



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NYERI**

**CIVIL APPEAL NO. 97 OF2011**

**JOSEPH GITHUKA KIHU.....APPELLANT**

**Versus**

**JOHN B. WACHIRA KIBARA .....RESPONDENT**

*(Appeal arising from the ruling of Hon J.M. Omino*

*Resident Magistrate in Karatina Civil Case No. 60 of 2007)*

**JUDGMENT**

1. By a plaint dated 11th June 2007 the Appellant sued the Respondent for a declaration that the repossession of motor vehicle Registration No. KJM 360 Peugeot 404 by the Respondent from the Appellant was unlawful together with damages for loss of income at the rate of Ksh. 2000/- per day from 7th June 2007 until the date when the motor vehicle registration No. KJM 360 is returned back to the Appellant.
2. The Appellant on the same date took out a chamber summons under certificate of urgency for an order that a temporary injunction do issue restraining the respondent his agents or servants from wasting damaging alienating, mortgaging or transferring motor vehicle registration No. KJM 360 until the hearing and final determination of the suit and that an order do issue for attention and preservation of the said motor vehicle at Thika police station until further order by the court and that the base Commander Thika be ordered to enforce the order.
3. The Respondent on 18th June 2007 filed a statement of defence and counter claim through the firm of Kinyua Kiama & co. Advocates in which he stated that there was a balance of the purchase price of Ksh. 27,000/- and that the respondent was entitled to repossess the said motor vehicle and in the counter claim claimed Kshs. 27000/- balance of the purchase price and Kshs. 22500/- cost of investigation leading to the location of the motor vehicle.
4. On the 1st June 2008 the Respondent filed a chamber summons application under order v rule 13(b)(c)(d) of the then Civil Procedure Rules the subject of this appeal for order

***THAT the plaint herein be struck out with cost and judgment be entered for the respondent as prayed for in the counter claim with cost.***

5. It was supported by the affidavit of the Respondent sworn on the same date wherein he deponed that he sold motor vehicle registration No. KJM 360 to the Appellant way back on 30th August 2014 who never paid the balance of the purchase price and that on 7th June 2007 the said motor vehicle was repossessed by his investigation at Gatundu police station and the appelalnt filed the suit and the application for the release of the motor vehicle.
6. That the appellant did not file any defence to the counter claim and that since he had secured back the motor vehicle this suit was serving his purpose.
7. In reply to the said application the Appellant filed a replying affidavit on 19th September 2008 in which he deponed that the agreement relied upon by the Respondent was in admissible for failure to comply with section 19 of the Stamp Duty Act and that the repossession of the motor vehicle was unlawful since the agreement did not provide for it and there was no court order empowering the said repossession.

8. He further deponed that he intended to seek leave of the court to file defence to the counter-claim out of time since the delay to do so was caused by the disappearance of the court file in the registry.
9. Upon hearing the parties herein the trial court proceeded to enter judgment on the counter-claim and struck out the plaint.
10. Being aggrieved by the said ruling the applicant filed the appeal and raised the following grounds of appeal

1. ***The learned trial magistrate erred in law and in fact in striking out the Appellant's plaint and entering judgment on the counter-claim***
2. ***The learned trial magistrate erred in law and in fact in failing to find that the Defendant's statement of defence and counterclaim had not been served on the appellant.***
3. ***The learned trial magistrate misdirected himself in proceeding on erroneous principles of law in striking out the appellant's plaint and entering judgment on the counter-claim on remote claims without any legal basis.***
4. ***The learned trial magistrate erred in law and in fact in striking out the Appellant's plaint and entering judgment against the appellant in a summary manner yet the plaint raised serious and weighty triable issues which should have been resolved in a full hearing.***
5. ***On totality there was no sufficient material placed before the subordinate court to warrant the finding and conclusion arrived at by the learned magistrate.***
6. ***The trial magistrate misdirected himself when he held that the appellant having secured the release of the motor vehicle, there were no issues left for determination yet the appellant's plaint had a prayer (b) for Dames for loss of income of the motor vehicle from the date of wrongful repossession to the date of restoration of the same to the appellant.***
7. ***The trial magistrate erred in law and in fact in allowing an extremely remote counter-claim for the sum of Ksh. 22,500/- allegedly being spent by the Respondent in investigations leading to the location of the motor vehicle on the 7th June 2007, which claim being one for special damages the respondent should have tendered specific documentary proof of the same.***
8. ***The trial magistrate misdirected himself in law and in fact when he failed to address himself to the issues raised by the appellant's counsel, in paragraphs, 4, 5, 9, 10 and more particularly paragraph 15 of the replying affidavit sworn by the appellant on 18th September 2008.***

