



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY COURT**

**Civil Suit No 426 Of 2012**

**JAMES KIMANI KABOGO .....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED....1<sup>ST</sup> RESPONDENT**

**KEYSIAN AUCTIONEERS.....2<sup>ND</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. The Respondent's (sic) Notice of Motion application erroneously dated 25<sup>th</sup> May 2013 and filed on 29<sup>th</sup> April 2013 was brought under the provisions of Order 2 Rule 15 (1)(b) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. It sought the following orders:-
  - a. **THAT the Originating Summons 21/06/2012 (sic) filed in this suit be struck out with costs to the Respondents.**
  - b. **THAT the costs of this application be provided for.**
2. The said application was premised on the following grounds:-
  - a. **THAT the Originating Summons was frivolous and vexatious.**
  - b. **THAT the Originating Summons was otherwise an abuse of the court process.**

**AFFIDAVIT EVIDENCE**

3. The Plaintiffs' application was supported by the affidavit of Kennedy Kasamba, a Recovery Manager attached to the Credit Support Unit of the 1<sup>st</sup> Respondent herein.
4. He stated that his duties entailed pursuit and recovery of all facilities outstanding from various customers, one of whom was the Applicant herein. It was his averment that the Applicant was offered banking facility by M/S Savings & Loans Limited which facility was secured by an instrument of Charge dated 18<sup>th</sup> June 2009 over the land parcel known as L.R. No 991/14 (Apartment Number COIR 80422, Riverside Drive) (hereinafter referred to as "the subject property"). He added that the said M/S Savings & Loans Limited amalgamated with the 1<sup>st</sup> Respondent herein whereupon all the former's rights and obligations became vested in the latter.
5. It was his averment that the Applicant did not pay the secured mortgage facility in conformity with the express terms of the lending under the Letter of Offer and the Instrument of Charge as a

- result of which he fell into huge arrears. He deposed that the 1<sup>st</sup> Respondent's statutory power of sale in respect of the subject property therefore crystallised whereupon it served upon the Applicant a Statutory Notice dated 17<sup>th</sup> January 2012. He said that the 2<sup>nd</sup> Respondent also served upon the Applicant the requisite forty five (45) redemption notice and Notification of Sale. He contended that the Applicant was therefore at all material times aware of the position of his mortgage account and that the 1<sup>st</sup> Respondent's statutory exercise of power of sale could not be impugned.
6. He further stated that the rules invoked by the Applicant to commence the proceedings herein did not clothe the court with the jurisdiction to restrain a chargee from exercising its statutory power of sale in respect of a charged property or to re-write the terms of the lending between a mortgagor and a mortgagee to allow for payments to be made outside the terms that had been set out in the contract between the parties.
  7. It was his averment that the proceedings herein were not tenable and that the Applicant was abusing the court process to vex the Respondents and in particular, the 1<sup>st</sup> Respondent herein. The Respondents therefore prayed that the Originating Summons herein be struck out with costs to them for being frivolous, vexatious and otherwise an abuse of the court process.
  8. In response thereto, the Applicant swore a Replying Affidavit on 12<sup>th</sup> November 2012. The same was filed on 13<sup>th</sup> November 2013. He admitted that the facility was offered to him as had been deposed by Kennedy Kasamba. He stated that he effected monthly payments in the sum of Kshs 119,787/= until February 2010 but that in blatant breach of the express terms in the agreement, the 1<sup>st</sup> Respondent failed to keep him informed of his account status. He deposed that due to miscommunication over the interest chargeable on the loan, he was unable to pay the loan as a result of which he was issued with a demand letter.
  9. He averred that he made repayment proposals to the 1<sup>st</sup> Respondent and that he was under the impression that the 1<sup>st</sup> Respondent had waived its rights to sell the subject property. He denied ever having received the 1<sup>st</sup> Respondent's Statutory Notice. He stated that he had not been aware that the loan had been recalled and was therefore shocked to discover that the subject property had been advertised for sale on 19<sup>th</sup> June 2012. He said that he had since resumed repayment of the mortgage although the issue of interest had not been resolved.
  10. It was his contention that having established a *prima facie* case, his Originating Summons had raised triable issues for determination and was therefore not frivolous. He contended that the 1<sup>st</sup> Respondent's application was devoid of substance and prayed that the same be dismissed with costs to him.

