REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 311 OF 2004

MAE PROPERTIES LIMITED.....PLAINTIFF

VERSUS

JOSEPH KIBE.....1ST RESPONDENT

PLANFARM INVESTMENTS LIMITED.....2nd RESPONDENT

RULING

Striking out defence for failure to make discovery

[1] By a Motion dated 7th July 2014, the Applicant applied for the following orders:-

a. ***That this Honourable Court be pleased to strike out the Defence filed in the present suit.***
b. ***That the Applicant to be awarded costs of this application and of the suit herein.***

Brief facts

[2] Facts giving rise to the Application are that:-The Applicant filed the suit herein for *inter-alia* an account of the profit made by the Respondents arising from the sale of certain plots, which belonged to the Applicant. The 1st Respondent, who was a director of the Applicant, purchased some plots from the Applicant at prices below market value in his name and through the 2nd Respondent. He later on sold them to third parties at substantial profits. The Applicant claims that; a) in the Statement of Defence filed in the suit herein, the Respondents have not denied having sold the properties to third parties; and b) the documents relating to the sale of the properties to third parties are solely within the Respondents possession.

The Applicant's contentions

[3] The Applicant contends that, on 20th May 2014, this Honourable Court ordered that the parties herein complete discovery of documents within 21 days, ahead of the hearing of this suit on 15th July 2014.The Applicant served the request pursuant to the Order for Discovery on the Respondent's Advocate on 23rd May 2014. But, the Respondents have neglected and/or refused to make discovery of the documents listed in the Order for Discovery. Hence, this application to

strike out the Defence filed in this suit with costs to the Applicant.

[4] The best argument put forth by the Applicant is that, failure by the Respondents to produce the requested documents amounts to a contravention of the Applicants'Constitutional rights. These rights are:

a) **The right of Access to information** in Article 35 (1) (b) of the Constitution of Kenya 2010 which provides that:

35. Every citizen has the right of access to-

(a) .....

(b) Information held by another person and required for the exercise or protection of any right or fundamental freedom.'

c. **The right to a fair hearing** in Article 50 (1) which provides as follows;-

50(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.'

They stated that fundamental rights and freedoms can be enforced between private personsas is the case here. On this, they cited the case of **Mike Rubia& another v Moses Mwangi & 2 others [2014] eKLR.** Accordingly, the Applicant is entitled to these documents in order for the present suit to be conducted fairly.

[5] They also cited the Civil Procedure Act and Rules especially:-

a) Section 1A of the Civil Procedure Act 2010 on Overriding Objectives of the Act which requires the parties to the proceedings to assist the court in achieving the overriding objectives;

b) Section 1B which provides on the duties of the Court to facilitate the just determination of proceedings;

c) Section 22 (a) of the Civil Procedure Act 2010,which gives the court the power to issue orders for discovery of documents, and reads:

'Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party—

a. ***make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence;'***

d) Order 11 Rule 3(2) (d) of the Civil Procedure Rules 2010 which also provides for discovery of documents and states:

(1) In addition to any other general power the court may at the case conference—

(d) Order the giving of evidence on the basis of affidavit evidence or give orders for discovery or production or inspection or interrogatories which may be appropriate to the case;'

[6] The Applicant submitted that,since production of the documents was made pursuant to the orders made on 20th May 2014, it was the duty of the Respondents to have complied with Court orders. Non-compliance thereof by theRespondentswill only attract Court sanction, hence, the application now before the Court. They relied on the case of **ABN AMRO BANK N.V V KENYA PIPELINE COMPANY LIMITED [2014] eKLR**where the court held:

> ***'Discovery as a compulsory disclosure, at the request of a party, of information thatrelates to the litigation in a civil suit is provided for in section 22 of the Civil Procedure Act and Order 11 rule 3(2) of the Civil Procedure Rules, and given the nature of discovery, I would class it as a means of access to information in the sense of Article 35(2) (b) of the Constitution. And as Justice Kimondo J stated in the Oracle productions case, I too conclude that "the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at trial." It, therefore, serves a higher objective as the enabler of fair hearing….the Applicant must; a) identify the information and or documents; and the person holding the information; and d) show that the information and or documents are required for the exercise or protection of a right or fundamental freedom.'***

[7] According to the Applicant, there can never be in law any oral assignment of an interest in land. The 1stRespondentstates in his replying affidavit that he only signed two agreements and purports to haveorally assigned his interest in the rest of the properties to third parties.The Respondents on the 16th October 2014 went on record confirming that the transaction with the third Parties was buy way of an oral assignment. The said oral assignment is invalid as per Section 3(3) of the Law of Contract Act (Cap 23) Laws of Kenya whichstates as follows;

1. ***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;

See the case of **SchonNoorani v DamjiRamji Patel & 2 others (2006) eKLR**where the court considered section 3 (3) of the Law of Contract Act and held the following:

> ***"By virtue of the provisions of Section 3 (3) of the Law of Contract Act (Cap 23) the Applicants' oral sale Agreement for the disposition of an interest in land is unenforceable."***

Chitty on Contracts **Volume 1 page 472 at paragraph 4-40** explains the object of similar provision as follows:

