**Mpaka Road Development Ltd v Kana**

[2004] 1 EA 161 (CCK)

**Division:** Milimani Commercial Courts of Kenya at Nairobi

**Date of ruling:** 29 May 2001

**Case Number:** 318/00

**Before:** Ringera J

**Sourced by:** LawAfrica

**Summarised by:** M Kibanga

*[1] Practice – Pleadings – Striking out pleadings as being frivolous, scandalous and vexatious – Order*

*VI, rule 13(1)(*b*) – Civil Procedure Rules.*

*[2] Tenancy – Concurrent tenancies in respect of the same premises – Whether concurrent tenancies*

*tenable in law.*

*[3] Tenancy – Whether allegation of concurrent tenancies in respect of the same premises is frivolous*

*and vexatious – Pleadings – Whether pleadings may be struck out for allegation of concurrent tenancies.*

*[4] Words and phrases – Frivolous, scandalous and vexatious, meaning of.*

**Editor’s Summary**

The Applicant who is the Plaintiff in the main suit, filed suit against the Defendant for arrears of rent.

The Defendant filed a defence and counterclaim. In the counterclaim the Defendant was joined by a

limited liability company, of which the Defendant was the director, as a co-Plaintiff. In the

Page 162 of [2004] 1 EA 161 (CCK)

counterclaim, the two Plaintiffs claimed that the Plaintiff in the main suit had sent an auctioneer, who

was also joined in the counterclaim as a co-Defendant, to restrain the premises. The auctioneer had then

locked the doors to the premises, causing the co-Plaintiffs to lose business. The Second Plaintiff in the

counterclaim also pleaded that the distress was illegal and excessive.

The Plaintiff in the main suit filed his defence to counterclaim and applied under Order VI, rule

13(1)(*b*) and Order XXXV, rule 1 of the Civil Procedure Rules for striking out of the defence and

counterclaim and summary judgment. The Plaintiff averred that both the defence and counterclaim were

scandalous, frivolous and vexatious because they disclosed the existence of two concurrent tenancies

over the same premises.

**Held –** A matter would only be scandalous, frivolous and vexatious if it would not be admissible in

evidence to show the truth of any allegation in the pleading which is sought be impugned, for example,

imputation of character where character is not in issue. A pleading is frivolous if it lacks seriousness. It

would be vexatious if it annoys or tends to annoy. It would annoy or tend to annoy if it is not serious or

contains scandalous matter, irrelevant to the action or defence. A scandalous and/or frivolous pleading is

*ipso facto* vexatious.

There was nothing scandalous about the defence and counterclaim. The claim as to tenancy by the

First and Second Plaintiffs in the counterclaim connoted two simultaneous tenancies. There could not

have been concurrent tenancies in respect of the same premises and tenancies could not have existed in

the alternative. The pleading was frivolous and therefore vexatious.

The defence and counterclaim was struck out and judgment awarded to the Plaintiff in the original

suit. It was not necessary to consider the application for summary judgment. The cases cited below were

considered but not applied.

**Cases referred to in ruling**

(“**A**” means adopted; “**AL**” means allowed; “**AP**” means applied; “**APP**” means approved; “**C**” means

considered; “**D**” means distinguished; “**DA**” means disapproved; “**DT**” means doubted; “**E**” means

explained; “**F**” means followed; “**O**” means overruled)

***East Africa***

*DT Dobie v Muchina* [1978] LLR 9 (CAK)

*Shah Panachand and Co v Velji and another* [1969] EA 194

***United Kingdom***

*Wenlock v Moloney* [1965] 1 WLR 1235

**Ruling**

**Ringera J:** By an application in the form of a summons in chambers filed in court on 29 March 2001,

the Plaintiff seeks the striking out of the Defendant’s statement of defence and counterclaim as well as

the counterclaim by a limited liability company of which the Defendant is a director. Summary judgment

is also sought against the Defendant. The application is expressed to be brought

Page 163 of [2004] 1 EA 161 (CCK)

under Order VI, rule 13(1)(*b*) and Order XXXV, rule 1 of the Civil Procedure Rules. The former gives

the court discretion at any stage of the proceedings to strike out or amend any pleading on the ground that

it is scandalous, frivolous or vexatious and the latter allows a plaintiff to apply for summary judgment in

suits where the relief claimed is a liquidated demand or recovery of land, with or without a claim for rent

or mesne profits.

