



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 366 OF 2015

STEPHEN CHERUIYOT CHERONOPLAINTIFF

VERSUS

KENNETH KIPTUM KANDIE.....DEFENDANT

RULING

INTRODUCTION

The defendant has raised a preliminary objection that the plaintiff lacks capacity to file suit having been declared bankrupt by the High Court of Kenya at Kisumu in Bankruptcy Cause No. 5 of 2015 in the Debtor's name Shaheen Saif Saeed and therefor ought to have filed this suit through the official receiver and or the trustee and or the manager of his estate. The plaintiff never sought leave of court to file this suit hence contravened Order 24, Rule 6 of the Civil Procedure Rules and section 9(i) of Chapter 53 of the Bankruptcy Act. This suit cannot stand for non compliance of the aforesaid requirements.

DEFENDANT'S SUBMISSIONS

The defendant submits that the plaintiff herein filed an application dated 19th May 2016 seeking for deferment of ruling and an opportunity to respond to the defendant's preliminary objections. On 31st May 2016, the application was allowed by consent and the plaintiff was granted leave to file written submissions in response to the to the defendant's oral submissions. The defendant submits that the plaintiff however in his attempt to circumvent the law and the defendant's submission, filed a purported reply to defence and defence to counterclaim on 8th June, 2016 together with written submissions relying on the said reply to defence and defence to counterclaim. The defendant submits that filing of reply to defence had already been overtaken by events the defendant having submitted on the same. Furthermore, leave granted was only for filing of written submissions and not reply to defence and counterclaim. The plaintiff's submissions cannot therefore purport to rely on the said pleading which is improperly before the court as the same was filed without leave, pleadings having closed way back in November, 2015. The reply to defence therefore has been filed after close of pleadings and after the defendant had argued the preliminary objection and further without leave of court which therefore cannot be relied upon by this Honourable court. It is therefore the defendant's submission that the instant suit cannot stand as the plaintiff has no capacity to sue or be sued. Secondly, it is the defendant's submission that the plaintiff herein Stephen Cheruiyot Cheronno alias Shaheen Saif Saeed is one and the same person, the plaintiff being a man of dual citizenship status, that is being citizen of the Republic of Kenya and of Republic of Qatar. The plaintiff cannot be heard to claim that Shaheen Saif Saeed is a different individual. The defendant in paragraph 10 of his defence and counterclaim clearly averred that the two names refer to one and the same person. That assertion has neither been denied nor controverted. Further, the defendant in his replying affidavit sworn on 17th December, 2015, in paragraph 29 states that the plaintiff is also known as Shaheen Saif Saeed, that despite being a matter which is in public domain, was not denied by

the plaintiff. Having satisfied the court that the said Shaheen Saif Saeed is also known as Stephen Cheruiyot Cheron, the plaintiff being a known public figure, a well known athlete, in fact the court ought to take judicial notice of his dual citizenship status. Thirdly, the defendant having shown that the plaintiff is a man of dual citizenship, the defendant further submits that the plaintiff has been duly declared bankrupt by the High Court in Kisumu vide Kisumu High Court Bankruptcy Cause No. 05 of 2015. This fact has been demonstrated by the defendant in his replying affidavit sworn by the defendant on 17th December 2015, more specifically paragraph 29, 30, 31, 32, 33, 34 and 35, where copies of receiving order, order constituting official receiver, letter to defendant as creditor and Gazette notice No. 3004 of 30th April, 2015 are duly annexed. The issue therefore is, if the plaintiff has been declared bankrupt, does he have the capacity to sue? It is the defendant's submission that the plaintiff had no locus standi to file and maintain the suit herein. He ought to have filed the same through the official receiver and/or the manager/administrator of his estate. The plaintiff further ought to have sought leave of the court to file this suit in person, none of the above stated mandatory requirements were complied to by the plaintiff before filing this suit.

