



REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

ELC CASE NO. 12 OF 2015

KALKA FLOWERS LTD.....PLAINTIFF

VERSUS

EQUITY BANK LTD.....1ST DEFENDANT

PURPLE ROYAL AUCTIONEERS.....2ND DEFENDANT

RULING

The Application

The application before the Court for determination is a Notice of Motion by the 1st Defendant dated 29th December 2014, brought under Order 2 Rules 15(1), (a), (b) and (d). The 1st Defendant is praying for orders that this suit be struck out, and that the Plaintiff pays the Defendants the costs of the application and of the suit. The application is based on the grounds that the suit is an abuse of court process as the Plaintiff had already filed another action, being Machakos HCCC No. 60 of 2014 over the same subject matter, and that there was a real risk that the two courts will arrive at different conclusions thereby undermining the judicial process. Further, that the Plaintiff has no cause of action against the Defendants, and that its claim was frivolous and vexatious.

The 1st Defendant filed a supporting affidavit sworn by Queenton Ochieng an advocate for the 1st Defendant, dated 30th December 2014. He reiterated therein that the Plaintiff had filed an earlier suit being Machakos HCCC No. 60 of 2014, where an application seeking various injunctions was argued on 17th December 2014. Further, that these matters were brought to the attention of the Plaintiff's advocates and there were correspondence exchanged on the issue. It was further averred that on 17th December 2014 the court in Machakos was not informed of the existence of this suit, even though the affidavits in both suits are sworn by the same person.

The 1st Defendant's advocates filed a further affidavit sworn on 19th January 2015 by James Tugee, wherein he averred that he was aware that that this suit was filed on 16th December 2014 and registered as Environment and Land Court (ELC) Case No. 1548 of 2014, and that the duty judge in the ELC division ordered that the matter be transferred to the Commercial and Admiralty Division for final disposal. Orders were also obtained by the Plaintiff on that date that were served on the 1st Defendant. The deponent averred that at the time of entering of appearance by the 1st Defendant on 29th December 2014, the suit had already been transferred to the Commercial and Admiralty Division and assigned a new number, being HCC No. 601 of 2014.

The deponent also stated that Machakos HCCC No. 60 of 2014, (formerly Nairobi HCCC No. 591 of

2014) was filed by the Plaintiff on 16th December 2014, and it was directed by the Kamau J. that the matter be transferred to the High Court in Machakos for *inter partes* hearing of the Plaintiff's injunction application on 17th December, 2014. The deponent also explained the various attempts made by the 1st Defendant's Advocates to bring the existence of the second suit to the Plaintiff's Advocates.

He averred that the issue at the core of both suits is the sale of the parcels of land namely Kajiado/Kisaju/1679 and Kajiado/Kisaju/1743. Further, that the addition of the second defendant in the present suit does not alter the substance of the suit in Machakos. He stated that the suit properties in both cases are situated in Kajiado within the local limits and jurisdiction of the High court in Machakos. He opined that section 6 of the Civil Procedure Act should be read together with section 7 of the same Act, and that there would be no point in staying this matter as the court will be barred by *res judicata* once the issues raised herein are heard and determined by the court in Machakos.

The Response

The Plaintiff opposed the said application in a lengthy replying affidavit sworn by its Advocate, F. Kinyua Kamundi, on 15th January 2015. The learned advocate averred that it was not clear when the suit in Machakos HCCC No. 60 of 2014 was filed, and that if it turned out that the Machakos suit was filed later, the problem would be with the Machakos suit and not the instant suit. He also stated that he had not been able to get clarification from the Plaintiff's director who instructed him, and who had also sworn the affidavits in the two suits by the Plaintiff, as he was unwell.

The Deponent denied having knowledge of Machakos HCCC No. 60 of 2014, (formerly Nairobi HCCC No. 591 of 2014) and stated that he only filed Case No. 1548 of 2014, and was not aware that it had been given a new number of HCCC 601 of 2014. Therefore, that he was not able to comment on the allegations of abuse of the Court process. He referred to various email correspondences with the 1st Defendant's Advocates and the Plaintiff's Advocates in the second suit in this regard.

The deponent noted that there were 2 defendants in suit No. 1548 of 2014 while there was only one defendant in Civil Suit No. 591 of 2014. Further, that he included Purple Royal Auctioneers suit no.1548 of 2014 as 2nd Defendants, and he identified a distinct and a separate cause of action against the said auctioneer for violating the Auctioneers Act and Rules. He reiterated that under section 6 of the Civil Procedure Act the jurisdiction of the court would be to stay this suit, if the court is satisfied that this suit and suit No. 1548 of 2014 are one and the same, and if the court is satisfied that suit No. 1548 of 2014 was filed after the Machakos Suit.

