REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Civil Case 570 of 2005

KENYA PIPELINE COMPANY LIMITED ……..……. PLAINTIFF

VERSUS

REDATE INVESTMENTS LIMITED ……..……..…… 1ST DEFENDANT

KENYA TIMES MEDIA TRUST …….……. 2ND DEFENDANT

SOVEREIGN GROUP LIMITED ……. 3RD DEFENDANT

TRANS-NATIONAL BANK LIMITED ……...…….. 4TH DEFENDANT

R U L I N G

1. There are two applications for determination before court. Such are Notices of Motion brought by the third and fourth Defendants to strike out the Amended Plaint amended on 22nd of June 2007. The third Defendant's application is dated 24 July 2012 and the fourth Defendant's application is dated 10 July 2012. Both applications are brought under the provisions of **Order 2 Rule 15 (1) (a)** as well as **Order 51 Rule 1** of the *Civil Proceeded Rules, 2010*. The fourth Defendant also brings its application under the provisions of **sections 1A** and **3A** of the *Civil Procedure Act*.

2. The Grounds upon which the third Defendant's application are based are as follows:

"a) The Amended Plaint does not contain any intelligible allegations or avernments that are sufficient to sustain a claim as against the 3rd Defendant and this is a plain and obvious case where this Honourable Court can exercise jurisdiction to strike out the amended plaint based on the examination of the pleadings only.

b) The Plaintiff's claim as against the 3rd Defendant is so hopeless and plainly obvious that it discloses no reasonable cause of action and is so weak and is, on the face of it, obviously unsustainable.

c) The pleadings filed herein by the Plaintiff as against the 3rd Defendant are a total muddle, incontestably bad and beyond curative remedy.

d) The amended plaint amounts to a pleading that is embarrassing in that it is not clear what case the 3rd Defendant has to meet at the trial.

e) The Plaintiff's claim as against the 3rd Defendant is bound to fail because it is ambiguous and

unintelligible in that it does not state the Plaintiff's claim against the 3rd Defendant, sufficiently and clearly and is thus unarguable.

f) The Plaintiff is estopped from maintaining the present claim against the 3rd Defendant as it is contrary to the Law of Contract Act, Chapter 23 Laws of Kenya.

g) The Plaintiff's claim against the 3rd Defendant is alleged fraud, collusion and misrepresentation and is thus founded in tort and in the circumstances, the Plaintiff is barred by the provisions of the Limitation of Actions Act, Chapter 22 of the Laws of Kenya from bringing this claim against the 3rd Defendant

h) The particulars of fraud, collusion and misrepresentation as alleged on the part of the 3rd Defendant are incomprehensible, groundless and without any substance and the amended plaint, is, in its entirety, a sham.

i) The Plaintiff's amended plaint which has been presented before this Honourable Court is manifestly unintelligible and no reasonable cause of action is disclosed. Instead, the Plaintiff is attempting to obtain a civil remedy against the 3rd Defendant after failing to get a conviction against the 3rd Defendant in a criminal case in which the Plaintiff was the complainant, viz Nairobi Chief Magistrate's Criminal Case No. 973 of 2004 in which the 3rd Defendant was acquitted under Section 210 of the Criminal Procedure Code (Cap. 75) Laws of Kenya.

j) The Plaintiff's action against the 3rd Defendant lacks bona fides and there are deserving circumstances in which the summary remedy sought of striking out the amended plaint should be granted".

3. The fourth Defendant's application has a similar grounds to that of the third Defendant in relation to the provisions of the Law of Contract Act (Cap 23), Laws of Kenya as well as particulars of fraudulent misrepresentation but otherwise touched upon different matters as follows:

"a. The Amended Plaint amended on 22nd June, 2007 and filed in court on 25th June, 2007 is predicated upon a contract for the disposition of an interest in land made in or about the year 2001;

b. From the said amended plaint, the following are the issues upon which the suit is founded:

i) The said contract was in writing and was executed between the Plaintiff and the 1st Defendant;

ii) A Transfer for the suit property was executed by the 1st Defendant in favour of the Plaintiff upon the payment of the consideration named in the plaint;

iii) The consideration for the purchase of the suit property was paid to the 1st Defendant by the Plaintiff;

iv) The Title to the suit property was in the name of the 1st Defendant;

c. The 4th Defendant was not a party to the said sale agreement and had neither a beneficial not any other disclosed interest therein;

d. The Plaintiff is estopped from maintaining the present claim against the 4th Defendant as it is contrary to the Law of Contract Act (Cap. 23), Laws of Kenya;

e. The particulars of fraud or misrepresentation as alleged on the part of the 4th Defendant therefore lack any legal and/or factual substratum;

f. The particulars of fraud and misrepresentation as alleged on the part of the 4th Defendant by the Plaintiff have been caught up by laches as provided for under the Limitation of Actions Act (Cap. 22), Laws of Kenya".

