



IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

COMM. CASE NO. E144 OF 2020

BETWEEN

REEMA KANTILAL SHAH.....1ST PLAINTIFF

NEENA KANTILAL SHAH.....2ND PLAINTIFF

(Suing as the Administrators of the

Estate of MANJULAL KANTILAL SHAH (Deceased)

AND

BANK OF BARODA (KENYA) LIMITED.....DEFENDANT

AND BY WAY OF COUNTERCLAIM

BANK OF BARODA.....PLAINTIFF

AND

REEMA KANTILAL SHAH.....1ST DEFENDANT

NEENA KANTILAL SHAH.....2ND DEFENDANT

(Sued as the Administrators of the

Estate of MANJULAL KANTILAL SHAH (Deceased)

READY TIMBER MERCHANTS LIMITED.....3RD DEFENDANT

CHANDULAL JETHALAL SHAH.....4TH DEFENDANT

RASHMIKANT MEGHJI SHAH.....5TH DEFENDANT

VINAL CHANDULAL JETHALAL SHAH.....6TH DEFENDANT

RULING

Introduction

1. The application before the court for consideration in this ruling is the Plaintiff's Notice of Motion dated 20th July 2020 seeking to strike out the Defendant's Statement of Defence and Counterclaim dated 25th June 2020 under the provisions of **Order 2 rule 15 (b), (c) and (d)** of

the **Civil Procedure Rules**. The application is supported by the joint affidavit of Reema Kantil Shah and Neena Kantil Shah sworn on 22nd July 2020. The application is opposed by the Defendant through the replying affidavit of its Legal Officer, Martin Karanu, sworn on 17th August 2020. The 3rd to 6th Defendants to the Counterclaim filed Grounds of Opposition dated 10th August 2020. Before I deal with the application, it is important to set out a background of the suit and the pleadings filed.

Background

2. The subject of this suit is a property; LR No. 4953/1235 (“the suit property”) owned in common and in equal shares by Manjula Kantil Shah (“the Deceased), Chandulal Jethalal Shah and Rashmikant Jethalal Shah who are the 4th and 5th Defendants to the Counterclaim. The Plaintiffs are the administrators of the Deceased’s estate. The Deceased died on 26th June 2014.

3. The 3rd Defendant to the Counterclaim (“the Company”) approached the Defendant (“the Bank”) for banking facilities. The first facility, contained in the Letter of Offer dated 13th April 2016, was an overdraft of Kshs. 20,000,000.00 and a term loan of Kshs. 20,000,000.00. The facility was secured by a Charge dated 26th April 2016 over the suit property and guarantees by the Company directors; Chandulal Jethalal Shah, Rashmikant Meghji Shah and Vinay Chandulal Jethalal Shah who are the 4th, 5th and 6th Defendants to the Counterclaim.

4. The Bank extended a further facility to the Company comprised in the Letter of Offer dated 2nd August 2017. The overdraft of Kshs. 20,000,000.00 was renewed and enhanced by a further Kshs. 10,000,000.00 to Kshs. 30,000,000.00. The existing term loan of Kshs. 20,000,000.00 with an outstanding balance of Kshs. 16,910,000.00 was reviewed and extended and a demand loan was granted against a Kshs. 1,275,000.00 FDR. The facility was secured by a Further Charge dated 25th August 2017 over the suit property, individual guarantees provided by the 4th, 5th and 6th Defendants to the Counterclaim as directors of the Company and a Letter of Lien against an FDR of Kshs. 1,400,000.00.

5. The Charge dated 26th April 2016 (“the Charge”) was prepared by *Maina Muiruri and Company Advocates* on behalf of the Bank. It was executed by the Deceased, 4th and 5th Defendants to the Counterclaim on 26th April 2016 when they appeared before E. Chege Ng’anga, Advocate. On the same day, the Deceased and 4th Defendant to the Counterclaim made a statutory declaration before E. Chege Ng’anga, Advocate declaring that they were a widow and widower respectively.