> ***"s 2 of the 1989 Act can be seen as based on a perceived need to protect people from being liable on the basis of oral utterances which are ill-considered, ambiguous or completely fictitious. It was intended to go further and to introduce a greater certainty into the law and stricter formal requirements."***

[8] They asserted that Courts will only enforce that which is lawful. If there is any doubt as to the lawfulness of a transaction it will not be enforceable. This is to protect all the parties to a transaction. Therefore, the court cannot protect the transaction between the Respondent and the third parties on an oral assignment for they are unenforceable and void in law. See the case of **MAPIS INVESTMENT (K) LTD V KENYA RAILWAYS CORPORATION [2005] eKLR** where the Court of Appeal held that if the illegality to a transaction is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality, it matters not whether the Respondent (in our case the Applicant) has stated the illegality or whether

he has not. If the evidence adduced by the Applicant proves the unlawful nature or illegality, the Court ought not to assist the Respondent.In the present case, the Respondent admits contravening the requirements of the law. And the Court should not assist him in his defence. Furthermore, once an illegality is brought to the attention of the Court it ought to be dealt with before the substantive hearing of the issues in question. This was held in the case of **PURPLE ROSE TRADING COMPANY LIMITED V BHANOOSHASHIKANT JAI [2014] eKLR** where the court stated:

> ***"Once illegality is brought to the attention of the Court it overrides all questions of pleadings including admissions made therein."***

[9] Therefore, they urged the court to strike out the Defence herein for it is an abuse of the court process. They were of the view that, the Respondent is misleading the Court by relying on an agreement that is contrary to law, unenforceable and void.The Respondents failed to comply with discovery which is a contravention of the orders the Court made on 20th May, 2014 and by that reason, to allow a full hearing would amount to this Court condoning illegalities. The Court should uphold the principle of fair trial as well as fulfil the overriding objectives of the Civil Procedure Act and the rules made under it. This would be achieved by striking out the Defence herein andawarding costs of the suit tothe Applicant.

Respondents: Our defence should not be touched

[10] The Respondents opposed the application on two fronts. The first one, that, the Applicant ought to have discharged its burden of proof rather than demand from the Respondents to produce documents. The second, the documents sought are non-existence and/or not in the possession and control of the Respondents.They addressed these two matters as shown below.

Non-availability of documents

[11] The Respondents also explained the non-availability of the documents relating to the two properties he purchased. He stated that the documents could not be availed for the reason of their destruction by the previous advocates for the Respondents as deposed in the replying affidavit. The discovery directed by thecourt should be in relation to documents which were under the control and possession of either of the parties and not otherwise. The court could not have issued orders for discovery of documents not in existence. Therefore, theRespondents have not contravened the order of the court as the documents demanded by the Applicant are simply non-existent. This application should just be dismissed with costs.

Burden of proof

[12] On burden of proof, the Respondent relied on the Court of Appeal decision in the case of **ZAKAYOMICHUBUKIBUANGE VS LYDIA KAGUNA JAPHETH & 2 OTHERS (2014) eKLR (see TASH GOELVEDPRAKASH V MOSES WAMBUA MUTUA& ANOTHER [2014]eKLR**) which held that he who alleges must prove. According to the Respondent, this suit was filed on an erroneous belief that he purchased all the plots from the Applicant and on the assumption that the Respondents were involved in the transactions with third parties. Also, the Respondent stated that the *Applicant has made further twin allegations, first that the 1st Respondent purchased the Applicant's properties at a price way below the market value, and secondly, that the 1st Respondent sold the properties at higher prices thus making profits. The Applicant ought to have proved these allegations instead of seeking for production of documents by the Respondents which will support its view of the facts. The procedure adopted is quite unacceptable, un-procedural and contrary to law. The Applicant is simply on a fishing expedition.*

*[13] TheRespondents did not stop there. They argued that, the Applicanthas not shown that the 1st Respondent was involved in the purchase and/or sale of the said properties before it could benefit from any order of discovery.*Article 35 of the Constitution provides for right of access to information held by another person. The applicant must provide proof that the person holds the

information. See also the case of **ABN AMRO BANK N.V VS KENYA PIPELINE COMPANY LIMITED [2014] eKLR**cited by the Applicantthat an Applicant must identify the information and or documents, the person holding the information and show that the information and or documents are required for the exercise or protection of a right or fundamental freedom. See further the case of **N.S.S.F VS SALLY KOSGEY** the court stated that disclosure can only be sought *when there is proof that the other party is in possession and in control of the documents.* **(INTERNATIONAL AIR TRANSPORT ASSOCIATION & ANOTHER vs.AKARIM AGENCIES COMPANY LIMITED & 2 OTHERS [2014]eKLR).**Therefore, without identifying the documents, if any, held by the Respondents (and which documents the Respondents submit and reiterate are non-existent and/or not in their possession or control) and prove that the Respondents had in their possession and control the said documents, production or discovered thereof is not tenable. In any case, the Applicant is a company and ought to keep records of its transactions. The simplest and easiest thing the Applicant could have done is produce such records thereby proving that the Respondents were involved in the impugned transaction. The Applicant failed to do so.For those reasons, the request for production of documents should be denied.