4. The third Defendant's written submissions were filed herein on 4 February 2013. The third Defendant set out its case noting that the Plaintiff as pleaded in its Amended Plaint entered into an agreement for the sale of the suit land with the first Defendant. The third Defendant was neither a director nor a shareholder of the first Defendant and could not have been involved in the decision made by the first Defendant to enter into a contract for the sale of land with the Plaintiff. The third Defendant cited to Court the principle established under **Salomon v. Salomon** that a limited company has a separate and distinct legal identity and consequently it was unfair of the Plaintiff to contend that any acts and/or omissions of the first Defendant should be visited upon the third Defendant. The Plaintiff had alleged that the first Defendant was "acting as a front" for the third Defendant. The third Defendant submitted that claims made against it in the Amended Plaint were not clear as it had never had any dealings with the Plaintiff in respect of the suit land. Thereafter, the third Defendant referred this court to the well-known case of **D. T. Dobie and Company (K) Ltd v Muchina & Anor. Civil Appeal No. 37 of 1978** as well as **Black's Law Dictionary pages 1237-1238** in relation to the doctrine of privity of contract. The third Defendant maintained that as it was not a party to the Contract as between the Plaintiff and the first Defendant, no rights or obligations were conferred upon it. The third Defendant also quoted **Chitty on Contracts, General Principles, 27th Edition page 396** detailing that the obligation to disclose material facts in full in relation to a sale of land contract is between the Vendor and the Purchaser and the burden thereof cannot be imposed on a third party. There was also the question of remoteness of damage and the third Defendant referred the court to the principles outlined in **Hadley v. Baxendale (1854) 9 Exch. 341**.

5. The third Defendant then turned its attentions to the Plaintiff's allegations against it in the Amended Plaint for collusion, conspiracy and fraud. It maintained that it was a rule of pleadings that when fraud is alleged in a statement of claim, then the precise and full allegations of the facts and circumstances should be detailed showing that there was fraud. It quoted from the case of **Davy v Garrett (1878) 7 Ch. D. 473** as quoted in **Bullen, Leake and Jacob's Precedents and Pleadings, 12th Edition page 452**. In the third Defendant's view the Amended Plaint did not specifically allege any collusion, conspiracy and/or fraud on the part of the third Defendant. Quoting again from **Bullen, Leake and Jacob**, the third Defendant quoted:

"General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice".

There had been no clear and distinct allegation of fraud in the Plaintiff's Pleadings as against the third Defendant. It quoted from the old case of **Lawrence v. Lord Norreys (1890) 15 App. Case 210** as follows:

"It was incumbent upon the Plaintiff to give precise and full allegations of facts and circumstances that would lead to an inference that fraud was the cause of the loss complained of."

6. The third Defendant also maintained that as regards the allegation of misrepresentation made against it in the Amended Plaint, as per **Newport Dry Dock & Engineering Co. v Paynter** as well as **Seligmann v Young** referred to again in **Bullen, Leake and Jacob**:

"The Statement of Claim must show the nature and extent of each alleged misrepresentation and it must contain particulars showing by whom and to whom it was made, and whether orally or in writing and if in writing, identifying the relevant document."

The third Defendant submitted that the Plaintiff had failed to do this in the instant case. It further submitted that these allegations against the third Defendant were founded in tort and as such the Plaintiff

was statute barred because an action founded on tort may not be brought after the end of 3 years from the date upon which the cause of action accrues. In this case, that time had already lapsed. The Defendant noted that prior to the amendment of the Plaint herein, the Plaintiff had already instituted criminal proceedings against the third Defendant being *Criminal Case No. 973 of 2004* in which the accused persons were acquitted. Finally, the third Defendant referred the court to the case of **Kenya Airways Ltd v Classical Travel and Tours Ltd HCCC No. 694 of 2003** in which **Emukule J** had made reference to the holding of **Lord Blackburn** in the case of **Metropolitan Bank v Pooley (1885) 10 App. Case 210**, in reference to the definition of the term "abuse of process of the court". The third Defendant submitted that the Plaintiff having failed in its attempt to criminally prosecute the third Defendant had resorted to filing this suit before this Court based on the same subject matter and such amounted to an abuse of the legal process.

