



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 75 OF 2019

ELSBETH REINHARD HEFTI, DANIEL BERNHARD REINHARD

suing as Administrators of the Estate of the late

DANIEL BERNHARD.....PLAINTIFF

VERSUS

- 1. JOYCE JEPLETING REINHARD.....1ST DEFENDANT**
- 2. THE CABINET SECRETARY IN CHARGE OF LANDS...2ND DEFENDANT**
- 3. REGISTRAR OF TITLES, MOMBASA.....3RD DEFENDANT**
- 4. THE ATTORNEY GENERAL.....4TH DEFENDANT**

RULING

1. By this Notice of Motion dated and filed on 13th January 2020, Elsbeth Hefti Reinhard and Daniel Bernhard Reinhard (Suing as the Administrators of the Estate of Daniel Bernhard Hefti (the Plaintiffs/Applicants) pray for orders: -

- 1. That this Honourable Court be pleased to strike out the 1st Defendant's Amended Statement of Defence filed in Court on 16th December 2019 for reason that the said pleading was filed out of time, without any leave sought and/or granted and consequently the said pleading discloses no reasonable cause of action or Defence;***
- 2. That this Honourable Court be pleased to strike out the 1st Defendant's Amended Statement of Defence filed in Court on the 6th December 2019 for reason that the said pleading contains a monetary claim time-barred by the Limitation of Actions Act, without any leave sought and/or granted, and consequently the said pleading discloses no reasonable Cause of Action or Defence;***
- 3. That this Honourable Court be pleased to enter Interlocutory Judgment in respect of the prayers for Special Damages contained in the Amended Plaint filed on 18th November 2019.***
- 4. That the costs of this application be paid by the Respondents.***

2. The application is premised on the grounds that: -

a) The Amended Statement of Defence was filed 17 days after service on the 1st Defendant of the Amended Plaint;

b) There is no evidence on record to the effect that prior to the filing of the Amended Defence, the 1st Defendant had filed any formal application seeking leave to file any pleadings out of time and that such leave was in actual fact granted;

c) The Amended Statement of Defence was admitted onto the Court file despite the presence on record of a Request for Judgment filed by the Plaintiff immediately upon expiry of 14 days from the date of service which Request was arbitrarily denied by Deputy Registrar notwithstanding that entry thereof is an administrative act devoid of Judicial discretion;

d) The Amended Statement of Defence contains amendments that are not properly marked and/or identified as required by the Civil Procedure Rules;

e) The Amended Statement of Defence purports to contain Counterclaim but the said Counterclaim is neither properly titled, nor unequivocal about whom it is filed against contrary to the mandatory requirements of the Civil Procedure Act; and

f) The Amended Statement of Defence purports to contain a Counterclaim but the said Counterclaim is further defective in so far as: -

i) It was not filed together with a List of Witnesses for the Counterclaim, as opposed to witnesses for the Defence Case;

ii) Any or any valid and proper verifying affidavit; and

iii) The purported Counterclaim relates to an agreement allegedly entered into in the year 2008, more than eleven years ago with the result that any monetary claims arising therefrom are time-barred under the Limitation of Actions Act (Cap 22).

3. The application is opposed. In a Replying Affidavit sworn and filed herein on 3rd February 2020, Joyce Jepleting Reinhard (the 1st Respondent) avers that she is the legal representative of the Estate of the late Daniel Bernard Hefti and asserts that the Plaintiffs' application is incompetent, an afterthought, baseless and lacking in merit as the same does not disclose any reasonable legal or factual ground for the orders sought.

4. The 1st Defendant avers further that the application is not contrary to the law supported by any affidavit and that the same does not meet the threshold for the striking out of a defence as by law required.

5. The 1st Defendant further avers that the Plaintiff's case raises pertinent issues that affect her property rights and purports to paint her as a fraudster and it is only prudent that all parties in the claim be given an opportunity to defend their case and establish their claim devoid of technicalities. The 1st Defendant further accuses the Plaintiffs of amending their Complaint without leave of the Court and then rushing to Court to block herself from responding thereto.

