



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 198 OF 2017**

**(formerly Machakos ELC No. 12 of 2015 consolidated with Machakos HCCC No. 60 of 2014)**

**KALKA FLOWERS LIMITED .....PLAINTIFF**

**VERSUS**

**EQUITY BANK OF KENYA.....DEFENDANT**

**RULING**

The application before this court is a notice of motion application dated the 18th April 2016 and filed on 19th April, 2016. It is filed by the 1st Defendant and brought under Order 2 Rule 15(1) (a) (b) and (d) of the Civil Procedure Rules. The 1st Defendant is seeking for the following prayers:

- a) Civil suit number 60 of 2014, *Kalka Flowers Limited v Equity Bank Limited* be struck out.
- b) The plaintiff do pay to the defendant the costs of this suit and this application.

The application is based on the following grounds:

- 1) Civil suit number 60 of 2014, *Kalka Flowers Limited v Equity Bank Limited* is an abuse of the court process as the Plaintiff also filed another action being Machakos ELC Number 12 of 2015 over the same subject matter.
- 2) The Plaintiff's suit does not disclose any reasonable cause of action against the 1st Defendant
- 3) The Plaintiff's claim is frivolous and vexatious
- 4) It is just and fair that the suit be struck out.

The 1st Defendant's application is also supported by the affidavit of one JOHN NJENGA where he deposes that he is an employee of the 1st Defendant. He outlines that civil suit no. 60 of 2014 was filed on 16th December, 2014 as HCCC No. 591 of 2014 but it was later transferred to Machakos and allocated no. 60 of 2014. The Plaintiff had sought for an injunction in the said suit but his application was dismissed by Justice Mutende. He also avers that the Plaintiff also filed a suit in the Environment and Land Court in Nairobi in which he sued the 1st Defendant and an auctioneer Purple Royal Auctioneers Limited, which suit is HCCC No. 1548 of 2014. This case was later allocated a new case number HCCC No. 601 of 2014. HCCC No. 601 of 2014 was later transferred to Machakos and given the number Machakos ELC No. 12 of 2015. The subject matter in both suits is the sale of parcels of land namely Kajiado/Kisaju/1679 and Kajiado/Kisaju/1743 respectively. The Defendant had filed an application on 30th December, 2014 to have Machakos ELC No. 12 of 2015 struck out but Justice Nyamweya declined

to do so and directed that the two suits be consolidated for the purpose of being heard and determined together. The Defendant is hence seeking the orders of the court to strike out No. 60 of 2014 despite the consolidation.

The Defendant proceeded unopposed but it is noted that that in the two different suits, the Plaintiff was represented by two different law firms of Messrs Wanjama & Company Advocates and Kinyua Muyaa & Company Advocates. Ms Kinyua Muyaa & Company Advocates were served and failed to attend court on the 23rd February, 2017 as they received the hearing notice under protest citing lack of instructions from the Plaintiff and expressed their intention to file a formal application to cease acting for the Plaintiff. However, Messrs Wanjama & Company Advocates received the hearing notice but failed to attend court.

Upon perusal of the court record, it is noted that the Plaintiff never filed a replying affidavit nor Grounds of Opposition to oppose the 1st Defendant's application dated the 18th April, 2016 .

### **Issues and determination**

The Defendant filed written submissions to its application. The Defendant's advocate Mr. Ochieng highlighted the submissions and argued that since the Plaintiff did not file any replying affidavit nor grounds of opposition, he urged the court to allow the application as it is unopposed. To support his application he relied on the case of **Mohammed & Anor v Haidara Civil Appeal No. 42 of 1972 (1972) EA where the appeal was allowed and it was held that in view of the lack of evidence filed by the respondent the extension of the caveat should not have been granted.**

**Spry V-P JJA further held that the respondent made no attempt to reply to these allegations and they therefore remain unrebutted...**

Mr. Ochieng further argued that filing of two suits constitute an abuse of the process of court. He relied on a ruling dated 4th December 2015 in this current suit where Justice Nyamweya ruled that **' it is therefore evident that there has been an abuse of the Court processes by the plaintiff in filing two suits on the same cause of action, as the main issue in both suits is the sale of the Plaintiff's property under statutory power of sale arising from the charge to the 1st Defendant to secure a loan facility....'** In the same authority Judge Nyamweya however further proceeded to hold that the Plaintiff had raised triable certain issues and made the following orders:

***'That the suit herein be and hereby consolidated with Machakos HCCC No. 60 of 2015 - Kalka Flowers Ltd vs. Equity Bank Limited for purposes of being heard and determined together on the basis of the pleadings already filed in the two suits and subject to any subsequent amendments'***

On his arguments as to whether the suit discloses a reasonable cause of action, he relied on the case of **Time Magazine International Ltd and Anor vs Michael F Rotich and Anor where Justice Onyango Otieno held that ' A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint'** The court went further to state that **'...'** ***no exact paraphrase can be given but I think reasonable cause of action means a cause of action with some chance of success when only the allegations in the plaint are considered'***

On his argument that the suit is frivolous and vexatious, Mr. Ochieng relied on the ruling dated 4th December, 2015 in this current suit that was delivered by Justice Nyamweya where she consolidated the two cases and held that **'in so far as the suits amounted as a abuse of the process of the court, certain triable issues were raised which ought to be canvassed at a full hearing.**

It is trite law that once two or more suits are consolidated it is deemed as one suit. However, in this instance, I will not delve into the merits of whether to strike out one of the suits or not, since the Defendant's application dated 18th April, 2016 proceeded unopposed. This is because the Plaintiff's representatives from the two law firms of Messrs Wanjama & Company Advocates and Kinyua Muyaa & Company Advocates were served and failed to attend court on the 23rd February, 2017. Further, even

though Messrs Kinyua Muyaa & Company Advocates received the hearing notice under protest indicating that they no longer had instructions and intended to apply to cease acting for the Plaintiff, yet they are still on record as they have not instituted any proceedings to cease acting for the Plaintiff. In the circumstance I allow the application filed on 18th April, 2016 in its entirety. The costs are awarded to the Defendant.

Orders accordingly.

**Dated signed and delivered in open court at Kajiado this 10th day of April, 2017.**

CHRISTINE OCHIENG

JUDGE

**REPRESENTATION.**

Ruling delivered in absence of parties

Court Clerk - Mpoye