The genesis of the application is a plaint filed in court in which the Plaintiff claims from the

Defendant, one Abdul Gafur Kana trading as Anil Kapuri Pan Coffee House the sum of KShs 1 119 349

being arrears of rent due and owing from the Defendant under a lease. The lease between the parties is

pleaded in paragraph 3 of the plaint to have been for five years and six months with effect from 1 January

1994.

The Defendant has filed a defence. He has also pleaded a set off and counterclaim. In the set off and

counterclaim he is joined by Anil Kapoori Pan Limited, of which he is a director. In the defence, the

Defendant admits the existence and particulars of the lease pleaded by the Plaintiff. He also pleads that

the Defendant instructed Eastern Auctioneers to levy distress against the Defendant for the recovery of

amounts due and owing in respect of arrears of rent who in executing those instructions placed padlocks

on the outer doors and changed the locks to the demised premises thereby denying the Defendant access

thereto resulting in the constructive eviction of the Defendant from the premises. The Defendant further

pleads, in the alternative, that by denying him entry and access to the demised premises, the Plaintiff

purported in effect to forfeit the lease illegally. The Defendant further pleaded loss and damage arising

from alleged illegal distress and forfeiture. He also denies that he is indebted to the Plaintiff as claimed in

the plaint or at all. Then in paragraph 13, the Defendant pleads in the alternative and without prejudice to

the above averments which are contained in paragraphs 2–12, that he is not liable to the Plaintiff as

claimed in the plaint for the reason that subsequent to the execution of the admitted lease the Defendant

incorporated Anil Kapoori Pan as a limited liability company for the express purpose of carrying on the

business of a restaurant and coffee shop previously carried on by him and the said company with the

knowledge and implicit consent of the Plaintiff continued to carry on business in the demised premises

thereby becoming a controlled tenant within the meaning of the Landlord and Tenant Act (Chapter 301)

of the Laws of Kenya. He therefore prays for the dismissal of the suit.

In the counterclaim, the Defendant in the original action sues as the First Plaintiff and his limited

liability company sues as the Second Plaintiff. The Plaintiff in the original action is sued as the First

Defendant and Eastern Auctioneers is sued as the Second Defendant. The Plaintiffs repeat paragraphs 3

to 13 of the defence by way of set off and counterclaim. It is then averred that the distress against the

Second Plaintiff was unlawful and excessive. It is further averred that the Defendants locked the demised

premises and changed locks thereby denying the Plaintiffs access thereto and the Second Plaintiff was

thereafter unable to continue with its business of a restaurant and coffee shop. Constructive eviction of

the Second Plaintiff and unlawful forfeiture against it are also pleaded. In paragraphs 27, 28 and 29, the

Plaintiffs aver that they have been prevented from carrying on their business and have suffered loss and

damage, they have been humiliated and they have suffered mental anguish and stress. They claim

aggravated damages, damages for unlawful distress, damages for unlawful forfeiture and eviction,

general damages and costs of the counterclaim.

Page 164 of [2004] 1 EA 161 (CCK)

To complete the state of pleadings, it should be indicated that the Defendants in the counterclaim have

filed a defence and a reply to the said counterclaim. The said defence and counterclaim were said to be

out of time but in any case, as will presently appear, the determination of this application does not turn

on the contents of the said defence and reply to the counterclaim. Having set out the background of the

application, it is now convenient to consider the application itself.

