REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 107 of 2006

KENYA TEA DEV. AUTHORITY…….……..…PLAINTIFF

VERSUS

JOSEPH OGUTU MBOYA T/A OGUTU MBOYA ADUO…….……...1ST DEFENDANT

DAVID OBARE OMWOYO T/A OMWOYO AUCTIONEERS……..2ND DEFENDANT

RULING

In his chamber summons dated 12th January 2005 and brought under **Order 6 Rule 13(1), (b)** and **(c)** of the **Civil Procedure Rules** and **Sections 3A** and **91** of the **Civil Procedure Act** as well **Section 4** of the **Limitations of Actions Act** the first defendant seeks the striking out of the plaint and, consequent upon that, the dismissal of this suit on the main grounds that the claim herein is statute barred under **Section 4** of the **Limitation of Actions Act**; that the first defendant owed no duty of care to the plaintiff; that the plaint as drawn is *ex-facie* incompetent and defective; that the plaint is based on a defective verifying affidavit and that the summons to enter appearance issued in this case is invalid.

The facts of the case briefly are that the plaintiff was the defendant in Kisii CMCC No. 238 of 1998 (the lower court suit) in which one Thomas M. Ongondo was the plaintiff. In this case the plaintiff claims in his plaint that despite the deposit in court on 1st September 1999 of the decretal sum in the lower court case and the consent given to the first defendant on 17th June 2000 to have that amount released to him on behalf of the plaintiff in that case, the first defendant unlawfully instructed the second defendant to attach and on or about 26th June 2000 the second defendant attached and sold the plaintiff's motor vehicle registration No. KAC 051G and other moveable properties all valued at Kshs.910,000/-. The plaintiff therefore claims against both the defendants the value of those goods and loss of user of the goods at a rate of Kshs.4,000/- per day as well as costs and interest.

Presenting the application and relying on the defendant's affidavit in support of it, counsel for the first defendant, Mrs Asuna, submitted that this suit is incompetent and bad in law,firstly, for the reason that as the claim is based on tort and the cause of action arose on the 26th June 2000, this suit, which was filed on 6th of January 2004, is statute barred under **Section 4** of the **Limitation of Actions Act.** In support of that contention she also relied on the decision of the Court of Appeal in **Javed Iqdal Abdul Rahman & Another Vs Bernard Alfred Wekesa Sambu & Another, Civil Appeal No. 11 of 2001**.

On the second ground she submitted that as it is based on the alleged impropriety of the execution proceedings in the lower court the claim in this suit should have been determined in the same lower court file by the same court as required by **Section 34** of the **Civil Procedure Act**. She cited **Section 91(2)** of the **Civil Procedure Act** and further contended that even before that court what the plaintiff should have sought was a variation of the decree and not restitution.

As regards the summons to enter appearance, which is dated 7th January, 2003, she submitted that the same is invalid because by the time it was served upon the defendant over a year later it had already expired. She cited the provisions of **Order 5 Rule 1** of the **Civil Procedure Rules** and the Court of Appeal decision in **Rajani Vs Charles Tahithi, Civil Appeal No. 85 of 1996** in support of that contention and urged me to hold that this suit, being based on an invalid summons to enter appearance, is incompetent. She added that it is also incompetent as it is not supported by a valid verifying affidavit as required. The purported verifying affidavit of Mrs Wahu Maina is totally incompetent as she did not have written authority of the plaintiff company given under seal as required by **Order 3 Rule 2 (C)** authorizing her to swear it. Lastly Mrs Asuna submitted that the first defendant did not owe any duty of care to the plaintiff and the issue of the first defendant's negligence in handling the lower court case does therefore not arise.

For the plaintiff Mr. Nyaga, relying on the replying affidavit, submitted that no summons to enter appearance can be issued before a suit is filed. He said the summons in this case was issued a day after the suit was filed and the date appearing on it is a typographical error. As regards the verifying affidavit he submitted that the plaintiff being a limited liability company it could only swear a verifying affidavit through one of its officers. The verifying affidavit in this case having been sworn by an officer of the plaintiff he said the same is valid. However, if the same is found to be defective he urged me to dismiss this application and give the Plaintiff time to file a proper one.

On the issue of the limitation period, counsel for the plaintiff submitted that this suit is not solely based on negligence. It is also based on the irregularities and the illegal sale of the plaintiff's goods in that the decretal sum in the lower court case having been deposited in court with authority to the decree holder to take it, the first defendant in this case had no reason whatsoever to cause the attachment and sale of the plaintiff's goods. In the circumstances, he submitted that the limitation period is not three but six years. He said if I find that the issues in this case should have been resolved in the lower court case, then **Section 18** of the **Civil Procedure Act** authorizes me to remit this case to that court to determine.