6. The Further Charge dated 25th August 2017 (“the Further Charge”) was also prepared by *Maina Muiruri and Company Advocates* on behalf of the Bank. It was executed by the Deceased, 4th and 5th Defendants to the Counterclaim on 25th August 2017 when they appeared before E. Chege Ng’anga, Advocate. On the same day, the Deceased and 4th Defendant to the Counterclaim made a statutory declaration before E. Chege Ng’anga, Advocate declaring that they were a widow and widower respectively.

7. Following default by the Company, the Bank evinced its intention to exercise its statutory power of sale by issuing statutory notices under **section 90** of the **Land Act** thus precipitating this suit. The Plaintiffs moved the court by a Notice of Motion dated 12th May 2020 seeking an interlocutory injunction restraining the Bank for exercising its statutory power of sale. The application was compromised when the parties agreed to proceed to the hearing of the main suit.

The Pleadings

8. The Plaintiffs filed the Plaint dated 12th May 2020. It was amended on 20th July 2020. The Plaintiffs’ case against the Bank is that the Charge and Further Charge over are illegal, null and void as they were created two years after the death of the Deceased. The Plaintiffs therefore seek a declaration to that effect. They also seek injunctive relief against the Bank to restrain it from exercising its statutory power of sale.

9. The Company filed a Defence and Counterclaim dated 25th June 2020 which was amended on 13th August 2020. The Bank denied any impropriety on its part. It stated that the Charge and Further Charge were valid and it was entitled to exercise its statutory power of sale. The Bank further stated that if it is true that the Deceased had passed away prior to execution of the Charge and Further Charge, then it was not aware of this fact and that it is the 3rd to 6th Defendants to the Counterclaim who perpetrated a fraud not only on the estate of the Deceased but on the Bank as well by, inter alia, failing to inform the Bank of the Deceased’s demise before obtaining the facilities.

10. The Bank further stated that since the suit property was held under tenancy in common, the 4th and 5th Defendants to the Counterclaim were entitled under the law to individually transfer and/or charge their individual shares in the property being two thirds (2/3) share in the suit property therefore the Charge and Further Charge are binding upon them. The Bank therefore sought to have the Amended Plaint dismissed and Judgment entered against the Defendants jointly and severally in the Counterclaim for the amount due to the Bank and a declaration that it is entitled to exercise its statutory power of sale over the two thirds of the suit property together with full indemnity against the Defendants to the Counterclaim.

11. The 3rd, 4th, 5th and 6th Defendants to the Counterclaim filed their Defence to the Counterclaim dated 20th July 2020. The Company and its directors, the 4th, 5th and 6th Defendants to the Counterclaim, admit that the Bank advanced facilities to the Company but state that the Charge, Further Charge and security documentation are null, void and illegal ab initio and thus incapable of enforcement. In addition, and in the alternative, they contend that the suit property was discharged in 2013 upon them paying Kshs. 3,000,000.00 in full and final settlement of the outstanding loan. They further state that the Charge and Further Charge were not executed by Kantilal Jethalal Shah hence they are null and void.

12. As regards the death of the deceased, the 3rd, 4th, 5th and 6th Defendants state that they disclosed to the Bank that the deceased had died

in 2014. They accuse the Bank of forging the signature of the Deceased and of being privy to the fraud and forgery of the Charge and Further Charge. They also deny that they are indebted to the Bank as alleged or at all.

The Submissions

13. I have outlined the uncontested facts and the parties' contention in the introductory part above. The gist of the Plaintiffs' application is that the Bank's Defence and counterclaim is unsustainable as against the estate of the deceased on the ground that the Deceased who is purported to have executed the Charge and Further Charge on 26th April 2016 and 27th August 2017 died on 26th June 2014 and could not therefore execute the documents.

14. Counsel for the Plaintiffs submitted that having demonstrated that the deceased did not execute the Charge and Further Charge and any of the other loan documents, it follows that the Defence and Counterclaim against the estate of the deceased cannot possibly succeed and that this court has jurisdiction to strike out the suit as against the estate. Counsel added that a full hearing need not be conducted to prove that someone is dead and that the certificate of death, grant of probate issued and certificate of grant produced are conclusive proof.

15. Counsel concluded by stating that nothing will be achieved in keeping the administrators in the suit or prolonging the matter as the Defence and Counterclaim is clearly fit for striking out as the fraud alleged by the Bank could not have been possibly committed by the Deceased since it occurred after her death as she did not execute the loan documents.

