REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT GARSEN

CIVIL SUIT NO. 1 OF 2020

BAKARI ALI KOMORA.....PLAINTIFF/RESPONDENT

VERSUS

HONOURABLE SAID BUYA HIRIBAE.....1ST DEFENDANT/APPLICANT

CONSTITUENCY DEVELOPMENT FUND GALOLE CONSTITUENCY.....2ND DEFENDANT/APPLICANT

Coram

Hon. Justice S.M Githinji

Wesonga, Mutembei & Kigen advocates for the Applicants

Bakari Ali Komora the Respondent

R U L I N G

The Applicants brought this application vide a Notice of Motion dated ***18th August, 2021*** seeking the following orders;

1. ***That the suit herein be struck off.***

2. ***That the plaintiff bears the costs of the suit***

3. ***That the costs of the application be provided for.***

The application is supported by the affidavit sworn by one Mutembei Marete on behalf of the applicants who states that he is aware that there is a borehole being drilled at Bondeni village within Galole constituency but the same is not being undertaken by the defendants. That under the Constitution of Kenya 2010, the Water Act and the County Governments Act, drilling of borehole and distribution of water is a complementary function of both the National Government and County Government.

He further states that a plain reading of the plaint indicates that the digging and drilling of the water borehole at Bondeni village is being undertaken by the National Water Corporation and Octagon Builders & General suppliers limited and not by either applicants.

He asserts that the suit does not seek any reliefs against the defendants nor does it reveal any known cause of action against the defendants thus frivolous and an abuse of the court process.

The matter came up for hearing on 4th October 2021 when the respondents sought time to file a response to the application. The respondent filed amended pleadings but no response to the application was filed.

Submissions of the parties, Analysis and Determination

The applicants submit that the plaint does not seek any orders against either of the defendants but rather seeks for orders against an 'uncertain project implementation agency' whose identity is not elaborated. That the water project in questions falls under the functions of the county government and not of the defendants as per Schedule 4 Part 2 Rule 11 (b) of the Constitution of Kenya 2010.

The applicants submit that the plaintiff has withdrawn its claim against the 2nd defendant and the subsisting suit is an abuse of process indicative of using court to settle political scores.

They relied on the authority of ***Kivinga estates limited Vs National Bank of Kenya Limited*** where the Court of Appeal defined frivolous pleadings as follows;

"A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is unintelligible or which states immaterial matters and raises irrelevant issues which will prejudice the fair trial of the action.''

It is on the above, that they seek the Plaintiff's case against the Defendants be struck out.

The Plaintiff/Respondent elected not to file their submissions.

I have evaluated the application before me.

The application is brought under Order 2 rule 15 of the ***Civil Procedure Rules*** Sub rule (1) of the said provision provides as follows:

At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

The principles for striking out pleadings are well settled in the case of *D. T. Dobie & Company (K) Ltd vs. Muchina [1982] KLR 1*; 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. The rationale for this is due to a realization that the exercise of the powers for summary procedure are draconian, coercive and drastic. And because a party may thereby be deprived of his right to a plenary trial, the court exercises those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law. The summary procedure should therefore only be invoked where it's vivid that a claim or case is beyond redemption as the judicial system would never allow a party to be driven unfairly from the judgment seat.

The application herein is premised on grounds that the plaint does not disclose any cause of action nor reliefs sought against the defendants, rendering it scandalous, frivolous, vexatious and otherwise an abuse of the Court process.

In ***Yaya Towers Limited Vs Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000)*** the Court expressed itself thus:

"A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved."

The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if doubted that at the end of the day it may not succeed, then the suit ought to go to trial. However, where the suit is without substance or is groundless and, or is brought with some ulterior motive, or for some collateral or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process, the court will not allow its process to be a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective.

Having looked at the plaintiff's pleadings, I find that it discloses triable issues that deserves a hearing.

I have however, also weighed the reliefs sought in the pleadings and they raise issues of public interest, thus the best way to pursue the same would have been through a Constitutional Petition.

That noted, I do agree with the defendants that the Plaintiff's claim is an abuse of the court process and the same is hereby dismissed.

There are no orders as to costs.

It is so ordered.

RULING FOR GARSEN READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 23RD DAY OF MARCH, 2022.

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S.M. GITHINJI

JUDGE

IN THE PRESENCE OF; -

1. KIMONDO GACHOKA & COMPANY ADVOCATES FOR THE APPELLANTS (ABSENT)

2. WAMBUA KILONZO & COMPANY ADVOCATES FOR THE RESPONDENT (ABSENT)

3. MR MUTEMBEI FOR THE 1ST DEFENDANT (APPLICANT)