The application is supported by the affidavits of Dr Fitzval Remedios Santana de Souza, the managing

director of the Applicant company, and Mr Josephat Musila Mutua who carries on business under the

name and style of Eastern Auctioneers, the Second Defendant in the counterclaim. There is a replying

affidavit by Abdul Gaful Kana, the Respondent.

The application was canvassed before me on 2 May 2001 by Mr *Oyatsi*, counsel for the Applicant,

and Mr *Ohaga*, counsel for the Respondent. The detailed submissions are on record and there is no need

to reproduce them here. The thrust of Mr *Oyatsi*’s submissions was that as the Respondent’s pleadings

stand, they apparently disclose the concurrent existence of two tenancies over the same premises, that

both tenants were victims of illegal distress and forfeiture by the landlord and its auctioneer, and that

damages for those trespasses are sought by the two tenants. In his submissions, such a state of affairs was

not tenable in law. It was not open to the Defendant to plead the existence of a lease between himself and

the Plaintiff and seek damages on account of alleged illegal distress and unlawful forfeiture of such a

lease and at the same time plead an implied surrender of the same lease to another entity. The pleadings

were self-contradictory. In his view, both the defence and the counterclaim were in the premises

scandalous, frivolous and vexatious and should be struck out. As regards the claim for summary

judgment, he submitted that the contents of paragraphs 1–20 of Dr de Souza’s affidavit in support of the

application, which paragraphs detail how the amount claimed in the plaint is due to the Plaintiff, how it

came to be so, and how the Defendant admitted the same and sought indulgences are not controverted in

the replying affidavit. In his view, there was no triable issue on the quantum of the rent in arrears. He

further submitted that the distress was levied in accordance with the law and the same was regular as

shown in the affidavits in support of the application.

The thrust of Mr *Ohaga*’s submissions on the other hand was that there was nothing scandalous,

frivolous and vexatious about the defence and counterclaim. He submitted that a matter would only be

scandalous if it would be inadmissible in evidence to show the truth of any allegation which is material to

the relief sought. He pointed out that there was nothing in the defence and counterclaim which amounted

to an imputation on the Plaintiff. He cited the *Supreme Court Practice* [1988] Volume I, paragraph

18/19/14 in support of his proposition. He further submitted that a pleading would only be frivolous or

vexatious if the case disclosed therein was obviously or plainly unsustainable. A court does not have to

delve into the merits of each party’s case to determine whether a matter is frivolous and vexatious. He

cited the *Supreme Court Practice* (*supra*), *Wenlock v Moloney* [1965] 1 WLR 1235 and *DT Dobie v*

*Muchina* [1978] LLR 9 (CAK) to support his contention. In his view, the application herein was

unsustainable under Order VI, rule 13(1)(*b*).

As regards the claim for summary judgment, Mr *Ohaga* submitted that there were several triable

issues. He pointed out that at paragraph 4 of the defence there is an allegation that the Plaintiff and the

auctioneer locked up the Defendant’s

Page 165 of [2004] 1 EA 161 (CCK)

premises. That was an issue of fact from which illegal forfeiture arose as an issue of law. There was also

the issue of whether the distress was excessive. In response to Mr *Oyatsi*’s submission that the

Defendant’s pleadings were inconsistent and contradictory, counsel submitted that the pleas were in the

alternative as permitted by Order VI, rule 6(2) of the Civil Procedure Rules. He further submitted that an

implied surrender of a lease was known in law. He cited *Shah Panachand and Co v Velji and another*

[1969] EA 194. He submitted that in the circumstances of this case, where a tenant had incorporated a

limited liability company to carry on his business in the demised premises, a surrender of the lease by

operation of law could be inferred and if that was done, it would follow that the company became a

controlled tenant within the meaning of the Landlord and Tenant Act (Chapter 301) of the Laws of

Kenya. That scenario raised issues of both law and fact. As regards the alleged admission of rent due, Mr

*Ohaga* submitted that the written admission was on a letterhead of a limited liability company and was

thus not an admission by the Defendant. He pointed out that the exhibit containing the admission as well

as the cheques made to the Plaintiff showed that the Plaintiff was aware of the presence of Anil Kapoori

Pan Ltd in the demised premises. Accordingly the issue of whether it was the company or the Defendant

as an individual who was the Plaintiff’s tenant was raised. He rounded off by submitting that an attempt

to have the suit determined by affidavits is a usurpation of the function of the trial court.