16. The Bank's case is that the Defence and Counterclaim raise triable issues among them whether the Charge and Further Charge are valid, whether the Defendants are entitled to two thirds of the charged property pursuant to **section 79** of the **Land Act**, whether the Bank is entitled to attach two thirds shares of the suit property belonging to the 5th and 6th Defendants to the Counterclaim, whether the Bank is entitled to indemnity from the 3rd to 6th Defendants to the counterclaim for any damages or costs arising in this suit and whether the Bank is entitled to Kshs. 45,134,744.90 as at 21st June 2019 from the Defendants to Counterclaim.

17. The Bank submits that since it seeks to attach two thirds of the suit property, the Counterclaim would affect the Plaintiffs' one-third share of the suit property hence they are vital parties to the Defence and Counterclaim. The Bank urged the court to dismiss the application with costs and fix the matter for hearing as it had directed once the application for injunction was compromised.

18. The 3rd to 6th Defendants to the Counterclaim supported the position taken by the Plaintiffs that since the Deceased died in 2014, there was no possibility that she executed the Charge and Further Charge. It was their position that the Charge, Further Charge and all security documents should be declared null and void.

Determination

19. The principles applicable in an application seeking to strike out a pleading under **Order 2 rule 15** of the **Civil Procedure Rules** have been settled in several cases. The court is guided by the general principle that it should be circumspect in striking out a pleading unless there are clear grounds to do so. The court's power to strike out pleadings is to be exercised sparingly and cautiously as the Court of Appeal stated in **D.T. Dobie & Company (Kenya) Ltd v 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.

20. The same principle was stated in **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000 [2000] eKLR** where the Court of Appeal expressed itself thus:

A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant 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...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment [Emphasis mine]

21. It is an uncontested fact that the deceased died on 26th June 2014 and that she predeceased the execution of the Charge and Further Charge which were executed on 26th April 2016 and 25th August 2017 respectively. The fact that the Deceased owned the suit property as a tenant in common with the 4th and 5th Defendants to the Counterclaim has not been disputed. The nature of a tenancy in common was summarized as follows by Eboso J., in **Cornella Nabangala Nabwana v Edward Vitalis Akuku and 2 Others NRB ELC No. 378 of 2017**

[2017]eKLR:

22. *In contrast, tenants in common hold their respective interests in undivided shares and each tenant in common has a distinct share in the property which has yet to be divided among the co-tenants. Secondly, in tenancy in common, there is no right of survivorship. This implies that when a tenant in common dies, his interest in the land passes under his will or intestacy.*

22. While I would be prepared to hold that on the basis of the undisputed facts, the Deceased did not execute the Charge and Further Charge, this does not necessarily lead to the conclusion that the Plaintiffs must, *ipso facto*, be struck out of the case. There are substantial issues to be tried between the Bank and the 3rd to 6th Defendants to the Counterclaim. If the Bank succeeds in the Counterclaim, the court may well conclude that there is a remedy against the two surviving co-owners of the suit property and therefore two thirds of the suit property. This issue would necessarily implicate the nature of relief against the suit property which is jointly owned in common by the Deceased and the 4th and 5th Defendants to the Counterclaim and which is yet to be partitioned. It is on this ground that I am not prepared to strike out the Defence and Counterclaim as against the Plaintiffs. They are necessary parties to the suit *whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit*. In the event the suit against them fails, they will be compensated by costs.

Disposition

23. I am constrained to dismiss the Plaintiffs' Notice of Motion dated 20th July 2020 with costs to the Defendants.

DATED and DELIVERED at NAIROBI this 15th day of JANUARY 2021.

D. S. MAJANJA

JUDGE

Court of Assistant: Mr M. Onyango

Mr Ochwo instructed by Ochwo and Company Advocates for the Plaintiffs.

Mr Kisinga instructed by Mohammed Madhani and Company Advocates for the Defendant.

Mr Juma instructed by J. O. Juma and Company Advocates for the 3rd, 4th, 5th and 6th Defendants to the Counterclaim.