



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ENVIRONMENT AND LAND COURT AT MOMBASA
ELC CASE NO. 97 OF 2014

ETHICS AND ANTI-CORRUPTION COMMISSION.....PLAINTIFF

-VERSUS-

LEKYO TOURS COMPANY LTD.....1ST DEFENDANT

SAMMY SILAS MOMENT MWAITA.....2ND DEFENDANT

RULING

1. The plaintiff has moved the Court under Order 2 rule 15 (1) of the Civil Procedure Rules seeking to have the defendants' statement of defence struck out and judgement be entered for the plaintiff as prayed in the plaint. The application is supported by the grounds on the face of it and the affidavit deposed to by Jarso Dida.

2. The grounds inter alia includes that the defence raises no triable issues ; the defence is frivolous and lacks seriousness and that the defence offends the provisions of order 7 rule 5 and is intended to delay the fair hearing of this matter. The applicant in ground 5 pleaded that the investigations undertaken by the plaintiff indicate the 1st defendant illegally allocated the suit property on 20th March 1998 when it was set aside for construction of a public house

3. The application is opposed by the grounds filed on 15th August 2015. In the grounds, the defendant states that they will be greatly prejudiced if the orders are granted. That the application is brought in bad faith and is intended to vex the defendants who have a good defence. They urged the Court to dismiss the application.

4. The parties made oral submissions on 5.5.16. Mr Murei for the applicant submitted that there was no presidential consent as provided for under section 3 of the Government Lands Act (repealed). Further that the law of trust was breached by the 2nd defendant and he is punishable under section 99 of the Penal Code. He relied on the Survey Plan, register of government buildings and letter of allotment issued. He cited the following case law in support of his submissions ;

i. Nbi HCCC No. 380 of 2013; Kenya Commercial Bank vs Suntra Investment Bank Ltd (unreported)

ii. Eld HCCC No. 61 of 2008; KACC vs Kipsirgoi Investment Ltd and another

iii. Eld. C.A No. 288 of 2010; Kipsirgoi Investment Ltd vs KACC

iv. Nak. HCCC No. 43 of 2008; KACC vs Sammy Silas Komen Mwaita and another

Mr Tarus for the defendants submitted they filed their defence in time and they objected to all the averments contained in the plaint. That the present application has not met the grounds for summary judgement but instead the applicant has argued the substantive suit. Lastly that the plaintiff is seeking to evict the defendants from these proceedings and that the Court should pursue justice by determining this matter on its merits. He asked the Court to find that this application is premature and order the suit to proceed to full trial. In a rejoinder, Mr Murei stated that striking out is provided for as long as a party satisfies the criteria. That no single triable issue has been raised in the defence.

The applicant has premised the application under order 2 rule 15 (1) without specifying which of the sub-rules it is relying on. Rule 15 (1) (a) does not require evidence to be adduced. The plaintiff has filed an affidavit in support of the motion meaning the application is not premised under subrule 1 (a).

In the orders sought in the plaint, the plaintiff sought for a declaration that the grant issued over L. R No MN/1/3074 was issued ultra vires the 2nd defendant's statutory powers, is illegal, fraudulent, null and void ab initio. He also prayed for general damages for fraud and breach of fiduciary duty as against the 2nd defendant. In the defence filed at paragraph 4, it is pleaded that "the 2nd defendant executed the grant in the course of the discharge of his statutory obligation/duty as the commissioner of lands". The defendant also denied the particulars of fraud and breaches set out in paragraphs 10, 11, 12 and 15 of the plaint and put the plaintiff to strict proof.

In explaining the breach, the applicant submitted that they undertake investigations which indicated that the 1st Defendant illegally allocated the suit property on 20.3.1998. There was no evidence annexed to show there was any decision reached that made a finding of abuse of office by the 2nd defendant as provided for under section 99 of the Penal Code. Secondly the letter of allotment annexed and dated 20th March 1998 was signed by a Mr. H. B Osodo not the 2nd defendant. In summary, the documents annexed to the affidavit of the applicant do not repispsa demonstrate the alleged illegalities or fraud committed by the defendants.

In the cases cited by the applicant, the decisions of Kipsirgoi Investments Ltd and KACA vs Sammy Komen Mwaita supra, were reached after the cases were heard on their merits. They are not relevant to the present application as this suit is yet to be heard. In the KCB case, Gikonyo enunciated the principles governing the striking out of defences. He cited articles 47, 50 and 159 of the Constitution which requires Courts to pay homage to its care duty of serving substantive justice. The second principle was laid down in the case of D.T Dobie & Co (K) vs Muchira (1982) KLR 1 where the Court of appeal held that striking out should be used sparingly as the Court does not get informed on the merits of the case.

Madam JA is an obiter stated that the Court should aim at sustaining rather than terminating a suit. The applicant stated that the defendant failed to comply with Order 7 rule 5. These requirements ought to be determined during pre-trial directions under Order 11 of the Civil Procedure Rules. From the record, I note that pre-trial directions had not been done. It would be pre mature to rely on non-compliance with the said order to strike out the defence.

In the case of KACA vs James Raymond, P.M Mwilu J. (as she then was) ruled that the land in dispute was not available for allocation and there was no evidence that could be adduced to reverse this position even if that evidence is given by the President himself. She proceeded to strike out the defence. In the present case, as I said earlier, there is no document annexed to show this land was alienated to the government and was therefore not available for allocation to the 1st defendant. Besides the development plan and the building register, the other documents are correspondences written after the allocation was made in 1998. The two documents prior the allocation are not conclusive evidence of alienation.

The foregoing reveals that this is not a clear case where summary judgement can be entered. The matter

will still have to proceed on formal proof. In formal proof, the defendants are entitled to cross-examine on questions of law. The only proper process to determine this matter with finality is to let it proceed for trial on its merits.

I am thus convinced that there are several issues to be determined during the trial e.g whether the 2nd defendant exceeded powers given to him under the law; if there was breach of fiduciary trust and whether there was conflict of interest all matters which have been denied by the defendants. On account of this, I find no merit in the application dated 16.10.2014. Same is dismissed with costs to abide the outcome of the main suit.

Ruling dated and delivered at Mombasa this 27th day of July 2016.

A. OMOLLO

JUDGE