



IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

CIVIL CASE NO. 436 OF 2017

BETWEEN

JOHN MUGAMBI T/A MUGAMBI & COMPANY ADVOCATES.....1ST PLAINTIFF

BEATRICE KARIUKI T/A BEATRICE KARIUKI & ASSOCIATES.....2ND PLAINTIFF

AND

SHOWCASE PROPERTIES LIMITED.....DEFENDANT

RULING NO. 11

1. The Plaintiffs have filed the Notice of Motion dated 29th June 2021 in which they have invoked, inter alia, **Articles 50(1) and 159 2(b)** of the **Constitution, sections 1A, 1B, 3, 3A and 63(e)** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** in which they seek an order of this court barring the Defendant from filing any further applications in the instant suit, except with prior leave of the court and that the Court be pleased to make an order for the assessment of costs in respect of subsequent application(s) filed by the Defendant and consequently dismissed or struck out, whether leave has been granted or not and payable immediately.

2. The application is supported by the grounds on its face together with the affidavits of John N. Mugambi, an advocate in the 1st Plaintiff's law firm, sworn on 29th June 2021 and that of Beatrice Kariuki, an advocate in the 2nd Plaintiff law firm, sworn on 9th July 2021. The application is opposed by Defendant through the Replying Affidavit of its director Francis Muhoro Gachanja, sworn on 5th July 2021. It has also filed brief written submissions

3. Since this is the 11th ruling on this matter, I do not intend set out the history of the matter as it is well known to the parties. The basis of the Plaintiffs' application is that the Defendant has filed 12 substantive applications before this Court post judgment in default of defence and decree, and that out of the 12 applications, 9 have been heard and determined, while 3 applications; dated 10th April 2021, 6th May 2021 and 22nd June 2021 are still pending resolution. The Plaintiffs add that more significantly, out of the 9 that have been determined, 7 have been dismissed with costs to them.

4. The Plaintiffs' case it is an abuse of the court process for the Defendant to file so many applications, some of which are repeat applications, regarding matters on which the court has already pronounced itself. They submit that it is an established principle that litigation must come to an end and that although the Defendant is entitled to and has a right of access to justice and to a fair hearing under the Constitution, it has not only abused the court process but has also prevented efficient use of judicial and administrative resources, prevented the timely disposal of these proceedings at a cost affordable by to the parties, frustrated the just, expeditious, proportionate and affordable resolution of this dispute. The Plaintiffs are apprehensive that if the orders sought are not granted, the Defendant will continue to flood the court with unnecessary applications further escalating costs which they have to bear upfront. The Plaintiff maintains that it should be allowed to enjoy the fruits of its judgment.

5. The Defendant does not deny that it has to date filed 12 applications in this matter over the last 12 months seeking to set aside the default judgment entered herein. The Defendant depones that the present application by the Plaintiffs is actually a complaint against the court for its efficiency in delivering of rulings in this matter usually within a week of parties filing their papers in response to the various applications and that in fact if there should be a complaint lodged in the matter, it should be by the Defendant stating the court is biased against it for dismissing their meritorious applications.

6. The Defendant rejects the submission that the applications are frivolous or vexatious as they raised various weighty issues such as attempted fraud on the court. The Defendant contends that the suit has not been heard on its merits and has been concluded through a process of denial of the Defendant's constitutional right to a fair and impartial hearing and that it continues to suffer due to a denial of an opportunity to present its defence to the Plaintiffs' claim which is colossal and has not been proved.

7. The Defendant avers that the court has allowed only 2 out of 13 of its applications and since the court also allowed the encashment of the Defendant's guarantee security of KES 5,000,000.00, the Plaintiffs have become so emboldened as to dictate to the court how the Defendant's applications should be granted or filed. The Defendant reiterates that the sole purpose of the application is calculated to preempt the Defendant from revealing the devious method used to gain undue advantage of a judgment they don't deserve and that justice must not only be done but also be seen to be done. The Defendant urges the court to be careful not to be used to profit the Plaintiffs from the Defendant's problems caused by the same Plaintiffs. It submits that it would be immoral and unjust if court were to be used by advocates to fleece innocent litigants using all manner of technicalities and label such elaborate heists as fruits of judgement.

8. I have no doubt that this court has the inherent power to make any order that are necessary to meet the ends of justice and to prevent an abuse of the court process. This is the collective import of **sections 1A, 1B and 3A** of the **Civil Procedure Act**. Under the overriding objective principle, this court is duty bound to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes at a cost affordable by the respective parties and ensure the efficient use of the available judicial and administrative resources.

9. Are the Defendant's applications vexatious and an abuse of the court process? In answering this question, I hold that each application filed by the Defendant has been argued and determined on its own merits. The court in **Republic v Chief Magistrate's Court at Milimani Law Courts; Director of Public Prosecutions & 2 others(Interested Parties); Ex-parte Applicant: Pravin Galot NRB HC JR Misc. Civil App. No. 622 of 2018 [2020] eKLR** held that the word "*vexatious*" means "harassment by the process of law," "lacking justification" or with "*intention to harass*" signifies an action not having sufficient grounds, and which therefore, only seeks to annoy the adversary. The hallmark of a vexatious proceeding is that it has no basis in law or at least has no discernible basis and that whatever the intention of the proceeding may be, its only effect is to subject the other party to inconvenience, harassment and expense, which is so great, that it is disproportionate to any gain likely to accrue to the claimant and that it involves an abuse of process of the court.

10. Having dealt with each application, I cannot say that the applications were vexatious so as to disentitle the Defendant to relief in subsequent proceedings. In my view, the Plaintiffs have established the threshold of barring the Defendant from obtaining such relief as is due to it in the circumstances of the case. The court is able to deal with each application and impose the necessary consequences should any application filed by the Defendant turn out to be vexatious and an abuse of the court process.

11. I am not unmindful of the Plaintiffs' concerns hence I shall dismiss the the Notice of Motion dated 29th June 2021 but with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2021

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Mr Mbobu with him Mr Otenyo instructed by Makhandia and Makhandia Advocates for the Plaintiffs.

Mr Mungai instructed by Mungai Kalande and Company Advocates for the Defendant.