Citing the case of **D.T Dobie & Company (Kenya) Ltd Vs Muchina, [1982] KLR 1** Mr. Nyaga submitted that striking out a suit is a draconian step which the court should not take as this suit raises serious triable issues. He urged me to dismiss this application with costs.

I have carefully considered these submissions and read the pleadings in this case. To start with I agree with Mr. Nyaga that the summons to enter appearance could not have been issued before the suit was filed. Looking at the hand written alterations on the plaint it is clear to me that the same together with the summons to enter appearance were drawn and meant to be filed in the year 2003. They were filed on 6th January, 2004 but whoever took them to court forgot to change the year on the summons. I am satisfied that it was, as contended for the plaintiff, issued on 7th January 2004 and that the date of 7th January 2003 that it bears is therefore a typographical error.

As regards the verifying affidavit, I disagree with counsel for the first defendant that the same is defective for the deponent's failure to annex thereto written authority from the company. Affidavits are pieces of evidence and I know of no legal requirement that anyone testifying on behalf of a company should first have its written authority to do so and/or that such authority should be under seal. I, however, agree with her that the verifying affidavit in this case is defective for the deponent's failure to state that she had the authority of the plaintiff company to swear it. But, as was held in **Microsoft Corporation Vs Mitsumi Computer Garage Ltd & Another, HCCC No. 810 of 2001 (Milimani Commercial Courts Nairobi),** that does not of itself warrant the striking out of the plaint as that omission does not affect the substance of the suit. So if I dismiss this application the plaintiff will have leave to file a proper verifying affidavit.

The contention that this matter should have been dealt with by the subordinate court in the lower court suit has no basis. This is because the defendants in this case were not parties to the lower court suit. Though the first defendant was the plaintiff's advocate in that suit and can be said to have been his representative, the second defendant was not a representative of either party. So the provisions of Section 34 of the Civil Procedure Act could not have been invoked in the subordinate court to resolve the claims made in this suit. Besides that the claim in this suit appears to me to be on an alleged distinct cause of action.

That brings me to the main issues in this suit which are whether or not the plaint in this suit is frivolous, vexatious or is meant to delay the fair trial of the action, and/or that the claim in this suit is statute barred and is therefore an abuse of the process of court.

The powers given to the court to strike out pleadings under Order 6 Rule 13 of the Civil Procedure Rules, sometimes referred to as summary procedure, are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court should exercise those powers with the greatest care and circumspection and only in the clearest of cases as regards both the facts and the law. The summary procedure under this provision should only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsuitable or where the case is unarguably clear and beyond doubt. This was made clear in the old English case of Dyson Vs Attorney General [1911] 1 KB 410 at page 419 in which Fletcher – Moulton L J said:

"To my mind it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat … without any court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."

Our law reports are also replete with authorities on this proposition. Suffice it to cite **DT Dobie & Company (Kenya) Ltd Vs Muchina [1982] KLR 1** in which this caution was also explicitly stated and **Bank of Credit & Commerce International (Overseas Limited) Vs Giorgi Fabrise & Another, Mombasa HCCC No. 711 of 1995** in which Waki J (as he then was) reiterated that caution in the following words:-

"**In a matter that alleges that the suit is scandalous, frivolous and vexatious and otherwise an abuse of the court process,…[the court] must be satisfied that the suit has no substance or is fanciful or the plaintiff is trifling with the court, or [that] the suit is not capable of reasoned argument; it has no foundation, no chance of succeeding and is only brought merely for the purposes of annoyance or to gain fanciful advantage and will lead to no possible good. A suit would be an abuse of the process of court where it is frivolous and vexatious."**

With that caution in mind it is, however, trite law that where a pleading has absolutely no substance and a party is only trifling with the court, it is the clear duty of the court to strike out such pleading and dismiss the action or enter judgment as the case may be. In the English case of **Anglo Italian Bank Vs Wells, 38 L.T. at page 201,** Jessel M.R. stated that:-

"**When the judge is satisfied that not only there is no defence but no fairly arguable point to be argued on behalf of the defendant it is his duty to give judgment for the plaintiff**."

This authority applies equally to a frivolous plaint.

