



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
MILIMANI LAW COURTS
CIVIL SUIT NO. 1 of 2016

NELLIE WANJIKU NJUGUNA 1st PLAINTIFF

FRANCIS NJUGUNA 2nd PLAINTIFF

VERSUS

KINGS DEVELOPERS LIMITED.....1st DEFENDANT

ALISAGHER BATANWALLA 2nd DEFENDANT

ZOHER TAHERALI DAWOODBHAI..... 3rd DEFENDANT

R U L I N G

1. The Application before the Court is brought by the 2nd and 3rd Defendants. The Application is dated 16th March 2016 and was filed on the same day, It is brought under ***Order 2 Rule 15(1)(d) and 51 Rule 1 of the Civil Procedure Rules, 2010 and Section 3(3) of the Law of Contract Act, Chapter 23 Laws of Kenya(sic)***. The Applicants are seeking the following Orders:

1. “THAT this Honourable Court be pleased to strike out the Plaint dated 21st December 2015 and filed herein on 6th January 2016 and to dismiss the suit as against the 2nd and 3rd Defendants with costs.

2. THAT the costs of this Application and the suit be provided for

3. THAT this Honourable Court be pleased to make such other or further orders as it may deem just and fit in the circumstances of the case.

2. The Application is grounded on the Affidavit of **Zoher Taherali Dawoodbhai** and on the grounds that:

a) *The proceedings herein to the extent that they seek to enforce an Agreement in respect of an immovable property are an abuse of the process of this Honourable Court.*

b) *The alleged undated Joint Venture Agreement at pages 38 to 48 is not capable of being enforced in light of the provisions of section 3 of the Law of Contract Act, Chapter 26, Laws of Kenya*

c) *In any event, the alleged Joint Venture Agreement is alleged made between 1st Plaintiff and a company being Kings Developers Limited described therein as a limited liability company and thus to the extent the proceedings are against the 2nd and 3rd Defendant, the same are embarrassing and otherwise and (sic) abuse of the process of this Honourable Court; and*

d) *Such other and/or further grounds and reasons as shall be adduced at the hearing hereof.”.*

3. The Supporting Affidavit is sworn by the 3rd Defendant on behalf of the 2nd Defendant and himself. He states that the Parties to the Agreement the subject of the suit was made between the 1st Plaintiff and the 1st Defendant. It is not said but implied that therefore that the other parties are superfluous. The Property to which it relates is LR No 330/317. The Deponent is aware that there was a "Joint Venture" Agreement. At paragraph 8 it is said *"THAT I verily believe that to the extent that these proceedings are aimed at enforcing the said Agreement, the same are incompetent in law and one for striking out."* Paragraph 9 states *"That I have considered the provisions of **Section 3(3) of the Law of Contract Act Chapter 26, Laws of Kenya** and verily believe that the proceedings herein cannot be sustained in law as the Agreement on the basis of which they are founded are in breach of the said section."* The deponent believes that it is a better use of judicial time to have the suit dismissed entirely (paragraph 10) and that *"it is a proper case for striking out of the Plaint and dismissal of the suit as against 2nd and 3rd Defendant"*. Paragraph 12 describes the Affidavit as an Application.

4. The Plaintiffs oppose the Application. The First Plaintiff's Replying Affidavit states at paragraph 5 *"THAT the prayers sought in the application dated 16th March 2016 are highly prejudicial to both the 2nd Plaintiff/Respondent and I"*. She goes on to relate that she entered into the joint venture sometime in the year 2010 and that the 2nd and 3rd Defendants are enjoined by dint of being directors of the first Defendant. She explains that the Joint Venture Agreement was prepared, drawn and attested to by the firm of Kitony Maina Karanja advocates and it is their advice that Kings Developers Ltd, the First Defendant has a counterpart copy of the Joint Venture Agreement and is in a position to available a copy. At paragraphs 13 and 14 she says *"that the 2nd and 3rd Defendant are sued in an individual capacity as co-directors in Skyrock Apartments Limited"* and also *"that they are jointly and severally responsible for their fraudulent actions that fall outside the mandate and objective of Skyrock Apartments Limited"* (sic) ("Skyrock")