7. The fourth Defendant's submissions were filed herein on 4 February 2013. As for the third Defendant, the fourth Defendant outlined the position under the Sale Agreement dated 15 August 2001 between the Plaintiff and the first Defendant. The fourth Defendant raised similar issues in its submissions as had been put before Court by the third Defendant viz:

"a) Admissibility and/or the legality of the contract between the Plaintiff and the first Defendant with regards to the provisions of the Law of Contract;

b) Whether the fourth Defendant was bound by the Contract between the Plaintiff and the first Defendant;

c) Whether the Plaintiff's suit, which is based on a claim for fraud, is brought within the stipulated period as the provisions of the Limitations of Actions Act Cap 22 Laws of Kenya."

With regard to a) and b) above, the fourth Defendant set out the provisions of **section 3 (3)** of the *Law of Contract Act* and quoted from the Ruling of **Ransley J.** in the case of **Metra Investments Ltd v. Gakweli Mohammed Wawakah HCCC No. 54 of 2006 (Milimani)** in which it quoted as follows:

"As the case is presented there is no evidence that an agreement in writing exists signed by both parties and witnessed as is required by Section 3 (3) of the Law of Contract Act.

In the absence of such agreement the section is clear that no suit shall be brought for the disposition of an interest in land. The applicant does not appear therefore to have a prima facie case with a probability of success. The relief formally available under the doctrine of part performance no longer exists."

Thereafter, the fourth Defendant detailed similar quotations from the cases of **Mawji v International University & Anor (1976-1980) 1 KLR 229** as well as **Morgan v Stubenitsky (1976-1980) 1 KLR**. The fourth Defendant emphasised that it was not a party to the Agreement and consequently by bringing an action against it, this constituted a violation of the provisions of the Law of Contract Act.

8. The fourth Defendant then moved on to the doctrine of privity of contract being a common law doctrine which details that only a person who is a party to a contract can sue or be sued upon it. It cited the case of **Kenya Airports Authority v Kiia (2012) eKLR** as well as **Kobil Petroleum Ltd. v Shreeji Transporters (1990) Ltd & 2 Ors (2012) eKLR** which in itself referred to the decision in **Agricultural Finance Corporation v. Lengetia Ltd (1985) KLR 765** which, in turn, quoted from **Halsbury's Laws of England, 3rd Addition, Volume 8 at paragraph 10** as follows:

"As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that the person, who is a stranger to the consideration of a contract, stands in such a near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration, does not entitle him to sue upon the contract."

Finally, the fourth Defendant turned its attention to the provisions of the Limitation of Actions Act. It noted that the claim as against the fourth Defendant by the Plaintiff was by way of alleged fraud, collusion and misrepresentation and was thus founded in tort. The fourth Defendant quoted section 4 of the said Act as well as section 26 which provided for an extension of the limitation period in cases of fraud or mistake. The fourth Defendant noted that the Plaint herein was filed on 20 September 2005, four years after the cause of action arose. In the Amended Plaint, the Plaintiff had never disclosed the date upon which it discovered the alleged fraud or misrepresentation on the part of the fourth Defendant and thus would not be entitled to protection under section 26 of the Act. The fourth Defendants and then cited to court the cases of **Naomi Were & Anor. v National Social Security Fund Board of Trustees & 3 Ors (2012) eKLR** and **David Kamau v National Industrial Credit Bank (2010) eKLR** quoting extensively from the latter case.

