



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 717 OF 2013

CHARLES JONYO OSICHO.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

KENYA BUILDING SOCIETY LIMITED.....2ND DEFENDANT

JARED MBUGUA RAGOI.....3RD DEFENDANT

RULING

The Application

The application before this Court for determination is a Chamber Summons dated 10th June 2014 brought by the 2nd Defendant under Order 1 Rule 10 (2) and (14) of the Civil Procedure Rules. The 2nd Defendant is seeking orders that its name be struck out of this suit and/or proceedings, and that the costs of this application and the suit against the 2nd Defendant be provided for. The application is supported by an affidavit sworn on 10th June 2014 by Patrick Wanaina, the Assistant Legal Manager of the 2nd Defendant, and is premised on the grounds that the suit against the 2nd Defendant discloses no cause of action and is frivolous, vexatious and otherwise an abuse of the court process.

The said deponent stated that the 2nd Defendant is not the owner of the properties known as Nairobi Block 121/207 or Nairobi Block 121/208, or a party to the lease that are the subject of this suit, and is therefore not a necessary party thereto. Further, that the dispute herein concerns trespass as between the Plaintiff and 3rd Defendant and the prayers sought cannot be enforced as against the 2nd Defendant.

The Plaintiff and the 1st and 3rd Defendants did not respond to or oppose the 2nd Defendant's application.

The Issue and Determination

I have carefully considered the pleadings filed by the 2nd Defendant. The issue for determination is whether the suit against the 2nd Defendant should be struck out. The applicable law in this regard is Order 2 Rule 15 (1) of the Civil Procedure Rules which state as follows:

“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. “

It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 at p. 9 by Madan, J.A.as follows:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

The overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. I have perused the Plaintiff dated 18th June 2013 filed herein by the Plaintiff. The 2nd Defendant is described therein as the developer of the premises on Nairobi Block 121/207, as well as other properties in Komarock Estate (Block 121), which it sold to various purchasers as complete houses ready for occupation and according to plans approved by the 1st Defendant. There is no claim made against the 2nd Defendant in the said Plaintiff, other than the allegation that an enforcement notice that was issued by the 1st Defendant was enforced by officers of the 1st and 2nd Defendants.

In addition, the cause of action in the suit arises from a lease that was issued by the 1st Defendant to the 3rd Defendant of empty space that was left undeveloped by the 2nd Defendant, and which he claims was not available for leasing, and has been developed irregularly by the 3rd Defendant. In addition the Plaintiff in his prayers does not seek any relief as against the 2nd Defendant, and the reliefs sought of a declaration, permanent injunctions, damages and demolition are primarily as against the 1st and 3rd Defendants.

In the premises, I find that the suit herein as against the 2nd Defendant does not disclose any triable issue or cause of action. In addition from the facts as presented in the Plaintiff there is no life that can be given to the case against the 2nd Defendant as it is evident from the Plaintiff that the 2nd Defendant exited the scene long before, and was not involved in the events giving rise to the suit, particularly the issue of a lease to the 3rd Defendant, the impugned construction by the 3rd Defendant, and the dispute as to encroachment as between the Plaintiff and 3rd Defendant.

The suit as against the 2nd Defendant is accordingly struck out and the Plaintiff shall meet the costs of the 2nd Defendant's Chamber Summons dated 10th June 2014 and of the suit as against the 2nd Defendant.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___30th___ day of ___January___ 2015.

P. NYAMWEYA

JUDGE