PLAINTIFF**

**ROSEMARY JAJA MBOGO, CHARLES GACHUGU  
MUCHIRI, MERCY MAKAU & WILLIAM MUCHIRI**

**suing as Administrators of the estate of**

**SIMON MBOGO MUCHIRI (Deceased).....3<sup>RD</sup> PLAINTIFF**

**WANJIRU NDERITU.....4<sup>TH</sup> PLAINTIFF**

**FRANCIS KIDIAVAI SABWA &**

**ALEX MWESIGWA SABWA suing as Administrators of the estate of**

**LUCY MWAURA (Deceased).....5<sup>TH</sup> PLAINTIFF**

**- VERSUS -**

**JOHN NGAIRA SABWA.....1<sup>ST</sup> DEFENDANT**

**NATIONAL BANK OF KENYA LIMITED.....2<sup>ND</sup> DEFENDANT**

**IGAINYA LIMITED.....3<sup>RD</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR, NAIROBI.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. The 2<sup>nd</sup> Defendant, **NATIONAL BANK of KENYA LIMITED**, have requested the court to strike out the case against it. They also wish to have struck out all consequential proceedings and court papers, including the Amended Plaintiff.
2. The applicant submitted that there was no actionable claim or cause of action which the plaintiff could legitimately ask the court to adjudicate upon as between the plaintiffs and the bank.

3. As far as the bank was concerned, the plaintiffs were total strangers to it, as the bank had never had any dealings with them.
4. The bank only had a contractual relationship with the 1<sup>st</sup> defendant, **JOHN NGAIRA SABWA**. Therefore as the said 1<sup>st</sup> defendant was not at all aggrieved with the bank's action of selling the suit property, the bank contends that the plaintiffs cannot raise claims in relation to the sale of the suit property.
5. The suit property had been charged to the bank, as security for the financial facility which the bank had accorded to the 1<sup>st</sup> Defendant (*hereinafter "Sabwa?"*).
6. According to the bank, it had conducted due diligence before it accepted the suit property as security, and had verified that Sabwa was the duly registered proprietor of the suit property.
7. Therefore, the bank believes that it cannot be held to account by the plaintiffs when the plaintiffs do not have any claims of impropriety on the part of the bank.
8. It was the understanding of the applicant that the plaintiffs claims were directed at Sabwa, who had allegedly deprived the plaintiffs of their interest in the suit property.
9. If the plaintiffs were to prove their allegation against Sabwa, the bank believes that that could only be a fraud perpetrated by Sabwa, and not by the bank.
10. The attention of the court was drawn to the Ruling which was delivered by Commissioner of Assize Ransley (as he then was) on 3<sup>rd</sup> August 1999.
11. The learned Commissioner of Assize held as follows, when delivering his decision on the plaintiffs' application for an interlocutory injunction:

***"Nowhere is it alleged that the 2<sup>nd</sup> Defendant was fraudulent and I hold that its title to the charge is absolute and indefeasible.***

***There is no prima facie case with a probability of success, and further, the plaintiffs rights are against the 1<sup>st</sup> Defendant, if anyone?.***

12. The bank reiterated that Sabwa was the sole registered proprietor of the suit property when the bank accepted the property as a security. In the circumstances, the bank believes that it was under no obligation to establish the existence or otherwise of the plaintiffs unregistered interests on the suit property.
13. In any event, the suit property was said to have been lawfully sold off on 6<sup>th</sup> November 2002. That was almost 13 years before this application was canvassed.
14. More significantly, the bank pointed out that the plaintiffs waited for more than six (6) years before taking steps to challenge the sale. In the circumstances, the claim against the bank was said to be statute barred pursuant to Section 4 of the Limitation of Actions Act.
15. In any event, the bank was persuaded that the Commercial Court had no jurisdiction over any claim in respect to which there was absence of privity of contract.
16. To support its submissions, the bank cited the case of **INSIGNIA LIMITED Vs ZADOK FAST AFRICA LTD & 2 OTHERS Hccc No. 560 of 2011** in which the court held that;

***"Only a party privy to an agreement can challenge it or seek any relief for any alleged violation or breach?.***

17. The bank also relied on the Court of Appeal's decision in **AINEAH LILUYANI NJIRAH Vs AGA KHAN HEALTH SERVICES, CIVIL APPLICATION No. 194 of 2009**. In that case the Court of Appeal said;

***"Privity of contract is a long established part of the law of contract. The essence of the privity rule is that only the people who actively negotiated the contract (who are privy to it) are entitled to enforce its terms. Even if a third party is mentioned in the contract, he cannot enforce any terms or have any burdens from that contract enforced against him?.***

18. I have no doubt about the correctness of the legal pronouncements in those 2 legal authorities. In any event, the decision of the Court of Appeal is binding on the High Court.

