



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 140 OF 2014**

**EAST AFRICAN SEED COMPANY LTD :::::::::::::::::::: PLAINTIFF**

**VERSUS**

**COUNTY GOVERNMENT OF TRANS-NZOIA :::::::::::::::::::: DEFENDANT**

**RULING**

1. The applicant filed a notice of motion dated 24/11/2014 in which it seeks to have the defendant/Respondent's defence filed in this matter struck out and judgement entered as prayed in the plaint. The applicant had purchased LR NO. 2116/823 from one Karugu Guandai in 2008. The applicant purchased the property after a rates clearance certificate was issued by Kitale Municipal Council, the predecessors of the respondent herein.
2. On 30/3/2011 the municipal Council of Kitale sent an assessment of rates to the applicant indicating that it owed the municipal council; of Kitale Kshs.1,512,716/= in rates arrears and interest. This assessment prompted the applicant to file a suit against the respondent in which it seeks among other reliefs a declaration that no sum is owed by the plaintiff to the defendant and that the rates clearance certificate No. 0051 dated 19/2/2008 is valid. The defendant filed its defence which provoked the current application.
3. The applicant contends that the respondent's defence does not raise any triable issues and that the same is scandalous, frivolous and vexatious and is otherwise an abuse of the process of the court.
4. The respondent has opposed the applicant's application based on the grounds of opposition filed in court on 16/2/2015 in which it contends that the applicant's application is misconceived, vexatious, frivolous, bad in law and is an abuse of the process of the court. The respondent also contends that its defence raises triable issues and that the application amounts to sharp practice whose intention is to defeat the respondent's right to be heard.
5. The parties herein agreed to dispose the application by way of written submissions. The applicant contends in its submissions that the predecessor of the respondent issued a clearance certificate confirming that there were no outstanding rates for the period prior to and including 31/12/2008. It is on the basis of the clearance certificate that the applicant went a head to purchase the property known as LR 2116/823 from Karugu Guandai. The applicant therefore contends that the respondent has no basis for demanding rates arrears from it having issued a clearance certificate confirming that there were no outstanding rates as at 31/12/2008.
6. The respondent in its submissions reiterated what was contained in the grounds of opposition and

maintained that its defence ought not to be struck out because it raises triable issues.

7. I have gone through the applicant's application as well as the supporting affidavit and submissions thereof. I have also gone through the pleadings filed by the respective parties as well as their submissions. It is not contested that the respondent's predecessor issued a rates clearance certificate confirming that there were no pending rates as at 31/12/2008. It is also not contested that the applicant bought LR NO. 2116/823 based on the rates clearance certificate. The issues which emerge for determination are firstly, whether the defence herein raises triable issues or not secondly whether the defence filed herein is frivolous, vexatious and an abuse of the process of court.

8. In considering whether the defence raises any issue, I must go to the defence filed by the respondent. Although the respondent is not disputing that its predecessor issued a clearance certificate, it goes on to say that the certificate was issued on the undertaking by Karugu Guandai that he was to clear the rates an undertaking which he did not honour but instead frustrated efforts by the municipal council of Kitale to recover the arrears of rates. The applicant's contention is that if there was such an undertaking, then the same was illegal is a matter of evidence. This is an issue which has been raised and it ought to be determined at a full trial. There are issues which will arise as to whether a party to an illegal arrangement can benefit from the illegality where the illegality has been brought to the attention of the court. In the **case of Olympic Escort international Co. Ltd & 2 others -Vs- Parminder Singh Sandhu & Another Nairobi Civil Appeal No. 306 of 2002**, the Judges of Appeal held that it is trite that a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide. In the instant case I find that the defence filed herein raises a triable issue. The defence is prima facie bona fide. It ought to go to full trial. This is not a case which can be determined summarily.

9. I have considered the two cases relied on by the applicant. In the **case of Lilian Njeri Mwangi -Vs- Municipal Council of Nakuru , Nakuru HCCC No. 191 of 2003**, the plaintiff had bought a property from a previous owner. The previous owner had wanted to sell the same property to the defendant. A consent to that effect was entered into by the previous owner and the defendant. This consent was subsequently discharged by the court as the defendant did not meet its part of the bargain. The previous owner then sold the property to the plaintiff. The plaintiff had the property transferred to her name after all necessary consents were given by the defendant. The defendant thereafter started hindering the plaintiff's plans to develop the property. She filed a suit against the defendant. The defendant filed a defence claiming that the property in issue was public land. The plaintiff applied to strike out the defendant's defence. Justice Kimaru struck out the defence on the ground that the same was a sham. This is because the defendant had unsuccessfully tried to buy the property from an individual and that it would not turn round and say that the property was public land. The facts in the above case are quite different from the facts in this case.

10. In the case of Abdulrazak Khafan & another -Vs- Supersonic Travel and Tours & Another Nairobi HCCC No. 624 of 2004, the plaintiffs had claimed certain specific amounts from the defendants. The defendants filed a defence in which they raised general denials. The plaintiffs filed an application seeking to strike out a defence. Justice Njagi had no difficulty in striking out the defence because the defendants had been confronted with a claim which was specific. In their defence, they did not say why they did not owe the plaintiffs. Justice Njagi quoted from the Court of **Appeal decision in Magunga General Stores - Vs- Pepco Distributors Ltd (1988 – 1992) 2KAR 89** where it was held as follows;-

***“First of all a mere denial is not a sufficient defence in this type of case. There must be some reasons why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore simply to deny liability without some reason given.”***

11. On whether the defence herein is frivolous or vexatious, it is trite law that a pleading is frivolous when it is without substance or groundless or fanciful and it is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. In the instant case, the defence filed herein is neither without substance nor is it hopeless and lacks a bona fides. The defence raises a triable issue which has been stated hereinabove in this ruling. Striking out of a

pleading is a drastic step which can only be allowed in the clearest of cases. It cannot be allowed in a case like this one. I therefore find that this application lacks merit. The same is hereby dismissed with costs to the respondent.

It is so ordered

**Dated, signed and delivered at Kitale on this 21st day of April, 2015.**

**E. OBAGA**

**JUDGE**

**In the Presence of Mr Bukah for Mr Kidiavai for defendant/Respondent. Court Clerk – Kassachoon.**

**E. OBAGA**

**JUDGE**

**21/4/2015**