5. The Plaint is filed under the Fast Track. The Prayers contained in the Plaint are for:

a) *"an orders that the Defendants render and account for the proceeds of sale of the additional 8 apartments;*

b) *Apportionment to the Plaintiffs of 50% sale of the total proceeds of sale of the additional 8 apartments;*

c) *Interest on (b) above at Court rates from the date of occupancy of the completed houses being July 2013.*

d) *Damages for breach of the joint venture agreement to be assessed by the Court*

e) *Costs of this suit*

f) *Any other and or further relief that this honourable court deems fit to grant."*

5. The Summons was issued on 6th January 2016. Only the 1st Defendant entered Appearance on 28th January 2015. The Affidavit of Service confirms that each of the Defendants was served albeit at the same premises. The 2nd and 3rd Defendants entered Appearance by filing a Memorandum of Appearance on 2nd February 2016. All three are represented by the same firm. The 1st Defendant filed a Defence (on 15th February 2016), the other two did not, and waited until 16th March 2016 to file this Application. Their Statement of Defence was filed later (the file copy is not on the file) and the Plaintiffs

have Replied on 20th June 2016.

6. The Facts as they appear from the Plaint are that the 1st and 2nd Plaintiffs were the owners of the Suit Property (LR 330/317, Thompson Estate, Nairobi). Paragraph 5 of the Plaint avers that the 2nd and 3rd Defendants were directors of the 1st Defendant. That is denied. At paragraph 6 of the Defence the 1st Defendant denies the existence of a joint venture or even a Joint Venture Agreement that was properly executed. Paragraph 4, 5 and 6 set out that the 2nd and 3rd Defendants never entered into an Agreement with the Plaintiffs in this matter (emphasis added). They also say that the Agreement sought to be enforced is not signed, yet the 1st Defendant has not made an application to strike out or dismiss the Plaint. At paragraph 6 it is said the "*the parties to the said Agreement are disclosed and described as the 1st Plaintiff and 1st Defendant*". The Plaint demonstrates that the original executed copy of the Joint Venture Agreement was stolen from the Plaintiffs. The gist of the dispute is that the Plaintiffs put up their property and the Defendants were to develop it. In the event the Defendants went outside the terms of the Agreement and as a consequence have unjustly enriched themselves. The Plaintiffs also allege fraud. In addition, it is pleaded that the Plaintiffs and 2nd and 3rd Defendants set up a landholding company called Skyrock to hold the suit property. The Second and Third Defendants have filed a Defence on 20th June 2016. The Defendants seem to deny every allegation in the Plaint. That demonstrates that there are numerous issues of fact to be resolved. Some of those could be resolved by independent evidence for example the CR 12s, the Records at the Registrar of Companies as well as by the Lands Registry. In relation to the dealings of the natural persons, what was said done and agreed could and may come down to what is revealed by oral evidence. The Plaintiff has not made an Application for judgment in default, therefore, the suit would need to be heard.

7. In order to place oral evidence before the Court it is not necessary for the witness or proposed witness to be a party to the proceedings. However, in this case it is not simply alleged that the 1st Defendant acted through its directors. What is alleged categorically is fraud. That is an allegation against the directing mind of the corporate entity as well. In addition, any finding of fraud, dishonesty or unjust enrichment, could and may justify or give rise to an application for piercing the corporate veil.

Law and Procedure

8 The Applicants rely upon **Order 2, rule 15, Civil Procedure Rules 2010**. Which deals with the Striking out of proceedings. It states:

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, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

9. The Applicants also rely upon **Section 3 of the Law of Contract Act Cap 23, Laws of Kenya**. It provides:

“3. (1) No Suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement un which such

suit is brought, or some memorandum or another thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.

(2) No suit shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods, unless such representation or assurance is made in writing, signed by the party to be charged therewith.

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

(a) the contract upon which the suit is founded-

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act, nor shall anything in it affect the creation of a resulting, implied or constructive trust.....”