9. The Plaintiff commenting upon the third Defendant's Application delved into the merits and the competence of the same. It maintained that the third Defendant had got into a muddle as to whether the Application was based on the inherent jurisdiction of the Court or whether it was brought pursuant to **Order 2 Rule 15 (1) (a)** of the *Civil Procedure Rules*. It then spelt out the provisions of **Rule 15** emphasising the four grounds upon which an application before this Court to strike out pleadings could be based. The Plaintiff quoted from the case of **General (Rtd) Mulinge v Lakestar Insurance HCCC No. 1275 of 2001** as per **Ringera J** in which the learned Judge had commented that under **Rule 15 (1) (a)** there were four distinct grounds on which pleadings may be struck out and in that particular case, the applicant had rolled the four distinct grounds into one expansive ground. The learned Judge had found that the muddle was unacceptable and held that the application was incompetent for that reason alone. The Plaintiff also quoted from the cases of **Mbaka v Blue Shield Insurance Co. Ltd HCCC No. 46 of 2003, BTB Insurance Agencies Ltd v Nitin Shah & Ors HCCC No. 1863 of 2000** as well as **Melika v Mbuvi (2001) 1 EA 124**. The Plaintiff maintained that the third Defendant had mixed up the prayer for striking out with the ground relied on in violation of Order 2 rule 15 (2). The Plaintiff also submitted on the applicable law in relation to striking out, quoting extensively from the cases of **The Cooperative Merchant Bank Ltd v. George Wekesa Civil Appeal No. 54 of 1999, Yaya Towers Ltd v Trade Bank Ltd (in liquidation) Civil Appeal No. 35 of 2000,** the case cited by the third Defendant above being **D. T. Dobie & Co (K) Ltd v. Muchina (1982) KLR 1** and **Jao** v **Homepark Caterers** in which **Mugo J** cited the case of **Peru v Peruvian Cuono Co. Ltd 36 Ch. D 389**. The Plaintiff thereafter summed up the several principles outlined in the above cases as follows:

ØStriking out a pleading is discretionary

ØThe court has inherent jurisdiction to dismiss that which is an abuse of the process of the court

ØStriking out a pleading is a draconian act, which may only be resorted to, in plain and obvious cases

ØWhether or not a case is plain is a matter of fact

ØA plaintiff is entitled to purse a claim in our courts however implausible and however improbable his chances of success.

ØA court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.

ØNo suit should 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

ØIt is not the practice in civil administration of the courts to have preliminary hearings and trial of actions by affidavits

ØThe summary jurisdiction is not intended to be exercised by a minute and protracted examination

of the documents and the facts of the case in order to see whether the plaintiff really has a cause of action

10. The Plaintiff continued with its submissions by outlining the background of its case particularly as against the third and fourth Defendant. In its opinion the matter was best left for the hearing of the suit and it would not be pertinent for it to go into the facts now. The Plaintiff examined in detail the grounds relied upon by the third Defendant in its application particularly as to whether the Amended Plaint contained intelligible allegations or averments sufficient to sustain a claim as against the third Defendant. To that end, the Plaintiff maintained that the third Defendant's application if it wished to rely upon the fact that the pleadings herein were unintelligible and ambiguous, such would amount to an embarrassing pleading which could only be struck out under **Order 2 rule 15 (1) (c)** not **rule 15 (1) (a)**. In any event, it maintained that the third Defendant had not demonstrated, in any which way, that the Amended Plaint fell short of clarity and comprehensibility nor what it considered to be unintelligible allegations. The Plaintiff reminded the Court that the third Defendant if it felt that there was any lack of clarity in the Pleadings, it should have filed a Request for Particulars. One of the principles in relation to striking out pleadings was that the plaintiff was entitled to pursue a claim through the courts however implausible and improbable his chances of success. The Plaintiff then moved onto the incidence of fraud as set out in the Amended Plaint. It reminded the Court of the decision in **National Social Security Found Board of Trustees v Ankhan Holdings & 2 Ors** in which the plaintiff had sued the first defendant company, together with its two directors, for alleged misrepresentation and fraud in selling to the plaintiff a piece of land in Ngong Forest in circumstances quite similar to this case. The defendants had applied therein for striking out the Plaint arguing that the second and third defendants, as directors, could not be held personally liable for the actions of the first defendant company bearing in mind the principle in **Salomon v Salomon**. The Plaintiff noted that **Ochieng J.** quoting from the House of Lord's case of **Standard Chartered Bank v Pakistan National Shipping Corporation (2002) UKHL 43** as per **Lord Hoffmann** who detailed as follows:

"And just as an agent can contract on behalf of another without incurring personal liability, so an agent can assume responsibility on behalf of another for the purposes of the Hedley Byrne rule without assuming personal responsibility. Their Lordships decided that on the facts of the case, the agent had not assumed any personal responsibility.