From those submissions I think two issues arise for determination. First, whether the defence and

counterclaim as drawn are scandalous, frivolous or vexatious, and second, whether the same disclose

*bona fide* triable issues. As regards the first issue, I accept the exposition of the words scandalous,

frivolous and vexatious contained in the *Supreme Court Practice*. As the exposition is of an English rule

which is *in pari materia* with our Order VI, rule 13(1)(*b*), I would hold that a matter would only be

scandalous if it would not be admissible in evidence to show the truth of any allegation in the pleading

which is sought to be impugned. Such would be the case where an imputation is made on the character of

a party when the character is not in issue. And I would say a pleading is frivolous if it lacks seriousness.

It if is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or

tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous

matter which was irrelevant to the action or defence. In short, it is my discernment that a scandalous

and/or frivolous pleading is *ipso facto* vexatious.

Now looking at the pleading sought to be struck out herein, namely the defence and counterclaim, I

must say that I detect no paragraph or combination of paragraphs which can be said to be scandalous

within the meaning of the law as expounded above. There is nothing irrelevant to the defence or

counterclaim sought to be advanced. And there is no imputation on the Plaintiff. So the pleading cannot

be struck out as being scandalous. Is it frivolous or vexatious? Mr *Oyatsi* has in a detailed and lucid

submission sought to show that the Respondent is metaphorically speaking running with the hares and

hunting with the hounds at the same time. He is resisting the Plaintiff’s claim by averring that he was not

the tenant as his lease had impliedly been surrendered to a limited liability company of which he is a

director while at the same time he claims the relief of damages arising from an unlawful distress and

forfeiture of the same lease on the basis, of course, that he was the tenant. The limited liability company

is also claiming damages for *inter alia* illegal distress and forfeiture. Mr *Ohaga* submits that these claims

are in the alternative and accordingly quite

Page 166 of [2004] 1 EA 161 (CCK)

proper. On a careful consideration of the matter I accept Mr *Oyatsi*’s submission that the matters pleaded

in the defence and set off and counterclaim are not in substance alternate pleas. To my mind, two persons

cannot plead in the alternative in respect of the very same cause of action as the Defendant and the

limited liability company of which he is a director seek to do here. In my opinion, the pleas in this matter

are contradictory pleas which are plainly unmaintainable. There cannot be concurrent tenancies in

respect of the same premises and I cannot contemplate the existence of tenants in the alternative. The

proposition is not a serious one, it is pretty much imaginary. As such it is frivolous. And it cannot but vex

any landlord to have a situation where two entities claim relief from him as tenants in his premises and

yet at the same time, a claim to rent arrears is resisted by the one who had executed a lease on the basis

that such lease had been surrendered to another. In the premises, I find the statement of defence and the

set off and counterclaim to be frivolous and vexatious. And although striking out a pleading is a drastic

remedy to be exercised only in plain and obvious cases, I consider this to be such a case and accordingly

order the said defence and the set off and counterclaim to be struck out with costs to the Applicant. I

further order that judgment be entered for the Plaintiff as prayed in the plaint. That being the view I take

of the matter, it would be the vainest pedantry to proceed to consider the summary judgment aspect of the

application. That I refrain from doing.

Those, then, are the orders of this Court.

For the Applicant:

*D Oyatsi* instructed by *Shapley Barret and Co*

For the Respondent:

*JM Ohaga* instructed by Ochien’g *Onyango Kibet Ohaga*