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| Case Number: | Civil Suit 23 of 1992 |
| Date Delivered: | 05 Dec 1994 |
| Case Class: | Civil |
| Court: | High Court at Eldoret |
| Case Action: | Ruling |
| Judge: | Roselyn Naliaka Nambuye |
| Citation: | D.M. Amayamu v Benjamin K. Tanui [1994] eKLR |
| Advocates: | - |
| Case Summary: | **DM Amayamu & Co Advocates *v* Tanui**<br><br>High Court, at Eldoret December 5, 1994<br><br>Nambuye J<br><br>Civil Suit No 23 of 1992<br><br>***Civil Practice and Procedure*** *– striking out of defence – application for – applicant arguing that defence was scandalous, frivolous and vexatious – where it's likely to delay fair disposal of suit – where it's hopeless and doesn't raise any triable issues – whether defence can be struck out on this basis.*<br><br>The plaintiff filed a suit against the defendant asking that an order do issue for the defendant to return title No Nandi/Kamoiywo/982 or in the alternative to pay the sum found due to M/s Standard Chartered Bank Kapsabet, costs and interests.<br><br>The defendant entered appearance and filed a defence which was out of time. The plaintiff thereafter filed chamber summons seeking to strike out the defence on the ground that it was frivolous, vexatious, and was likely to prejudice, |

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| | embarrass or delay the fair disposal of the suit.<br><br>He also requested for interlocutory judgment to be entered in his favour, but it was delayed, and this is when the defence entered appearance and filed defence.<br><br>**Held:**<br><br>1. The cardinal principle in an application such as this is that before a party is deprived of his right to defend the suit, the defence must be totally hopeless and that it does not raise any triable issues at all.<br><br>2. When the defendant took out the loans he knew that the responsibility fell on him to make good those loans. He therefore could not be allowed to wriggle out of his responsibilities on points of technicalities.<br><br>3. The principle that one has to make good before he seeks indemnity had not been shown, and even if it were, the same was not a bar to the Court to look at the situation of both parties and see who had soiled his hands most.<br><br>*Defence struck out.*<br><br>**Cases**<br><br>No cases referred to.<br><br>**Statutes**<br><br>1. Civil Procedure Rules (cap 21 Sub Leg) order VI rule 131(b), (c); order IXA rule 8<br><br>2. Advocates Act (cap 16) |
| Court Division: | Civil |
| History Magistrates: | - |
| County: | Uasin Gishu |
| Docket Number: | - |
| History Docket Number: | - |
| Case Outcome: | Defence struck out. |
| History County: | - |

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| Representation By Advocates: | - |
| Advocates For: | - |
| Advocates Against: | - |
| Sum Awarded: | - |

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT ELDORET**

**CIVIL SUIT NO. 23 OF 1992**

**D.M.AMAYAMU.....**
**.PLAINTIFF**

**VERSUS**

**BENJAMIN K.**
**TANUI.....DEFENDANT**

**RULING**

The plaintiff filed a suit against the defendant seeking orders that an order do issue for the defendant to return title No Nandi/Kamoiywo/982 or in the alternative to pay the sum found to M/s Standard Chartered Bank Kapsabet, costs and interest.

The defendant entered appearance and filed defence. The plaintiff/applicant has filed chamber summons under order VI rule 13(b) and c and order IXA rule 8 of the Civil Procedure Rules seeking orders that the defence filed herein be struck out as the same is scandalous, frivolous and vexatious and or it may prejudice, embarrass or delay the fair disposal of this suit and that the defendant be condemned to pay the costs of the application. The application is supported by the affidavit in support, annextures and oral submissions in Court. The sum total of the argument is that the plaintiff/applicant is an advocate of the High Court of Kenya practising under the name and style of Amayamu & Co Advocates currently based in Eldoret.

On 5.9.89 he was acting for the defendant/respondent in his professional capacity. Apparently the defendant/respondent had a loan with Standard Bank Chartered Kapsabet. It has not come out clearly from the documents annexed as to whether the defendant was unable to repay this loan or not.

However it is clear that the plaintiff/applicant wrote to advocates of Standard Chartered Bank vide annexture A asking them to release the title document for Nandi/Komaiywo/982 to enable the defendant charge the same with Thabiti Finance Co Ltd, to secure a loan of 450,000/- to use the same to pay off the loan with Standard Bank. The plaintiff gave a professional undertaking to pay the same should his client default. It appears the title documents were released as per the undertaking of the plaintiff/applicant to the advocates of the bank. These were collected from the plaintiff by the defendant who also gave an undertaking on 30.8.90 as per annexure 2 to return the same after securing a discharge from the Land Registrar Kapsabet. On 24.10.90 the defendant gave another undertaking

to secure a loan with Thabiti Finance and use the proceeds to pay off the loan with Standard Bank and if he does not do so the plaintiff was at liberty to take any legal action that he deems fit to take.