19. In the circumstances, the court must now grapple with the question as to whether or not the plaintiffs' claims against the bank were so weak and hopeless that even an attempt to breathe life into it, through an amendment would be an exercise in futility.
20. The bank has invited me to conclude that the case against it cannot be given any chance of survival, even if the plaintiffs were allowed to amend the plaint. In the event, I was told that the only recourse available, in the interests of justice, was the striking out of the unsustainable claim.
21. In answer to the application, the 1<sup>st</sup> plaintiff, **MOHAMMED BARAKA**, submitted that the bank cannot escape responsibility for the sale of the suit property. The 1<sup>st</sup> plaintiff (*hereinafter "Baraka?"*) submitted that the bank was well aware of the judgement which the plaintiffs had obtained against Sabwa, before the bank sold off the suit property.
22. As the bank had, allegedly, become aware of the fact that the suit property belonged to the plaintiffs, Baraka says that the bank ought not to be permitted to get out of the case which seeks to challenge the foundation upon which the bank had, allegedly, obtained the power to sell-off the suit property.
23. In determining the application, the starting point is what the 2<sup>nd</sup> to 5<sup>th</sup> plaintiffs have said about what constitutes a reasonable cause of action. It is, as stated in **"BULLEN AND LEAKE AND JACOB'S PRECEDENTS OF PLEADINGS? 12<sup>th</sup> Edition, at page 142;**

*"...a cause of action with some chance of success when only the allegations in the pleadings are considered. The pleading will not be looked at with the same strictness as it would under the old demurrer, the question not being whether it discloses a good cause of action or answer, but whether it discloses a reasonable one.*

*Accordingly, as long as the statement of claim, including the particulars served thereunder, discloses some cause of action or some question fit to be decided by the court, whether it be a question of law or of fact or of mixed law and fact, the mere fact that the case is weak or not likely to succeed at the trial, is no ground for striking it out?.*

24. In this case I find that if the plaintiffs were able to prove that the bank was aware that the plaintiffs had lodged a claim against Sabwa, asserting that they had a stake in the suit property, the bank may need to explain why it still felt justified and entitled to sell-off the suit property, without recourse to the plaintiffs.
25. I also find that the Ruling delivered by the Hon. Commissioner of Azzize, Ransley, on 23<sup>rd</sup> August 1999 was only on an interlocutory application. Therefore, it cannot have constituted a final conclusive determination on any point of law or of fact.
26. But even if it were to be presumed that a final determination was made on any issue, that would not constitute a bar the amendment of the plaintiff's claim, if the plaintiffs were to seek leave of the court to do so. Of course, I am not suggesting that if leave was sought, the court would give it automatically. No; the court would be obliged to give due consideration to any application made.
27. Hon. Ransley noted that there was no allegation of fraud directed against the bank; and that is correct. However, it is also possible that if the court were to find that Sabwa was motivated by fraud, to offer the suit property as security to the bank, the said security may be tainted.
28. In the event, I find that the plaintiffs' case against the bank was not so hopeless that it cannot be sustained either as it is or by a possible amendment.
29. Therefore, even if the claim may appear weak, justice demands that the claim against the bank should not be summarily struck out.
30. In arriving at this decision, I have also taken into account the fact that by sustaining the claim against the bank, there will be no undue prejudice occasioned to the bank. Any defence which the bank may have will have an opportunity to be tested at the trial, and if the court sustains any such defence, the bank would be vindicated.
31. In the event, the application dated 27<sup>th</sup> April 2015 is dismissed, with costs to the plaintiffs.

**DATED, SIGNED and DELIVERED at NAIROBI this 10<sup>th</sup> day of February 2016.**

**FRED A. OCHIENG**

**JUDGE**

**Ruling read in open court in the presence of**

No appearance for the Plaintiffs.

No appearance for the 1<sup>st</sup> Defendant

Odhiambo for the 2<sup>nd</sup> Defendant

No appearance for 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

Collins Odhiambo – Court clerk.