It is the defendant's submission that a party who has been declared bankrupt cannot maintain, defend or institute a suit personally and that the issue of identity was finally decided in Eldoret Children's Case No. 85 of 2015, Wayne Kipchumba, Ian Kimutai and Olive Kipchirchir (Minors suing through Monica Julie Kangogo) Vs Stephen Cheruiyot Cheron alias Shaheen Saif Saeed, where interim orders of maintenance and custody of the children were granted as against the defendant in the children's matter who is also the plaintiff in the instant suit. It is therefore, the defendant's submission that the suit herein is fatally defective, improperly before court and is otherwise an abuse of the court process for the above stated reasons.

PLAINTIFF'S SUBMISSIONS

The plaintiff has filed submissions arguing that it is not clear what the defendant wants the court to deal with in the matter or the reliefs sought. The plaintiff's name as indicated in the plaint dated 22.9.2015 reads Stephen Cheruiyot Cheron. It is only when the defendant filed the defence and counterclaim that the name Shaheen Saif Saeed was introduced by the defendant. In reply to defence and defence to counterclaim, the plaintiff has denied knowledge of the said Shaheen Saif Saeed and such the issues thereof are joined. The plaintiff argues that the principles guiding striking out of suits are well laid and settled by various judicial decisions.

In **D. T. Dobie & Company (Kenya) Ltd Vs Muchina (1982) KLR and Wenlock Vs Mooney (1965) LWLR 1238**, where it was held;

***“No suit ought to 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 action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for account of justice ought not to act in darkness without the full of a case before it.*”**

It was further observed that:

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial Judge and to produce a trial case in chambers, on affidavits evidence tested by cross examination in ordinary way.”

The plaintiff submits that the preliminary objection does not meet the threshold laid out in the above authorities in view of the fact that the order annexed thereof refers to Shaheen Saif Saeed and not Stephen Cheruiyot Cheron. He submits that these are different people with no interrelation whatsoever, otherwise the bankruptcy order would have laid so very clearly and that if at all Stephen Cheruiyot Cheron and Shaheed Saif Saeed are one and the same person, that jurisdiction is within purview of the trial court in view of the facts that the issue is a factual one that requires oral evidence and tested by cross examination.

The defendant has only annexed the Kisumu Bankruptcy Cause No. 5 of 2015, proceedings thereto and Gazette notice. Nothing has been put before the court to lay the basis and nexus between the preliminary objection and the annexures thereto. No affidavit is annexed to enable the plaintiff respond substantively.

DETERMINATION

Section 9 of the Bankruptcy Act Cap 53 Laws of Kenya provides as follows:-

(1) On the making of a receiving order the official receiver shall be thereby the constituted receiver of the property of the debtor, and thereafter, except as directed by this Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings, except with the leave of the court and on such terms as the court may impose.

(2) This section shall not affect the power of a secured creditor to realize or otherwise deal with his security in the same manner as he would have been entitled to realize or deal with it if this section had not been passed.

I have looked at the replying affidavit of Kenneth Kiptum Kandie sworn and filed on the 17th December 2015 paragraphs 28 to 35 on the allegation of the plaintiff's dual citizenship of Kenya where he is known as **Stephen Cheruiyot Cheron** and Qatar where he is known as **Shaheen Saif Saeed** which is not controverted and that the official receiver has constituted a manager of the properties of the plaintiff. It is clearly evident that on 25th February 2015 the High court at Kisumu issued a receiving order against Shaheen Saif Saeed who is the plaintiff herein which order was issued on his own petition in the matter of Shaheen Saif Saeed bankruptcy cause no 05 of 2015. I am satisfied that the plaintiff herein is the person referred to as Shaheen Saif Saeed referred to in the Kenya Gazette of 30th April 2015 at page 1047 in Gazette notice no 3004 of 17th March 2015 as one against whom a receiving order had been made. I have not seen an order granted to the plaintiff allowing him to commence this suit as required by law aforesaid. The upshot of the above is that the Preliminary Objection is upheld and the suit herein is struck out with costs.

DATED AND DELIVERED AT ELDORET THIS 12TH DAY OF JULY, 2016.

ANTONY OMBWAYO

JUDGE