Apparently the defendant secured the loan and made off. He never returned the title documents, neither did he pay off the loan with Standard Bank Chartered Kapsabet branch.

As a result of this default the plaintiff was followed and requested to honour his professional undertaking. He replied contending that the undertaking was done on behalf of his client who should be followed but he was told that in accordance with the relevant law governing his profession that is to say the Advocates Act cap 16 Laws of Kenya he is the one to be followed as he gave a personal guarantee and disciplinary proceedings were commenced against him. The outcome is not yet known.

Thereafter the plaintiff filed this case seeking judgment against the defendant. There was no appearance and defence in time and he requested for interlocutory judgment to be entered in his favour but this was delayed and the defendant filed defence and appearance. This gave rise to this application by which the plaintiff seeks to strike out the defence on the grounds specified.

The respondent/defendant has opposed the application on the grounds of opposition filed herein and replying affidavit as well as oral submission in Court. The sum total of their argument is that:

(1) The suit was filed way back in 1992 and since then the plaintiff has not moved the Court to have the same heard and as such it is the plaintiff who has delayed the fair trial of the suit and not the defendant.

(2) That the chamber application was filed on 24.8.92 under certificate of urgency and there is no explanation as to why it was not heard earlier on and it shows lack of seriousness on the part of the plaintiff in this matter.

(3) That since the suit arises from a professional undertaking the plaintiff has to make good that undertaking before he can initiate civil proceedings against the defendant for reimbursement and since he is the one who gave that undertaking he should not seek to make the defendant honour the same on his behalf.

(4) That the plaint is bad as it does not disclose the amount the defendant is to pay.

(5) That there is another suit relating to the same undertaking filed in Nairobi which should be canvassed first before the current suit is gone into.

In reply caused for the plaintiff stated that the delay has not been on their part as all adjournments have been occasioned by the defendants.

(2) That the current suit should be canvassed first as the Nairobi suit was filed after this one.

(3) That what is outstanding can be given by the bank in a statement of account and that there is no legal requirement that the plaintiff has to meet the undertaking first before he can seek indemnity.

The cardinal principle in an application such as this one is that before a party is deprived of his right to defend the suit the defence must be totally hopeless and that it does not raise any triable issue at all. The agreed facts are that indeed the applicant gave a professional undertaking to have title released to defendant to secure a loan. There are 2 annextures by the applicant allegedly by the defendant to the effect that he was taking the title to process a discharge from Standard Bank and the second one was that he was going to charge the same to Thabiti Finance and then pay off all monies due to Standard Bank with proceeds of the newly secured loan. Apart from saying that there is no affidavit from Thabiti Finance to show that the loan was given the defendant does not contest the two letters and the Court is satisfied that indeed there was such an arrangement.

Secondly the defendant does not dispute the undertaking that the plaintiff gave and his argument is that the plaintiff should pay that money under the guarantee first before he can come to follow him for the indemnity. The plaintiff has argued that there is no such legal requirement and none has been shown to Court by the defendant/respondent although the existence of the same cannot be ruled out.

The parties herein were client and advocate. The advocate acted in good faith in trying to assist his client pay off the loan to Standard Bank Ltd. The client wrote two letters committing himself that if he defaults then the advocate was to take any legal action that he deems fit against him. He has not disputed writing these letters. It has not been shown that the advocate benefited from any of the loans. When the defendant took the loans he knew that the responsibility fell on him to make good those loans. He cannot be allowed to wriggle out of his responsibilities on points of technicalities.

The applicant is being followed professionally as the law requires so. There may be a principle that he has to make good first before he seeks indemnity. This principle has not been shown to me. Even if it were the same is not a bar to the Court to look at the situation of both parties and

see who has soiled his hands most.

The defendant in his defence has merely denied the claim and has asserted that the undertaking should be honoured first before indemnity issue can be followed. He has not given any explanation as to why he has not taken any action to pay off the loans as he will have to pay them any way in the long run. Protecting him would be tantamount to protecting the party in the wrong and the tenets of justices do not require that.

I therefore find that he does not have any good defence to the plaintiff's claim. Even if it were to be stayed for whatever period he will have to be followed to make good the claim.

As regards the amount due this arises from a bank loan whose figure varies from time to time due to interest accrual and as such the plaint is properly framed as the plaintiff will have to prove in his formal proof as to the amount then outstanding.

As regards the delay in prosecuting the application a perusal of the record shows that the parties were discussing a settlement or proposals for payment and as such the fault did not lie on the plaintiff alone. The application was listed for hearing when a settlement did not materialise.

In the premises I find the plaintiff/applicant has made out a case and I grant him the relief sought by striking out the defence filed herein by the defendant and the plaintiff be and is hereby given liberty to proceed by way of formal proof to prove his claim.

**Dated and Delivered at Eldoret this 5th day of December 1994.**

**R.N.NAMBUYE**

**JUDGE**