The Parties have filed their respective Lists of Authorities containing the following cases:

Applicant's List

1. Nairobi HCC No 195 of 2011, John Wangusi vs Susolo Wabuye & Anor
2. Malindi HCC No 116 of 2015
3. Kisii ELC No 447 of 2014
4. Homabay C A No 2 of 2014
5. Friendship Container Manufactureres Limited vs Mitchell Cotts (K) Ltd 2001 EA 338
6. Nairobi CA No 247 of 2005
7. Nairobi HCCC No 205 of 2001

Plaintiff's List

8. Zingo Investment Limited vs Miema Enterprise Limited [2015] eKLR
- 9 Sunrise Orthopaedic and Trauma Hospital Limited and Another Vs Lectary Kibor Keiyo Lelei [2011] eKLR
10. Joseph Mwangi Thiga v Peter Mungnai Mwangi [2015] eKLR

They have very helpfully attached copies and the Court has considered them.

8. The Plaintiff has filed a Reply to the 2nd and 3rd Defendants Defence. The Third Defendant has filed a Supplemental Affidavit exhibiting the CR 12 for the First Defendant as at 19th October 2012.

9. It is clear that, as alleged by the 2nd and 3rd Defendants there was a contract for the transfer of the Suit Property. That was between the Plaintiffs and a Third Party not party to this suit (Skyrock). That would engage **Section 3(3) of the Law of Contracts Act**. However on the pleaded case there were also agreements in relation to:

- (1) The building project, its existence and parameters
- (2) The profit sharing relating to any future sale of the units developed, alternatively realisation of that project,
- (3) Financing of that Project and
- (4) Issues as to implementation of the project.

Analysis and Decision

12. The relationship between the Parties is complicated. It includes an alleged Joint Venture and also an arrangement whereby a property holding company (Skyrock) was to be incorporated to hold the suit property. The intended Shareholding of that Company is also set out. As set out above, the Plaintiffs seek a variety of remedies. The Defendants have entered appearance and filed their respective Defences, it seems outside the timescales envisaged. The Defendants in the main have pleaded a blanket denial. The positive case put forward is that as directors of the first Plaintiff they cannot properly be enjoined to the suit. The Defences respond to the allegations relating to the Joint Venture Agreement. The Defences do not comply with **Order 7 Rule 5**. The Lists of Documents and Witnesses are not attached and neither are copy documents attached.

13. As stated the Parties have each filed a List of Authorities. In the main they have only tangential relevance to the issues herein. The authority of **ELC 170 of 2014** is distinguishable because in that case the agreement was admitted, here it is not admitted. However **116 of 2015** is relevant as is **ELC 447 of 2014**. They are from courts of equal status and therefore are persuasive. However, the principles that are enunciated and to some extent the Parties are in agreement with are:

- (1) That a limited company is distinct from its directors and shareholders (**Salomon v Salomon 1897** AC 2);
- (2) That in the right circumstances the Court can pierce the corporate veil. Both quote Paragraph 90 of Halsbury's Laws of England 4th Edition that:

“Notwithstanding the effect of a company’s incorporation. In some cases the court will ‘pierce the corporate veil’ in order to enable it to do justice by treating a particular company, for the purpose of litigation before it, as identical with the person or persons who control that company. This will be done only where there is fraud or improper conduct but in all cases where the character of the company, or the nature of the persons who control it, is a relevant feature. In such cases, the court will go behind the mere status of the company as a separate legal entity distinct from its shareholders, and will consider who are the persons, as shareholder or even as agents, directing and controlling the activities of the company.

It is interesting to note that the Second and Third Defendants so called “Further” List of Authorities contains authority setting out that principle even though the main thrust of their argument is that joinder of the agent of a disclosed principal is not right in principle. (**Civil Appeal No 247 of 2005**).

- (3) The corporate veil may be lifted where the private company is founded on personal relationships between the members

14. The prayers sought raise a number of issues which must be considered in analysing whether the Application should succeed. In addition to the prayers and issues set out above, the facts of this case give rise to issues of Equity, **Article 159**, the Court's inherent jurisdiction, the position of the **Evidence Act** on contracts that are partly oral and partly in writing as well as to the principles of Equity, Proprietary Estoppel and Estoppel generally. Also whether the doctrine of part performance applies to the circumstances of this case. The relevant parts of the Evidence Act are in particular **Section 107** et seq which provide:

107. Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

110. Proof of admissibility

The burden of proving any fact necessary to be proved in order to enable any person to give evidence of any other fact is on the person who wishes to give such evidence.