The object of the summary procedure as was stated by Lord Buckley in Carl- Zeiss- Stiftung Vs Rayner, [1969] 2 ALL ER 897 at p. 908 is:-

"…to ensure that the defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts. In principle if there is any room for escape from the law, well and good; it can be shown. But in the absence of that, it is difficulty to see why a defendant should be called on to pay a large sum of money and a plaintiff permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which must fail. … The object is to prevent parties

[from] being harassed and put to expense by frivolous vexatious or hopeless litigation."

As I have already pointed out this application is brought under the provisions of **Order 6 Rule 13(1), (b)** and **(c)** of the **Civil Procedure Rules**. The grounds stated in those paragraphs are that this suit is scandalous, frivolous or vexatious; or that it may prejudice, embarrass or delay the fair trial of the action. A pleading is scandalous when it alleges indecent, offensive, or improper acts, or motives against an adversary which are unnecessary in proof of the action pleaded. It is frivolous and vexatious when it lacks seriousness and/or tends to annoy. See **Dr Murry Watson Vs Rent-A-Plane Ltd & 2 Others, Nairobi HCCC No. 2180 of 1994** and **Mpaka Road Development Ltd Vs Kana, [2000] LLR 1011 (HCK)**.

I have carefully read the plaint in this suit and I can find nothing scandalous about it. This application would therefore fail if it was based only on that ground. However, on the other grounds, I think the first defendant is on firm ground.

If I understand the plaintiff's complaint, it is that notwithstanding the plaintiff's deposit in court of the decretal sum in the lower court case with authority to the decree holder in that case to take it, the first defendant negligently, unlawfully and irregularly instructed the second defendant to sell the plaintiff's goods which had been attached.

The first defendant was not the plaintiff's advocate in that suit. Whatever he did in the execution of the decree in that case was therefore in discharge of the professional duty he owed to his client and not to the plaintiff in this case. So the issue of the plaintiff being aggrieved by the negligent performance of that duty does not arise. With respect I do not understand what the plaintiff means by the averment in paragraph 6 of the replying affidavit that "The claim emanates from the Defendant's execution of an intrinsic duty owed to the plaintiff in the course of an execution." Whatever the plaintiff calls it I find that the first defendant did not owe the plaintiff any duty of care and the allegations of negligence on his part have therefore no legal basis.

In my view the first defendant can only be held liable if, by any wrongful act, he caused injury or loss to the plaintiff. But did he do that?

The plaintiff claims that it consented to the release to the decree holder of the amount that had been deposited in court. The letter containing that consent was sent after attachment and is not even signed by the first defendant as was envisaged. At any rate there is no proof that it was delivered or received by the first defendant before the sale of the plaintiff's goods or at all.

Mr. Nyaga for the plaintiff also claimed that there has been double payment as, besides the sale of the plaintiff's goods, the decretal sum was also released to the first defendant. Asked for proof of that he only rumbled and could not avail any. In the circumstances I accept first defendant's denial, through his advocate, that the amount was and has never been released to him. Consequently I find that the plaintiff's claims that the execution was unlawful and/or irregular have no basis. The first defendant's acts in execution of the decree in that case were therefore lawful and proper. That being my view of the matter, it follows that the plaint in this case lacks seriousness and the plaintiff is trifling with the court. It is, in the circumstances, frivolous and vexatious. A frivolous and vexatious pleading does not disclose any or any reasonable cause of action and is also an abuse of the court process.

As I have already pointed out the plaintiff claims that besides negligence his claim in this suit is also founded on alleged irregularities and illegalities. Mr. Nyaga was non-committal on whether those irregularities and or illegalities fall under the law of contract or tort. I agree with Mrs. Asuna for the first defendant that whichever way one looks at it the claim in this suit is clearly founded on the law of tort. That being the case, and the cause of action having arisen on the 16th June 2000, when the plaintiff's properties were sold, by the 6th January 2004 when this suit was filed, the plaintiff's claim was clearly statute barred under **Section 3** of the **Limitation of Action Act**. On that ground also the claim in this suit has no legal basis and is clearly an abuse of the process of the court.

These being my findings, what orders should I make?

I am alive to the fact that the second defendant has not joined in this application and in my view the plaintiff had a valid claim against him if it could prove that he indeed attached a vehicle he had not proclaimed. But that claim is also founded on tort and is statute barred. There is therefore nothing left of this suit even as against the second defendant to go to trial. In the circumstances I allow this application and hereby strike out the entire suit with costs of this application to the first defendant and those of the suit to both defendants.

DATED and delivered this 2nd day of October, 2008.

D.K. MARAGA

JUDGE.