### **LEGAL SUBMISSIONS BY THE APPLICANT**

11. In its written submissions dated 17<sup>th</sup> January 2014 and filed on 28<sup>th</sup> January 2014, the Respondent relied on the case of **Trust Bank Limited vs Amin & Co Limited & Another (2000) KLR** to buttress its submission that the Applicant's Originating Summons was frivolous and vexatious and otherwise an abuse of the court process. It referred the court to the holding therein which was that:-

**“A pleading or action is frivolous when it is without substances or groundless or fanciful and is vexatious when it lacks *bona fides* and is hopeless or offensive or tends to cause the opposite side unnecessary anxiety, trouble or expense... A pleading which is an abuse of the process of the court machinery or process...”**

12. It also placed reliance on **paragraph 74 of Volume 36, Halsbury's Laws of England, 4<sup>th</sup> Edition** to the effect that although an order for striking out pleadings had to be in plain and obvious cases, the court had a duty to make such an order in suitable cases since a party was entitled to have the against him presented in an intelligible manner.
13. It was its submission that the Originating Summons was groundless and hopeless. It submitted

- that the reliefs sought by the Applicant, which were basically injunctive orders or an order for payment of mortgage payments by instalments, could not be granted under the provisions of the law that the Applicant had relied upon.
14. It was emphatic that the injunctive orders being sought were based on a perceived dispute of accounts and that payment by instalments was untenable in law. It argued that judicial authority was clear that a dispute as to accounts cannot be the sole basis for restraining a mortgagee from exercising its statutory power of sale. It relied on the case of **Mrao Limited vs First American Bank of Kenya Limited & 2 Others (2003) KLR 125** in this regard.
  15. It was also its submission that even if the prayers had been properly grounded under the provisions of Order 37 Rule 4 of the Civil Procedure Rules, the same could still not be granted for the reason that the Instrument of Charge clearly stipulated the manner in which the mortgage debt was to be repaid and the effect of default.
  16. It contended that a challenge to its statutory power of sale could not be mounted in the context of the proceedings herein and that having done so, the Applicant was improperly using the machinery of the court to vex it as he was aware that the issues in dispute could not be determined in a summary manner. It placed reliance on the case of **Kenya Commercial Bank Limited vs Osebe (1982) KLR 296** where the Court of Appeal observed as follows:-

**“The procedure of originating summons is intended for simple matters and enables the court to settle them with the expenses of bringing an action. The procedure is not intended for determination of the matters that involve a serious question. The procedure should not be used for the purpose of determining disputed questions of fact. The procedure... is designed for the summary or *ad hoc* determination of points of law, construction of certain specific facts or for obtaining of specific directions of the court such as trustees, administrators of the court’s execution officers...”**

17. It was categorical that the mortgagee’s statutory power of sale in case of default was specifically reserved in clause 9 (a) of the Instrument of Charge and ordering the Applicant to pay the mortgage debt by instalments would be essentially re-writing the contract they had entered into. It referred the court to the case of **National Bank of Kenya Limited vs Pipe Plastic Samkolit (K) Limited & Another (2001) KLR 112** to buttress its argument in this regard. It urged the court to strike out the Originating Summons as it had sought in its application.