6. I have perused and considered the application and the response thereto. I have similarly perused and considered the rival submissions as filed by the Learned Advocates for the parties.

7. The Plaintiff herein has urged this Court to strike out the 1st Defendant's Amended Statement of Defence for two reasons; first that it was filed out of time without the leave of the Court and secondly, for the reason that the Amended Defence contains a monetary claim which is time-barred by dint of the Limitation of Actions Act. Accordingly, the Plaintiff urges the Court to proceed, upon striking out the Amended Defence, to enter Interlocutory Judgment in his favour in respect of prayers for Special Damages contained in his Amended Complaint filed herein on 18th November 2019.

8. The principles guiding the striking out of pleadings are now well-settled. These principles as set out in **D.T. Dobie & Company (K) Ltd – vs- Muchina (1982) KLR 1**, are 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/or that it is so weak as to be beyond redemption and incurable by amendment. Accordingly, where a suit shows a mere semblance of 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.

9. The rationale for the above position is of course due to the realization that the exercise of the power of summary procedure are draconian, coercive and drastic. And because by the exercise thereof a party may thereby be deprived of his right to a plenary trial, the Courts exercise those powers with the greatest care and circumspection and only in the clearest of cases as regards the facts and the law.

10. The Plaintiff's application before me is principally 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.

11. According to the Plaintiff, the 1st Defendant's pleadings were filed out time without leave of the Court and hence as a consequence, they do not disclose any reasonable cause of action or defence. The amended defence also fails to disclose any reasonable cause of action according to the Plaintiff on the basis that the monetary claim made thereon is time-barred under the Limitation of Actions Act. I was however unable to find the basis for the conclusion that simply because the 1st Defendant did not file a response to the Amended Plaintiff within 14 days, then her pleadings ipso facto failed to disclose a reasonable cause of action or defence.

12. In the same vein and from the material placed before me at this stage, I was unable to see on what basis the Plaintiffs assert that the monetary claim made by the 1st Defendant is time-barred. While the application makes mention of an agreement allegedly entered into between the parties in the year 2008, the Notice of Motion before me dated 13th January 2020 was unsupported by any affidavit evidence and this Court was not able to make any conclusive determination on the matter given the mere passing reference made thereto in the Plaintiffs' application.

13. As has often been stated, the jurisdiction to strike out pleadings must be exercised sparingly and in clear and obvious cases. Unless the matter is plain and obvious, a party to a civil litigation is not to be deprived of his/her right to have his/her case tried in a proper trial. The Court in this regard ought to act very cautiously and carefully and to consider the facts of the case without embarking upon a trial thereof before dismissing a case or striking out a defence for not disclosing a reasonable cause of action or being otherwise an abuse of the Court process.

14. While the Plaintiff was quick to urge the Court to strike out the 1st Defendant's pleadings for being filed out of time and without the leave of the Court, a perusal of the record herein reveals that the initial Plaintiff was instituted by the Plaintiff herein on 18th September 2019. On 11th October 2019, the 1st Defendant filed her Statement of Defence. Some 37 days later the Plaintiff moved to Court on 18th November 2019 to file his Amended Plaintiff which is the subject matter herein. There is no evidence on record to show whether the Plaintiff himself sought and or obtained leave to file the said Amended Plaintiff given that the pleadings would have closed 14 days after the Defence was filed and served upon himself.

15. Accordingly, I was not persuaded that the 1st Defendant's Statement of Defence having been filed some 18 days after service of the Amended Plaintiff would prejudice the Plaintiff in any way and I find no merit in the Motion dated 13th January 2020. The same is dismissed with costs to the 1st Defendant.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 30TH DAY OF APRIL, 2021.

J.O. OLOLA

JUDGE