The reasoning cannot in my opinion apply to liability for fraud. No one can escape liability for his fraud by saying, "I wish to make it clear that I am committing this fraud on behalf of someone else, and I am not to be personally liable". Sir Anthony Evans framed the question ([2000] 1 Lloyd's Rep. 218, 230) as being "whether the director may be held liable for the company's tort" but Mr. Mehta was not being sued for the company's tort. He was being sued for his own tort and all the elements of that tort were proved against him. Having put the question in the same way he did, Sir Anthony answered it by saying that the fact that Mr. Mehta was a director did not in itself make him liable. That of court is true. He is not liable because he was a director but because he committed a fraud". (Emphasis ours)

Justice Ochieng was satisfied that there was a cause of action against the 2nd and 3rd defendants in that case "not because they were directors but because they might have committed acts of false misrepresentation or fraud on the plaintiff who may prove its claims against the said two defendants, they may well be found liable personally".

11. Continuing with its submissions, the Plaintiff detailed that the manner in which the sale of the Ngong Forest plots were conducted resulting in the loss of the monies paid by the Plaintiff brought the third Defendant into the transaction in that it was the third Defendant who had issued instructions to incorporate the first Defendant and it was also the third Defendant which was to pay for the costs of processing the invalid titles issued to the first Defendant and later sold to the Plaintiff. The Plaintiff pointed the finger at the involvement of the third Defendant by lengthy submissions in relation to the fact that it maintained it was to prove at the hearing in due course. However, the Plaintiff admitted that the cause of action against the third Defendant did not arise out of any contractual relationship between it and the Plaintiff but because the third Defendant participated in acts of fraud, or collusion, misrepresentation

and deceit. It had also unjustly enriched itself at the expense of the Plaintiff by receiving and sharing the proceeds of sale of the Ngong Forest plots. In that regard the Plaintiff referred to the cases of **Chase International v Laxman Keshra & Ors (1978) KLR 143** in which **Madan JA**, as he then was, quoted **Lord Wright** in the case of **Fibrosa Spolka Akcyjana v. Fairbairn Lawson Combe Barbour Ltd (1943) AC 32** as well as citing **Goff and Jones** in their volume on the **Law of Restitution**. It was the Plaintiff's case, which it maintained that it would demonstrate at the trial, that it did not get value for its money as it was unable to take possession of the Ngong Forest land. It maintained that the third Defendant unjustly enriched itself at the Plaintiff's expense when it obtained the sum of Kenya shillings 58,753,247/-being part of the consideration for the purchase of the said plots of land.

12. I then found that, with regard to the criticism of its Pleadings, the Plaintiff tended to repeat itself as to what can be considered an application under **Order 2 rule 15 (1) (a)** as compared to the provision under **Order 2 rule 15 (1) (c)**. The Plaintiff then addressed the submission of the third Defendant (as well as the fourth Defendant) that its claim was barred under the provisions of the Limitation of Act. Having set out in **section 26** of the Act, the Plaintiff referred the Court to the case of **Municipal Councill of Garissa v Ahmed Siad Mohammed& Anor HCCC No. 7 of 2011 (Garissa)** quoting from the presiding Judge **Mutuku J** as follows:

"Section 26 (of the Limitation of Actions Act) **makes it very clear in dealing with claims where fraud or mistake is alleged, then time starts to run from the moment such fraud or mistake is discovered. Fraud is alleged in this case and therefore under the provisions of section 26, time starts to run when the fraud was discovered…."**

In this connection, I also take cognizance of what the learned Judge said in that case as set out in the Plaintiff's submissions in response to those of the fourth Defendant. The learned Judge maintained:

"The prudent thing for a court to do where fraud is alleged in a claim is to allow the parties to proceed to trial so that the parties can present facts for and against the alleged fraud for the court to make a determination on the matter. It would be against the dictates of fair play and justice to decide such a case at the preliminary stage."

13. The Plaintiff submitted that its complaint against the third Defendant in this connection was its participation in obtaining the purchase price for the plots through the decoy of the first Defendant and collusion with the other Defendants in committing acts of fraud against the Plaintiff coupled with misrepresentation/ deceit. As regards the date of discovery of the fraud, the Plaintiff dismissed the same in rather a cavalier fashion by saying that although the date of discovery was not pleaded in the Amended Plaint, this was not fatal for a Plaintiff is not required to anticipate defences that may be raised by a defendant. To this end, the Plaintiff referred to 2 cases being **Stephen Ochola v. Edward Hongo Civil Appeal No. 209 of 2001** as well as **V. K. Construction Co. Ltd v Mpata Investments Ltd HCCC No. 257 of 2003**. I was of the opinion that neither of these cases lends anything to the proceedings before me as they referred to their own particular circumstances in each case. Similarly, I was not impressed by the Plaintiff's submissions in relation to the possibility of an amendment. Of course, this was referred to in the **D. T.Dobie** case but one has to bear in mind that in these circumstances, the Plaint has already been amended. I have said I found that the Plaintiff's submissions rambled on and were full of repetition. It addressed such matters as the need to hear disputes of fraud and land on merits, justiciable issues, overriding objective and the Constitution of Kenya – imperatives in the administration of justice. I found none of these submissions relevant to the application in hand.