In the circumstances of this case those provisions should to be read with **Section 97** which provides:

97. Written contracts and grants

(1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence

shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

15. Therefore on the face of it, the burden of proving the existence and content of the Joint Venture lies on the Plaintiffs. However, that cannot be the end of the matter. The Defendants as corresponding parties to the various agreements should also have in their power possession and control the documents the Court will have to consider to resolve the dispute. The Defendants have not complied with **Order 7 Rule 5**. In so doing, they have denied the Plaintiffs an opportunity to issue a Notice to Produce in relation to the counterpart contract. In the alternative this Application is premature.

16. The Court takes cognisance of the fact that striking out or dismissing a suit without hearing is a drastic and draconian step. It has the effect of excluding a party from the seat of justice. It is a well accepted principle that it should only be exercised in the clearest of cases. In this case, although it is apparent that the Plaintiffs could benefit from amendment, that is not sufficient reason for dismissing the suit. The fact that the issues are apparent even at this stage means that the Court is bound by **Article**

159(2)(d) which provides; “(2) *In exercising judicial authority , the courts and tribunals shall be guided by the following principles..... (b) justice shall not be delayed....(d) justice shall be administered without undue regard to procedural technicalities.*”. At this stage, any decision on the status of documents that would be available to the Court can only be based on technicalities procedural or otherwise.

17. Further, the proceedings have not reached a stage where it can be stated categorically that the documents alleged do not exist and have never existed. This Court is also a Court of equity and equity will not permit a statute to be used as an engine of fraud (per Lord Denning in **Greenhalgh v Arderne Cinemas Ltd [1951] Ch 286 (CA)** and **Boulton Engineering Ltd v T J Graham .**

18. In addition, what would be the effect if the Court dismissed the suit at this stage? The Plaintiffs could get their house in order and then could re-issue these proceedings. That would not be a sensible use of resources nor within the overriding objective which is that “*The Parties were required to bear in mind the provisions of Section 1A and 1B of the Civil Procedure Act relating to the overriding objective of the court. The parties were required to assist the court to attain the following aims:-*

- a. the just determination of the proceedings*
- b. the efficient disposal of the business of the court,*
- c. the efficient use of available judicial and administrative resources;*
- d. the timely disposal of proceedings and all other proceedings in the court, at a cost affordable by the respective parties; and*
- e. the use of suitable technology”*

per A O Muchelule J in; **Sultan Hardware Ltd v William Murithi Kimani and Charles Adongo Civil Appeal No 150 of 2012, High Court of Kenya at Kisumu**

17. Further, as stated above and in the circumstances of the scenario of a case such as this, the Defendants’ collective failure to produce any documents whatsoever, save for a selectively timed CR 12, raises concerns of bad faith and demonstrates the lack of clean hands.

18. It seems that the Plaintiffs do not have, in their possession, the original transfer relating to the suit property. The Act provides for the agreement on which the suit is brought, to be in writing. It also provides for some memorandum or note thereof signed by the party or duly authorised person. In the circumstances of this case the existence or not of any documents that fit those descriptions can only be verified after discovery, being disclosure by list and/or inspection and /or disclosure by a third party including any disclosure from Sky Rocket and/or the lawyers acting at the time. A definitive analysis and decision can only be made at the end of such an exercise. For the Court to decide that no such document exists at this stage, and on the basis of only affidavit evidence would at this stage be premature and therefore unsafe. For those reasons, the Application is dismissed with costs.

19. Parties to take all steps and comply with directions for preparation of this suit for an early Hearing. To that end the Defendants shall comply with **Order 7 Rule 5** as well as to disclose all documents that relate to LR No 330/317 in particular between 2010 and 2012.

Order accordingly.

FARAH S. AMIN

JUDGE

DATED, SIGNED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2016

In the presence of:

Isaiah Otieno Court Assistant

Mr Saluny HB for Mr Luseno for the Defendants

N/A for Plaintiff Ashitiva & Co on the Record