



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CASE NO. 21 OF 2017

CHAXTON GEOFFREY KAMAMI MAINA.....PLAINTIFF

VERSUS

KCB KENYA LIMITED.....1ST DEFENDANT

JEED AUTO SPARES LIMITED.....2ND DEFENDANT

EDWARD N. MURIMI.....3RD DEFENDANT

ISHMAEL ELISHA ESİKOTE

T/A HIGH CLASS AUCTIONEERS.....4TH DEFENDANT

RULING

1. Chaxton Geoffrey Kamami Maina, the plaintiff, by this action seek prayers for; a declaration that the sale by public auction of his property L.R. 18111/53 Baraka Estate Phase II Hse No D35, Nairobi was illegal; and an order of injunction to issue restraining the defendants from transfer the property.

2. Before me is a Notice of Motion application dated 7th March 2017. It is brought by the 2nd defendant, Jeed Auto Spares Limited. The order sought by the 2nd defendant is for the striking out of the 2nd defendant from this action on the ground that the plaintiff's action discloses no reasonable cause of action against the 2nd defendant; the action is scandalous, frivolous or vexatious; it may prejudice, embarrass or delay the fair trial of this suit; or it is an abuse of the court process.

3. In its affidavit in support of the application the 2nd defendant stated that the 2nd defendant was neither a purchaser of the property nor did it acquire that property. The 2nd defendant stated that it never attended the auction of the property. Without prejudice the 2nd defendant stated that it made payment on behalf of Edward Njoroge Murimi, the 3rd defendant, at the Kenya Commercial Bank Limited (KCB), the 1st defendant.

4. The plaintiff opposed the application on the sole ground that the 2nd defendant made payment in respect to the purchase by public auction of the property and its presence in this case was necessary for the court to reach the correct adjudication of this case.

ANALYSIS

5. The plaintiff charged his property as security for a loan facility he obtained from KCB. That property was sold by KCB in exercise of its statutory power sale in August 2016. The plaintiff by his amended plaint pleaded that the auction of the property was illegal and fraudulent. The particulars of that fraud are pleaded in that amended plaint as follows:

“PARTICULARS OF FRAUD

a. Selling the property without giving the necessary notices.

b. The account manager colluding to sell the property to a relative (he is a Meru and by the name disclosed the 3rd Defendant is a Meru)

c. Accepting payment from a person who had not bided being the 2nd defendant

d. Selling the property at a gross under value property was valued at Kenya Shillings Fourteen Million (Ksh 14,000,000/= and sold for Kenya Shilling Eight Million (Ksh 8,000,000/=)”

6. The application is based on Order 2 Rule 15 of the Civil Procedure Rules which provides:

“15.(1) 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...**

7. In an application such as the one before me the court should approach it with caution bearing in mind that evidence has not yet been adduced. For the court to accede to the prayer sought the claim that the pleading is frivolous, vexatious or without reasonable cause of action should be plain and obvious. The court should assume the allegations in the pleading are true. In the case **Kivanga Estate Limited v National Bank of Kenya Limited (2017) eKLR** the Court of Appeal considered when pleading can be struck out thus:

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action?” See Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 164.

8. Having looked at the plaint I note that the plaintiff’s case is based on two issues. First that the sale of the property was illegal and or fraudulent; and that the plaintiff had re-paid substantial part of the loan facility.

9. It is not denied that the property was sold in a public auction and the buyer was the 3rd defendant. The 2nd defendant admits it remitted payment for that purchase, to KCB, on behalf of the 3rd defendant. Indeed when one examines the amended plaint it becomes plain and obvious that there is no reasonable cause of action against the 2nd defendant. The plaintiff’s claim is that KCB accepted payment from the 2nd defendant when the said 2nd defendant was not a purchaser of the property. The 2nd defendant’s presence in this action in my view will not be necessary because the burden is on KCB to show why it accepted the payment from the 2nd defendant and not the other way round. It is for the above reason I find the Notice of Motion dated 7th March 2017 merited.

10. The 2nd defendant having succeeded it will be granted costs of the application and costs of the suit.

11. I grant the following orders:

- a. The 2nd defendant is hereby struck out of this suit.
- b. The costs of the Notice of Motion dated 7th March 2017 and the 2nd defendant’s costs of this suit are awarded to the 2nd defendant to be paid by the plaintiff.

DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF NOVEMBER 2019.

MARY KASANGO

JUDGE

Ruling Read in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE 1ST DEFENDANT

..... FOR THE 2ND DEFENDANT

..... FOR THE 3RD DEFENDANT

..... FOR THE 4TH DEFENDANT