#### **LEGAL SUBMISSIONS BY THE APPLICANT**

18. The Applicant’s undated written submissions were filed on 13<sup>th</sup> March 2014. He reiterated the averments in his Replying Affidavit. He argued that the fact that the Respondent did not bring its application under Order 2 Rule 15 (1)(a) of the Civil Procedure Rules clearly indicated that his Originating Summons disclosed a reasonable cause of action.
19. While relying on the provisions of Section 1A of the Civil Procedure Act that mandated the court to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act, he submitted that the Originating Summons raised triable issues which ought to be heard and determined in a full trial and as such, the same could not be struck out for being frivolous, vexatious or otherwise an abuse of the court process.
20. He relied on the case of **Nyati (2002) Kenya Limited vs Kenya Revenue Authority [2009] eKLR** where Ringera J (as he then was) stated as follows:-

**“ A matter would only be scandalous, frivolous and vexatious, if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned, for example, imputation of character is not in issue. A pleading is frivolous if it lacks seriousness. It would be vexatious, if it annoys or tends to annoy. It would annoy if it is not serious or contains scandalous matter, irrelevant to the action or defence. A scandalous and/or frivolous pleading is *ipso facto* vexatious.”**

21.He reiterated that the 1<sup>st</sup> Respondent did not serve him with the Statutory Notice. He placed reliance on the case of **Elizabeth Wambui Njuguna vs Housing Finance Co of Kenya [2006] eKLR** where the court therein held as follows:-

**“...I think the omission to serve a valid statutory notice is not an irregularity or impropriety to be remedied in damages. It is a fundamental breach of the stature, which derogates from the chargor’s equity of redemption.”**

22.He pointed out that the court had also found an applicant in the case of **Ephraim Wambu Miano vs Kenya Commercial Bank Limited [2004] eKLR** to have established a *prima facie* case as he had not been served with a statutory notice.

23.He contended that he had the legal right to seek the reliefs that he had sought in his Originating Summons as Order 37 Rule 4 of the Civil Procedure Rules provides as follows:-

**“ Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require, that is to say, sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee.”**

24.He admitted that he defaulted in arrears but that the same had been caused by miscommunication between him and the 1<sup>st</sup> Respondent regarding the interest that had been charged. He reiterated the facts leading to his default as had been set out in his Replying Affidavit. He submitted that the power to strike out any pleading was discretionary and had to be exercised in plain and obvious and plain cases. He relied on the case of **DT Dobie Company (Kenya) Limited vs Muchina (1982) KLR 1** in this regard. He therefore urged the court to uphold the law and the interests of justice and not to strike out his Originating Summons.

## **LEGAL ANALYSIS**

25.The court did note the Applicant’s submissions regarding the principle of the overriding objective under Section 1A of the Civil Procedure Act Cap 21 (laws of Kenya). However, it did not see the nexus between that Section, the aspect of triable issues that necessitated the matter to be heard and determined in full trial and not striking out of his Originating Summons for being frivolous, vexatious or otherwise an abuse of the court process as he had submitted.

26.His submissions that the provisions of Order 37 Rule 4 of the Civil Procedure Rules, 2010 were applicable in the matter herein appeared to be more relevant as a response to the Respondent’s prayer that his Originating Summons ought to be struck out. That is because the said provision permits a mortgagor or mortgagee to take out as of course an originating summons for such relief of the nature or kind following as may be by the summons specified.

27.The substantive reliefs sought by the Applicant in his Originating Summons were as follows:-

- i. **A temporary injunction be issued against the Respondent’s herein (or their servants or agents) restraining the sale, disposition or alienation of property known as Land Reference Number 991/14/ Apartment No. COIR 80442 Riverside Drive Nairobi pending the hearing and determination of the suit;**
- ii. **The Applicant exercises its right to redeem the property known as Land Reference Number 991/14/ Apartment No. COIR 80442 Riverside Drive Nairobi by way of monthly instalments...”**

28.However, whilst the court noted the holding in the case of **Kenya Commercial Bank Limited vs Osebe** (Supra) which was also considered in the cases of **James Koropan (on behalf and legal**

