



Anne Wangeci Schofield t/a Schofield and Associates v Ehsani & another (Civil Case 352 of 2016) [2021] KEHC 413 (KLR) (Commercial and Tax) (16 December 2021) (Ruling)

Neutral citation: [2021] KEHC 413 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 352 OF 2016
WA OKWANY, J
DECEMBER 16, 2021**

BETWEEN

ANNE WANGECI SCHOFIELD T/A SCHOFIELD AND ASSOCIATES APPLICANT

AND

HOOMAN EHSANI 1ST RESPONDENT

PALM VALLEY DEVELOPMENT LTD 2ND RESPONDENT

RULING

1. The applicant herein, Ann Wangeci Schofield, filed the application dated 25th June 2021 seeking the following orders:
 1. Spent
 2. This honourable court be pleased to order that the defence of the 2nd defendant filed on 26th September 2016 be struck out and judgment be entered against the 2nd defendant as prayed in the plaint.
 3. That this honourable court be pleased to restrain the defendants/respondents whether by themselves, their servants and agents or otherwise howsoever, from selling, charging, transferring title or parting with possession of any of the unsold villas, town houses and apartments in the development known as palm valley development on L.R No 12825/39-42 Kiambu and from distributing to the shareholders their nominees, agents or to investors of the 2nd defendant or any person whatsoever the income from the villas, town houses and



apartments already sold in the said development pending further orders from this court.

4. That this honourable court be pleased to restrain the defendant/respondents whether by themselves, their servants and agents or otherwise howsoever from selling, charging, transferring title or parting with possession of any of the unsold villas, town houses and apartments in the development known as Palm Valley Development on LR NO 12825/39-42 Kiambu and from distributing to the shareholders their nominees, agents or to investors of the 2nd defendant or any person whatsoever the income from the villas, town houses and apartments already sold in the said development pending hearing of the application for summary judgment, assessment of damages and/or determination of this suit
5. That in the alternative this Honourable court be pleased to restrain the defendants/respondents from selling, transferring title to six townhouses reserved under and allotted to Stephen Kimotho Kabogo, the 1st defendant, Hamed Ehsani and Century City Limited under the terms of the Joint venture Agreement between those parties pending hearing of the application for summary judgment assessment of damages and/or determination of this suit.
6. That this Honourable court be pleased to restrain the directors and shareholders of the 2nd defendant from transferring the reversionary interest in LR NO 12825/39-42 to the management Company and/or transferring the title to such property to any person company or entity pending hearing and determination of this suit.
7. That this Honourable Court be pleased to restrain the directors and/or shareholders their agents or nominees from winding up the 2nd defendant pending the hearing and determination of this suit.
8. That the costs of this application be provided for.

2. The application is supported by the applicant's affidavit and is based on the following grounds: -

1. Under Order 40 Rule 1 of the *Civil Procedure Rules*, this honourable court has power to restrain the sale, alienation or disposition of a defendant's property where a plaintiff will or may be obstructed in the execution of any decree that may be passed against a defendant.
2. Under section 3A of the *civil Procedure Act* this Honourable Court has the inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
3. Article 50 of the *Constitution of Kenya* guarantees the right of the plaintiff/applicant to have the issues as to whether the defendant breached the retainer agreement between them and the plaintiff determined in a fair public hearing.
4. In this suit, the plaintiff/applicant has sought damages for breach of a retainer contract which was terminated by the common law doctrine of frustration together with interest at court rates from 29th August 2016 costs of the suit and any other orders that the court may deem fit



5. The plaintiffs claim herein also takes the form of legal fees earned as a result of legal services that were provided to the defendants in relation to a joint venture over LR NO 12825/39-42 on which has been constructed several villas, town house and apartments. Through the bulky documents filed in support of the claim, the plaintiff has placed a prima facie case with a probability of success at trial.
 6. In terms of the joint venture, the shareholders of the 2nd defendant who include the 1st defendant, are to get income taking the form of a number of townhouses and the share of the income/proceeds of sale of the rest of the villas, townhouses and apartments thereafter, after the sale of the units, the 2nd defendant will transfer its reversionary interest into a management company and consequently be wound up.
 7. So far the defendants have sold the majority of the villas, town houses and apartments to third parties.
 8. The 2nd defendant has not filed a Board resolution under seal authorizing the 1st defendant and/or advocates representing it to act on its behalf and it therefore follows that the 2nd defendant is NOT before this court under the rules of this court as set out in Order 1 rule 13 and Order 9 rule (2) (c) the laws of Kenya and the Company's Articles of Association.
 9. The plaintiff is apprehensive that unless the order of injunction sought is granted, the property the subject matter of this suit may be placed out of her reach and that of the court thus making any judgment in her favour ineffectual as held in Assanad Vs Petit 1989KLR the rationale behind interlocutory injunctions is to keep the status quo so that if at the hearing, the plaintiffs obtain a judgment in their favour the defendant will have been prevented from dealing in the meantime with the property in such a way as to make that judgment ineffectual.
 10. Unless the Honourable Court grants the prayers sought there is a danger that the Plaintiff/Applicant's legal right will be defeated before this court and/or in any subsequent appeals that may arise out of any decision made by this court.
3. The respondents opposed the application through the 1st respondent's replying affidavit dated 19th July 2021 wherein he states that he consulted the plaintiff on a development opportunity in Kiambu and that it was agreed that the defendant would pay Kshs 1,000,000 out of which Kshs 250,000 was to be paid in cash and the balance of Kshs 750,000 be offset against rent for the plaintiff's office space. He states that the Plaintiff's engagement to prepare the joint venture agreement was a specific stand alone engagement with a fee consideration. He further states that the plaintiff offered to discount her legal fees below the published Advocates' Remuneration Order (ARO) schedule and commenced work on the joint venture agreement. He states that the plaintiff wrote to him stating that the fees would be charged in accordance with the 2015 ARO thus giving wrong assurances in order to secure the work engagement. He further states that the plaintiff unilaterally terminated her engagement in the project citing contract frustration.
 4. The application was canvassed by way of written submissions which I have considered. The main issues for determination is whether the defendant's statement of defence dated 26th September 2016 should be struck out and whether the applicant has made out a case for the granting of orders of injunction.