The deponent further averred that the injunction in section 6 of the Civil Procedure Act was that no court shall proceed with the trial, and he could not ask for an order of stay because he had not spoken to his client. He also opined that the present application should have been served upon the advocate representing the Plaintiff in the second suit, so that the court can deal with the matter conclusively with both firms of advocates for the Plaintiff present. He stated that suit no. 1548 of 2014 was neither frivolous nor vexatious as the plaint establishes very strong and concise causes of action. He concluded that one of the fundamental rights and freedoms that cannot be limited is the right to fair trial under Article 25(c) and Article 50 of the Constitution. Therefore there was no room to strike out suits without according parties opportunity to be heard.

The Issues and Determination.

The parties were directed to canvas the application by way of written submissions. The Plaintiff did not file any submissions within the timelines given by the Court. The 1st Defendant's Advocates, Hamilton Harrison and Mathews Advocates, filed submissions dated 16th November 2015, wherein they argued that this suit was an abuse of the court and its intention was to stop the sale of the Plaintiff's charged properties being Kajiado/Kisaju/1743 and 1679.

The 1st Defendant cited the case in **Governors Balloon Safaris Ltd vs Attorney General & 2 Others,**

(2014) eKLR where the court held that it is an abuse of the court process to institute several proceedings in order to challenge the same action, and that the court has inherent jurisdiction to prevent such abuse. The 1st Defendant therefore urged the court to invoke its inherent powers under Order 2 rule 15(1)(d) of the Civil Procedure Rules to strike out the suit. Further reliance was placed on the decision in **Commercial Exchange Ltd & Another V Barclays Bank of Kenya Ltd (1997) eKLR** in this regard.

The 1st Defendant further submitted that the Plaintiff had no cause of action against the defendant which merited a trial. It was argued in this regard that the Plaintiff's application for an injunction was heard and a ruling delivered by Mutende J. in HCCC No. 60 of 2014 on 20th January 2015, wherein it was found that the Plaintiff had admitted to defaulting on the loan granted by the Defendant, who had the right to exercise its statutory power of sale. Further that the present suit is based on the same charge, and it is not necessary to await the outcome of the other suit. Lastly, the 1st Defendant argued that striking out the present suit would be in line with the duty of the court as set out under Section 1B of the Civil Procedure Act, which requires the court to ensure the efficient use of the available judicial and administrative resources.

I have carefully considered the pleadings filed herein, and submissions made by the 1st Defendant. The issue for determination is whether the suit filed herein should be struck out. The law on striking out of pleadings is stated in Order 2 Rule 15 of the Civil Procedure Rules and in various judicial decisions. Order 2 Rule 15(1) provides that:

“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 power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated in D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 at p. 9 by Madan, J.A.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.”

Therefore, the overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues.

In the present application it is not in dispute that there are two suits filed by the Plaintiff that concern the same subject matter and essentially the same parties, as the 2nd Defendant in the present suit is being sued in its capacity as auctioneer and therefore agent of the 1st Defendant. The said suits were both filed on the same date and have had a chequered history, having been transferred severally from other courts.

The present suit began life after being filed on 16th December 2014 as HCCC Suit No 1548 of 2014, and

was placed before the Environment and Land Court in Nairobi, before it was transferred to the Admiralty and Commercial Division of the High Court in Nairobi and assigned a new case number of HCCC 601 of 2014. The said suit was further transferred from the Admiralty and Commercial Division to Machakos High Court, where it was given its current number of Machakos HC ELC 12 of 2015. The second suit was first filed on 16th December 2014 as HCCC 591 of 2014 in the Admiralty and Commercial Division of the High Court at Nairobi, before an order was made to transfer it to Machakos High Court where it was given a new case number of HCCC 60 of 2014.

It is therefore evident that there has been an abuse of the Court process by the Plaintiff in filing two suits on the same cause of action, as the main issue in both suits is the sale of the Plaintiff's property under statutory power of sale arising from a charge to the 1st Defendant to secure a loan facility. However, after perusal of the files of both suits, I note that the Plaintiff has raised other triable issues in the present suit that have not been raised in HCCC 60 of 2014, and that were not determined by the ruling delivered by Mutende J. therein on 20th January 2014. These issues are the legality and efficacy of the charge executed by the Plaintiff in favour of the 1st Defendant, and that of damages if any payable to the Plaintiff. To this extent it is my view that this suit is therefore not one that is amenable to striking out, notwithstanding the undesirable conduct of the Plaintiff in this matter.

The appropriate course of action that therefore lends itself to me to remedy the abuse of court process by the Plaintiff is that of consolidation of the two suits, pursuant to the provisions of section 1A, 1B and 3A of the Civil Procedure Act and Order 11 Rule 3 of the Civil Procedure Rules

It is accordingly ordered as follows:

1. That the suit herein be and is hereby consolidated with Machakos **HCCC No. 60 of 2005 – Kalka Flowers Limited Ltd vs. Equity Bank Limited** for purposes of being heard and determined together on the basis of the pleadings already filed in the two suits, and subject to any subsequent amendments.
2. The file for the suit herein shall be the lead file for purposes of filing of pleadings and recording of proceedings.
3. The costs of the Notice of Motion by the 1st Defendant dated 29th December 2014 shall be borne by the Plaintiff.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 4th day of December, 2015.

P. NYAMWEYA

JUDGE