14. In response to the fourth Defendant's submissions, the Plaintiff raised much of what it had already detailed with regard to the third Defendant's submissions and there is no need to repeat the same here. The same submissions were put forward with regard to the competence of the application, the merits of the same, the background to the Plaintiff's case, the fact that the fourth Defendant (like the third Defendant) was not a party to the sale agreement, the incidence of fraud, the influence of the Criminal Case on the civil matter before Court, unjust enrichment, the possibility of amendment, the need to hear disputes on fraud and land on merits, justiciable issues, overriding objective, **section 26** of the *Limitation of Actions Act*, the *Law of Contract Act* and, more particularly, the imperatives in the administration of

Justice under the *Kenya Constitution, 2010*. However, the Court's interest was drawn to the Plaintiff's submission that the statute of limitation must be pleaded in the Defence. In this regard, the Plaintiff cited to Court the case of **Ochola v. Hongo Civil Appeal No.209 of 2001**. The Plaintiff quoted extensively from the finding in that suit but the last paragraph thereof is pertinent:

"In the circumstances of the present case, we think Tanui J was not right in, first, allowing the issue of limitation to be raised when it had not been pleaded and secondly, in upholding the preliminary objection of the second respondent based on that issue and thus terminating the appellant's claim against the second respondent."

Such was followed by further references by the Plaintiff to the necessity for pleading Limitation by reference to the cases of **Emirates v. Skylink Airservices Ltd & Anor. HCCC No. 1523 of 2001 (per Njagi J.)**, as well asthe **V. K. Construction** case (supra).

15. As required of this Court under **Order 2 Rule 15 (1) (a)**, I have had the opportunity of taking a long look at the Amended Plaint dated 22nd of June 2007, filed herein on 25th of June 2007. Apart from the descriptive paragraphs, the reference to the third and fourth Defendants therein commences at paragraph 14 with the averment by the Plaintiff that the fourth Defendant, knowingly and with intent to defraud, instructed a law firm to sell forest land to the Plaintiff. Thereafter, there is an averment at paragraph 17 that the third Defendant illegally and fraudulently received the purchase price paid by the Plaintiff knowing that the property sold was forest land which averment is also made of the fourth Defendant at paragraph 19. Also included at paragraph 17 are particulars of the Defendants' fraudulent misrepresentation. Paragraphs 20, 21 and 22 also give particulars of the Defendants' fraud including the fact that the Defendants had used their corporate face to shield their identities in the fraud committed against the Plaintiff. Paragraph 23 contains particulars of fraud, collusion and misrepresentation by the second, third and fourth Defendants such going into 10 sub-paragraphs. Thereafter, the Amended Plaint goes into details of the damages suffered by the Plaintiff as a consequence of the Defendants' joint and several actions. There is a prayer for damages for breach of contract against the Defendants jointly and severally but perhaps more importantly, is the prayer for general damages which would not only apply to breach of contract but also damages for tort.

16. I have also perused the Amended Defences of the third and fourth Defendant. As to be expected that of the third Defendant contains references to its inability to plead and that the Amended Plaint does not disclose a reasonable cause of action as against it, is misconceived and bad in law. The third Defendant then refers to paragraphs 17, 20 and 23 of the Amended Plaint in which it details that the averments and allegations of the Plaintiff against it, are unintelligible, ambiguous, embarrassing and prejudicial. The third Defendant reserved unto it the right to apply to have the Plaintiff's claim against it struck out for being scandalous, frivolous or vexatious or otherwise an abuse of the process of the court. At paragraph 5 of the third Defendant's Amended Defence, it clearly maintains that the Plaintiff's claim against it is founded on tort and pleads limitation (3 years) under the provisions of the Limitation of Actions Act. Finally at paragraph 20 for the third Defendant pleads:

"The Amended Defence of the 3rd Defendant is being filed Under Protest. The 3rd Defendant states that the Amended Plaint served is factually and legally incapable of being defended, the Plaintiff having purported to Amend the Plaint in total disregard of law and the mode of amending Pleadings thereby placing the 3rd Defendant in a position where the 3rd Defendant does not know if it is the original Plaint or the Amended Plaint it is answering. The 3rd Defendant contends that the purported Amended Plaint puts it under a great disadvantage."