5. The Order 2 Rule 15 of the Civil Procedure Rules provides as follows: -

15. 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.

6. In *Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR* the Court of Appeal set out the principles governing the striking out of pleadings as follows: -

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows: -

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said: -

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable. “

7. The principle emerging from the foregoing authority is that the power to strike out pleadings should be exercised sparingly and only where the court is satisfied that there are no triable issues. I have perused the defence filed in this matter and I am of the view that it raises triable issues with regard to the defendant’s legal representation in the joint venture agreement which should be determined by a full hearing. My take is that a party ought to be given a fair and reasonable opportunity to present its case and that no party will be prejudiced if the matter proceeds to full hearing.

8. On the second issue of whether the applicant has made out a case for the granting of an injunctive relief, Order 40 Rule 1 of the Civil Procedure Rules 2010 provides for the circumstances under which



temporary injunction can be granted. In the case of *Giella Vs Cassman Brown (1973) E.A 358* the court held as follows regarding the granting of temporary injunction: -

“The settled principles therein are firstly that the applicant must show a prima facie case with probability of success at the trial. Secondly, an interlocutory injunction will not normally be granted unless the applicant can show an irreparable injury which cannot be adequately be compensated by damages. Thirdly, if the court is in doubt, it should decide the application on a balance of convenience”.

9. Prima facie case was described in the case of *Mrao Ltd Vs First American Bank of Kenya Ltd & 2 Others (2003) KLR 125* to mean: -

“So what is a prima facie case.....In civil cases it is a case which on the material presented to the court or a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation on rebuttal from the latter.”

10. The applicant’s case is that it entered into a contract for legal services but that the respondents frustrated the contract thus necessitating the filing of the instant suit for breach of contract. The applicant is apprehensive that unless an order of injunction is granted, the defendants might dispose of the suit properties thereby making it impossible to recover any damages that may be awarded by the court.

11. The respondents, on the other hand argued that the applicant has not demonstrated that she has a prima facie case with a probability of success. The respondents submitted that the suit property is charged to a bank and that granting an order of injunction will disadvantage them in as far as meeting their obligations under the loan facility is concerned. In [*Esso Kenya Limited. vs. Mark Makwata Okiya Civil Appeal No. 69 of 1991*](#) by the Court of Appeal stated as follows: -

“The principles underlining the granting or refusal of injunction are well settled in several decisions of the court. Where an injunction is granted, it will preserve or maintain the status quo of the subject matter pending the determination of the main issue before the court. The merits or demerits of granting injunction orders deserve greater consideration. The court should avoid granting orders which have not been asked for in the application before it or determine issues in the suit before the actual hearing. In cases where an award of damages could be adequate compensation, an injunction should not be granted. On an application for an injunction in aid of a plaintiff’s alleged right, the court will usually wish to consider whether the case is so clear and free from objection on equitable grounds that it ought to interfere to preserve property without waiting for the right to be finally established. This depends upon a variety of circumstances, and it is impossible to lay down any general rule on the subject by which the court ought in all cases to be regulated, but in no case will the court grant an interlocutory injunction as of course...”

12. I have perused the record and I note that it is not disputed that the plaintiff’s claim against the defendant is for breach of contract and recovery of the legal fees due. The plaintiff however seeks to restrain the respondents from disposing the suit property on the basis that they might dispose of all the apartments. I however note that the plaintiff did not demonstrate that she is likely to suffer a loss that cannot be quantified in damages. The plaintiff has also not demonstrated that the defendants have no other known assets such that they will not be able to pay any decretal sum that may be passed by the court.



13. In the circumstances of this case, I find that while the plaintiff has made out a prima facie case against the defendants, she has not demonstrated she will suffer irreparable loss if the injunctive orders sought are not granted.
14. With regard to the balance of convenience, I find that it tilts in favour of the party that would suffer greater harm with the outcome of the motion, in this case, the defendant. I am guided by the holding of Ojwang J. (as he then was) in *Suleiman vs Amboseli Resort Ltd (2004) eKLR* 589 where he held that: -

“ A fundamental principle is that the court should take whichever course that appears to carry the lower risk of injustice if it should turn out to have been “wrong” .
15. In sum, I find that the application dated 25th June 2021 is not merited and I therefore dismiss it with orders that costs shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF DECEMBER 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Chege for Defendants Respondents

Mr. Maina for Ikua for Plaintiff.

Court Assistant: Margaret

