



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO. 12 OF 2013

DR. JAMES NYAMAI KITIVI.....PLAINTIFF

VERSUS

HON. JUSTICE JOSEPH MBALU MUTAVA.....1ST DEFENDANT

CENTRAL BANK OF KENYA.....2ND DEFENDANT

RULING

1. The application before this Court is a Notice of Motion dated 13/6/2013 brought under Order 2 rule 15(1) (a) of the Civil Procedure Rules 2010. The defendants/applicants seek for the plaint to be struck out and dismissed with costs. The grounds stated by the applicants are as follows; that the plaint discloses no reasonable action known in law; that the 1st defendant did no dealing with the plaintiff in his personal capacity or in the disclosed circumstances and that the suit has been made in bad faith, is untenable, without any basis or foundation in law; that the 2nd defendant is not a bank under Cap 488 and does not engage in banking services such as opening accounts and receiving cheques to the general public in the republic of Kenya; that the defendants were adhering to a lawful order of a Court and cannot be held liable and thus no cause of action can be sustained.
2. The Respondent through his grounds of opposition filed on 5/3/14 opposed the application and states that; the cause of action is admitted; the 1st defendant was an employee of the 2nd defendant; the 2nd defendant admits to have opened CDS Account no. *[particulars withheld]* and added that the Court Order issued in HCC no. 6 of 2010 did not direct any of the defendants to disclose to any party the status of the account.
3. At the hearing of the application Mr. Simiyu for the applicant argued that the plaintiff's claim had no cause of action as the disclosure by the bank was made in HCCC 6 of 2016 where an order made required disclosure and the same fell under bank client confidentiality. He relied on the case of ***TOURNIER -VS- NATIONAL PROVISION AND UNION BANK OF ENGLAND LIMITED [1923] ALL ER***, where it was held that; disclosure by the bank of a client's account can be justified under the compulsion of law.
4. Counsel argued that there was a Court order issued on 23/3/10 and on receiving the said order they had to comply with it. Counsel referred to the case of ***Hadkinson vs Hadkinson, [1952] 2ALL ER 550***. Counsel further argued that there is no connection between the disclosure and the evidence; that the 1st defendant is was an employee of the 2nd defendant and cannot be liable for making communication on behalf of the 2nd defendant; that striking out a case is done in clear circumstances as was held in the case of ***D.T. DOBIE & COMPANY (KENYA) LIMITD –VS- JOSEPH MBARIA MUCHINA & ANOTHER, CIVIL APPEAL NO. 37 OF 1978 NAIROBI***; that the disclosure was done lawfully and that can't form a cause of action , he urged the Court to dismiss the matter.

5. Prof. Wangai for the Respondent submitted that the defendants have already admitted the cause of action and they didn't have to disclose the plaintiff's bank details and have admitted breaching the confidentiality clause; that it is not denied that the 1st defendant was the employee of the 2nd defendant and was the author of the disclosure. He argued that the order was a temporary injunction restraining the respondents from dealing with the monies and the CDS account and did not direct the defendants to disclose the account details to a 3rd party; that the issues raised are matters of fact and has nexus of the disclosure and injuries does not fit within the meaning of this application; that striking out has been held to be draconian and that there is no basis of doing so now.
6. Mr. Simiyu in reply admitted that there indeed was disclosure but argued that the same fell within the exemptions to the bank confidentiality rules; that all the applicants did was to respond to the letter dated 6/5/10 and the issue that the account had a nil balance was written by the advocates who served; that the matter lacks a cause of action and should not go to full trial.
7. The applicants' claims that the plaintiff's suit discloses no reasonable cause of action as they were following a lawful court order and that in the disclosed circumstances they cannot be held liable. In the plaint the plaintiff pleads that the defendants communicated confidential information and that they were in breach of customer confidentiality. The particulars of the said breach are stated at paragraphs 5 (i) to (vi). He claims that he suffered loss. The plaintiff also claims that the defendants were negligent and failed to use reasonable care when handling the said account. There is the issue whether the defendants interpreted the court order given on the 11th of March 2011 correctly. On the cases relied on by the applicant the courts had an opportunity to examine the documents in question, which this court has not yet done in this case. The plaintiff has made allegations against the defendants that need to be interrogated. In the case of **D.T. Dobie and Company (Kenya) Ltd vs. Joseph Mabaria Muchina and another Civil Appeal No. 37 of 1978 (1980) eKRL** the late Justice Madan, held that,

“ 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”.

8. Guided by the words of Justice Madan that a pleading will not be struck out unless it is demurrable and something worse than demurrable and that the jurisdiction should be exercise with extreme caution , and in exercising my discretion I find that the plaintiff should be given a chance the ventilate his case. The defendants' application is dismissed however costs shall be in the cause.

Orders accordingly.

Dated, signed and delivered this 6th Day of **October 2014**

R.E. OUGO

JUDGE

In the Presence of:-

.....For the Defendants /Applicants

..... For the Plaintiff /Respondent

.....Court Clerk