- representative of Oreu Ole Kipriken) vs Kimittee Ole Setek [2006] eKLR, Kulsumbai vs Abdulhussein [1957] E.A. and Kibutiri vs Kibutiri [1983] KLR** regarding the circumstances when originating summons may be filed, the court wishes to point out that in addition to trustees, administrators or executors of a deceased person, there were other categories of persons who could also take out originating summons as a matter of course. These persons include mortgagees and mortgagors as is stipulated in Order 37 Rule 4 of the Civil Procedure Rules, 2010.
29. The Applicant's prayer, in the Originating Summons herein, to repay the mortgage debt by paying monthly instalments could be deemed to have been one for redemption. Such a relief was provided for under Order 37 Rule 4 of the Civil Procedure Rules, 2010 as he had sought a prayer to be allowed to redeem the property. Though he did not say in so many words, he appears to have taken out the Originating Summons herein in his capacity as a mortgagor. The Applicant was therefore within his right to take out the Originating Summons herein with a view to having a question determined by the court.
30. Notably, the crux of the Respondent's submissions was that the court had no jurisdiction to grant an injunctive relief or an order for payment of the mortgage of debt by way of monthly instalments under the said Order and that in any event, the court did not have power to re-write the contract between it and the Plaintiff herein.
31. A perusal of the Charge dated 18<sup>th</sup> June 2009 clearly shows the rights and obligations of both the Plaintiff and the 1<sup>st</sup> Respondent herein. The court is not able at this point to enter into the discourse as to whether or not the 1<sup>st</sup> Respondent was entitled to issue the statutory notices in the event the Applicant defaulted in payment of the mortgage debt.
32. In the same vein, the issue of whether or not the 1<sup>st</sup> Respondent's statutory power of sale had crystallised after the Applicant defaulted in the payment of the mortgage debt would not be a matter that could be addressed in an application for striking out of the said Originating Summons.
33. Similarly, the question of whether or not the Applicant was served with the requisite notices before the 1<sup>st</sup> Respondent exercised its statutory power of sale can only be determined upon hearing the parties on the said issue.
34. While the court has noted parties' submission in respect of the aforesaid issues, the court would essentially be going outside the scope of the matter presently before it if it was to make a finding on the said issues.
35. The question of whether or not the Applicant was entitled to the said reliefs that he had sought in his Originating Summons was a different matter altogether and had not been placed before the court for determination. The concern of the court at this stage, is for it establish whether or not the Respondents had furnished it with sufficient or adequate reasons to persuade it to strike out the Applicant's Originating Summons as they had sought.
36. The Respondent may have felt strongly that the Originating Summons herein to have been hopeless and groundless. However, that would not automatically connote that the said Originating Summons was frivolous or vexatious or otherwise an abuse of the court process and for which the said Originating Summons ought to be struck out. The Applicant had applied to be allowed to repay the mortgage debt by way of monthly instalments. He had every right to seek, from the court, any relief it deemed fit whether the same was merited or not, a finding that the court would have to make after hearing the merits of the case.
37. An act of striking out of pleadings by the court should therefore be exercised cautiously and with a lot of restraint. Reasons advanced to the court for striking out a pleading must be so cogent and water-tight and the pleading must be so useless *prima facie* that any reasonable or prudent man would confidently find the pleading so baseless and a waste of time.
38. The main aim is to sustain rather than terminate a suit, striking out a suit is a draconian step which must be used as a last resort. This was a position that was espoused in **Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR** where Musinga J (as he then was) had the following to say:-

**“It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.”**

39. The Court of Appeal also stated in **DT Dobie & Co (Kenya) Ltd vs Muchina [1982] KLR** that:-

**“ ... As the power to strike out pleading is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously. The court should aim at sustaining rather than terminating a suit...As long as a suit can be injected with life by amendment, it should not be struck out...”**

40.As has been stated hereinabove, an originating summons is filed for determination of simple questions. A question of whether or not the 1<sup>st</sup> and 2<sup>nd</sup> Respondents served the Applicant with a statutory notice and the requisite notices respectively cannot in the mind of this court be deemed have been a simple matter. The question of whether or not the Applicant ought to be granted leave to repay the mortgage debt by way of monthly instalments is also a matter that cannot be dealt with summarily. These are serious issues that would need to be determined after a full trial and not based on affidavit evidence only.

41.In the circumstances foregoing, the grounds relied upon by the 1<sup>st</sup> Respondent had to be so cogent so as not to prejudice the Applicant’s case. The Respondent’s argument that the proceedings herein that had been brought by way of an Originating Summons had put them into unnecessary trouble and expense as to amount to the same being frivolous, vexatious or otherwise an abuse of the court process appear to have been far- fetched.