1. Directions were given that the appeal be disposed of by way of written submissions which have been filed.

### **SUBMISSIONS**

2. It was submitted by the Appellant that he was unable to trace the court file until he writes to the Chief Justice when the file resurfaced but after interlocutory judgment had been entered in favour of the Respondent and that the Respondent learnt of the filing of the suit before the subordinate court then before he was served with summons to enter appearance plaint and verifying affidavit.
3. It was submitted that the issues raised by the Appellant in his replying affidavit that the attachment of the motor vehicle was unlawful since the agreement did not provide for repossession was yet to be determined by court and that the Appellant had raised the issue of the ownership of the subject motor vehicle since the Respondent was not the registered owner and was therefore unable to even execute a transfer in favour of the appellant.
4. That for the court to strike out pleadings it must be demonstrated that the pleadings is vexatious frivolous, an abuse of court process or that it does not disclose any reasonable cause of action.
5. It was further submitted that the court erred in entering judgment for the respondent on the counter claim since the court did not satisfy itself that the appellant had been properly served with the defence and counter-claim and that the claim in the counter-claim was too remote to be allowed.
6. On behalf of the Respondent it was submitted that the cause of action at the lower court arose out of an agreement for sale of motor vehicle registration No. KJM 360 at an agreement price of Ksh. 57,000/- of which the Appellant made a down payment of Ksh. 30,000/- leaving a balance of 27,000/- to be paid on 19th August 2004 and that upon taking of possession of the motor vehicle the Appellant went underground leading to the repossession thereof.

7. That the respondent filed a counter-claim which was served upon the appellant counsel then on record Ms Gathoga Wairegi and Co and no defence was filed thereon leading to the application the subject matter of the appeal.
8. It was therefore submitted that the appeal lacks merit since the appellant has failed to exhaust the order issued on 19th December 2008 applied against and that it is fatal to the appeal. It is further submitted that the appellant has moved the court with untidy hands since he has not paid Ksh. 27,000/= balance of purchase price and that the trial court was right in striking out the plaint.
9. It was submitted that the respondent filed a liquidated counter-claim for Kshs. 49,500/= to which the appellant never filed a defence and therefore even if the appeal was allowed the appellant will still not be able to defend the counter-claim and therefore court order should not be issued in vain.
10. With the above submissions and affidavit evidence the court has identified the following issues;

***a. Was the trial court right in striking out the appellant's plaint and entering judgment on counter-claim?***

***b. Whether the counter-claim was a liquidated claim and if the same was proved on a balance of probability.***

11. The conditions under which a court can strike pleadings are set out in the order 5 of the Civil Procedure Code and now rule order 2 rule 5(1) of the Civil Procedure Rules which provide as follows:

**“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.**

**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 court and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.**

12. It has been held that the power of 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 see DT DOBIE CO. KENYA LTD v MUCHINA [1982]KLR1 at page 9 where Madan JA stated thus:

***“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 infected with real life by an amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of a case before it.***

13. For the trial court to strike out pleadings the applicant must satisfy the court that the pleadings which he seeks to have struck out are scandalous, frivolous or vexatious, discloses no reasonable course of action and this being first appellant court I have to look at the proceedings before the trial court and from the plaint the appellant was claiming a declaration that the repossession of the motor vehicle was unlawful and damages of loss of income at Ksh. 2000/= per day from 7th June 2007 until the motor vehicle was returned back.
14. The question then was whether the pleading herein disclosed reasonable cause of action against the respondent the appellant having admitted that he paid only Ksh. 30,000/=?. From the pleadings herein one would not fault the trial court in holding that the appeal as pleadings did not disclose any reasonable cause of action against the respondent having admitted that he only paid Ksh. 30,000/=.
15. The next issue is whether the trial court was right in entering judgment against the appellant on counter-claim from the evidence placed before the court the only claim proved by the respondent was Ksh. 27,000/= being balance of purchase price the respondent had to prove Ksh. 22,500 the cost of investigation.
16. I therefore find that the trial court was in error in entering judgment for the respondent from a claim of Ksh. 22,500/- which was not proved and should therefore have ordered this part of the counter-claim to go for formal proof.
17. I would therefore positively allow the appeal herein by entering judgment for the respondent for Kshs. 27000/-

and order the balance of the claim in the counter-claim to proceed for formal proof before the SRM court at Karatina.

Dated and delivered at Nyeri this 13th day of February 2014.

J. WAKIAGA

JUDGE

Court: Judgment read in open court in the absence of the parties.

J. WAKIAGA

JUDGE