17. In its turn, the fourth Defendant, in its Amended Defence dated 10 July 2007, denies any involvement in the Agreement for the sale of the suit land and further denies the particulars set out of fraud, collusion and misrepresentation as against it in paragraphs 9 (i) to (vii) inclusive and 17 (a) to (g) of the Amended Plaint. It also makes a point of denying seriatim the allegations as set out in paragraphs 15 to 31 of the Amended Plaint. Then in paragraph 5D, the fourth Defendant avers that the Amended Plaint is a complete muddle, a total contradiction and amounts to an abuse of the process of the court. The fourth Defendant details that it intends to apply that the same should be struck out with costs.

That, presumably, is the whole object of its Application before court dated 10 July 2012. It is however, interesting to note, that in its Amended Defence, the fourth Defendant does not pleads limitation under the provisions of the Limitation of Actions Act. Consequently, its submission that the Plaintiff's claim as against it is hopelessly time-barred under the provisions of that Act cannot, in my opinion, hold water in view of the findings in the **Ochola v Hongo, the Emirates and V. K. Construction** cases (supra).

18. Both the third and fourth Defendant's Applications before this Court are grounded under **Order 2 rule 15 (1) (a)** of the *Civil Procedure Rules, 2010*. Such was formally under the old **Rules – Order VI rule 13 (1) (a)**. As per **Ringera J**. in the case of **Mosi v. National Bank of Kenya Ltd (2001) KLR 333**:

"Order VI rule 13 of the Civil Procedure Rules specifies four distinct grounds on which an application to strike out a pleading may be grounded, namely, it discloses no reasonable cause of action or defence, that it is scandalous, frivolous or vexatious; that it may prejudice, embarrass or delay the fair trial of the action, or that it is otherwise an abuse of the process of the Court….. When the court is considering to strike out a pleading on the ground of nondisclosure of a cause of action or defence, the Court is enjoined to look at the pleadings only as no evidence is admissible to support an application under Order VI rule 13 (1) (a)."

This then is the guiding principle of the Court to be followed as regards the separate Applications of the third and fourth Defendants herein.

19. From the large number of cases that have been cited to this Court by counsel for the Plaintiff as well as the third and fourth Defendants, 2 stick out. Firstly, we have the well-established and long-standing decision in relation to the striking out of Pleadings as per the **Court of Appeal** in the **D. T. Dobie v Muchina** case (supra). The principles set out in **D.T Dobie & Company Ltd vs- Muchina & Another (1982) KLR 1**) are clear that if the pleading does not disclose *any reasonable cause of action* or defence, then it ought to be dismissed. In that suit, it was held:-

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no 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 the case before it." (Underlining mine).

20. The second case which I considered to be important so far as the Applications before Court are concernedis the one of **Standard Chartered Bank Ltd v Pakistan National Shipping Corporation** (supra) as per the quotation from **Lord Hoffmann** which I have set out and consider applicable. Although I am of the view that the Plaintiff has a steep hill to climb in terms of its proving fraud, misrepresentation and collusion, the Amended Defences of the third and fourth Defendants in this respect contained mere denials of such. Those Defendants have attempted to persuade this Court that limitation under the *Limitation of Actions Act* applies in this instance but such are matters of fact to be proved at the trial of this suit in due course. At this stage, I am only beholden to look at the Pleadings rather than consider any statement of fact detailed in submissions. I am satisfied that there are substantial triable issues in relation to this suit and the 30 odd other suits in relation to it.

21. Accordingly, I strike out both the third Defendant's Notice of Motion dated 24 July 2012 as well as the fourth Defendant's Notice of Motion dated 10 July 2012 with costs to the Plaintiff. Further, I should note that I am disturbed at the large number of interlocutory applications that continue to be put before this Court thus delaying the trial of this 8-year-old matter. Consequently, I direct the parties to comply with **Order 11** of the *Civil Procedure Rules, 2010* and direct that the parties do take a date at the Registry for a pre-trial conference within 30 days of the date hereof.

DATED and delivered at Nairobi this 4th day of June, 2013.

J. B. HAVELOCK

JUDGE