42.Having said so, it is important to point out that in the event a party has filed a matter as an originating summons as opposed to a plaint, the court would still find it extremely difficult to strike the same out for the reason that Order 37 Rule 19 of the Civil Procedure Rules, 2010 which provides as follows:-

- 1. Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had begun by filing a plaint, it may order the proceedings to continue as if the cause had begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty of the parties to add, or to apply for the particulars of, those affidavits.**
- 2. Where the court makes an order under subrule (1), Order 11 shall apply.**
- 3. This rule applies notwithstanding that the cause could not have been begun by filing a plaint.**
- 4. Any reference in these Rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under subrule (1).**

43.It is evident that the court can order that an Originating Summons be continued as if the cause had been begun as a plaint. In the case of **Siasa Pashua & 2 Others vs Mbaruk Khamis Mohamed & Another [2012] eKLR**, the court therein did in fact direct that the Originating Summons be treated as a the normal plaint. This was also a fact that was acknowledged by the Court of Appeal in the case of **General Tools & Electrical Equipment vs Oriental Commercial Bank Limited [2009] eKLR** where it was stated that:-

**“ In any event as was appreciated in the KCB vs Osebe case (supra), the court has a discretion under Rule 10 (1) Order 36 of the Civil Procedure Rules to order that proceedings commenced by Originating summons to be continued as if they had been commenced by way of plaint.”**

44. It would therefore be premature for the court to strike out the Originating Summons herein for seeking reliefs the 1<sup>st</sup> Respondent felt could only be granted if the cause had been commenced by way of a plaint.

45.This court is, however, of the view that the court cannot, while hearing an application for striking out an originating summons, such as in this case, direct that the Originating Summons herein to be treated as a normal plaint. The court has not heard what the Applicant’s case is all about so as to make a just determination as to whether or not the said Originating Summons should continue as if the cause had commenced as a plaint.

46.A plain reading of Order 37 Rule 4 of the Civil Procedure Rules, 2010 is very categorical that such powers can only be enforced upon hearing of summons. The summons has not yet been heard and no directions have been given yet.

47. Indeed it is trite law that a party must be given a fair and reasonable opportunity to present its case. Article 50 of the Constitution of Kenya, 2010 protects the constitutional right of every individual to be accorded fair trial. It would be a travesty of justice for the court to pre-empt the Applicant's case or interfere with the way he wishes to present his case to court for determination. It therefore follows that if the court were to dismiss the Applicant's Originating Summons at this stage, it would be denying him an opportunity to present his case in the best way he knows how.
48. Therefore, having carefully considered the pleadings herein, the affidavit evidence, the written submissions and the case law in support of the parties' respective cases, the court was not persuaded that 1<sup>st</sup> Respondent demonstrated in a clear manner that the Applicant's Originating Summons was frivolous, vexatious, an abuse of the court process or that it was intended to embarrass and delay the fair trial of this action. The Respondents were under a duty to lay a proper basis for their application, which this court finds they failed to do.
49. For the avoidance of doubt, the court wishes to point out that it referred to the Respondents and 1<sup>st</sup> Respondent in the same manner that they had been referred to in the Respondent's written submissions. The word "Respondents" and "1<sup>st</sup> Respondent" were therefore used interchangeably in the ruling herein to refer to the 1<sup>st</sup> Respondent herein depending on how they were used by the Respondents in their written submissions. The court has also not indicated the letters "O.S" after the citation of the case herein as the same was not included by the Applicant in his original pleadings and or by the parties in their subsequent pleadings herein.

### **DISPOSITION**

50. Accordingly, the upshot of this court's ruling is that the Respondent's Notice of Motion application dated 24<sup>th</sup> May 2013 and filed on 29<sup>th</sup> May 2013 was not merited and the same is hereby dismissed with costs to the Applicant.
51. It is so ordered.

**DATED and DELIVERED at NAIROBI** this 10<sup>th</sup> day of July 2014

**J. KAMAU**

**JUDGE**