Respondent: Oral assignment of interest in land is lawful

[14] The Respondents also replied to the submissions by the Applicantthat the assignment by the 1st Respondent contravened the provisions of section 3 (3) of the Law of Contract Act. It is worth noting that this section came into force on or about the 1st day of June 2003. Section 3 (7) of the same Act provides that subsection (3) aforesaid is not to apply to contracts that occurred prior to the coming into force of subsection (3). In **MUCHANGA INVESTMENTS LTD v SAFARIS UNLIMITED (AFRICA) LTD & 2 others [2009] eKLR**the Court of Appeal stated:

> ***As regards the application of the Law of Contract Act we think that nothing turns on it, since it came into force on 1st June, 2003 long after registration of the caveat.***

The assignment in the instant case took place long before the commencement of the said section 3(3) of the Law of Contract Act and therefore, the said subsection does not apply to the assignment. The law that applies is the law prior to the commencement of subsection (3) which provided that

> *No suit shall be brought upon a contract for the disposition of an interest in land unless the agreement upon the suit is founded, or some memorandum or note thereof, is in writing and signed by the party to be charged or some person authorised by him to sign it.*
>
> *Provided that such a suit shall not be prevented by reason only of the absence of writing, where an intending purchaser or lessee who has performed or is willing to perform his part of contract.*

The requirement that such agreements had to be in writing as propounded by the Applicant is thus utterly erroneous. There is therefore no illegality as alleged by the Applicant. Those arguments ought to be disregarded. Accordingly, the defence should not be struck out as that would be a drastic measure which should be used sparingly and only on clear cases of irredeemable pleadings. More so, the rules regarding the striking out of pleadings in Order 2 Rule 15 of the Civil Procedure Rules 2010 have not been satisfied. See the case of **KENINDIA ASSURANCE CO. LTD vs. LABAN IDIAHNYAMACHE [2011]eKLR**and the case of **BLUESHIELD INSURANCE COMPANY LIMITED vs. JOSEPH MBOYA OGUTTU (2009)eKLR.**The plea to strike out the defence should be refused too.

[15] Instead, this court should dismiss the suit in its entirety for failure to disclose any cause of action against the Respondents. But despite these failures by the Applicant to prove the allegations it has made, the 1st Respondent, nonetheless,gave an account of the properties he purchased during his tenure as a director of the Applicant Company. He showed interest in purchasing certain

properties owned by the Applicant. But eventually, he purchased only two properties from the Applicant in his name. All the subsequent transactions regarding the sale of the properties in question took place between the Applicant and third parties, to the exclusion and without involvement of the 1stRespondent. The properties were purchased by third parties from the Applicant directly. The 1stRespondent stated these facts in his affidavit. They urged the court to dismiss the application with costs.

DETERMINATION

[16] As I stated in the case of **ABN AMRO BANK N.V vs. KENYA PIPELINE COMPANY LIMITED [2014] eKLR**:

> ***'Discovery as a compulsory disclosure, at the request of a party, of information that relates to the litigation in a civil suit is provided for in section 22 of the Civil Procedure Act and Order 11 rule 3(2) of the Civil Procedure Rules, and given the nature of discovery, I would class it as a means of access to information in the sense of Article 35(2) (b) of the Constitution. And as Justice Kimondo J stated in the Oracle productions case, I too conclude that "the true purpose of discovery is to level the litigation field, to expedite hearing, reduce costs and allow parties to gauge the case they will face at trial." It, therefore, serves a higher objective as the enabler of fair hearing….But such application seeking information and documents is measured on a new yardstick; the Applicant must; a) identify the information and or documents; and the person holding the information; and d) show that the information and or documents are required for the exercise or protection of a right or fundamental freedom.'***

[17] Discovery is an important process in civil litigation and parties should take it seriously. On 20th May 2014, this court made an order that parties do undertake discovery in preparation for the hearing of this case. The Applicant sought from the Respondents discovery of certain documents in the notice dated 21st May 2014. The discovery sought was in respect of five transactions relating to L.R 7785/803, L.R. 7785/958, L.R. 7785/1103, L.R. 7785/1001 and L.R. 7785/1104. The Applicant was convinced that the Respondents did not make appropriate discover as sought and so they applied to have the defence struck out for non-compliance with the order for discovery. I have considered the explanations given by the Respondents, First, the explanation that the documents sought are non-existent is not convincing at all. They merely averred that the documents were destroyed upon the statutory age. They have not provided sworn evidence on the date and the fact of the destruction of the documents by their former advocates or details of the transactions, or details of deducted information of the said documents etc. To me they are just being evasive on the matter. Second, the explanations given that they orally assigned their interest in some of the properties except two, to third parties is also notconvincing. The applicable law before 2003 is as cited by the Respondents. But it seems the state of the law at the time is serving as a perfect excuse for the Respondents to defeat answering discovery. Even if what they are saying were true, there is nothing which is preventing them from providing succinct and specific details of the alleged oral assignments of the lands in question. They Respondents are not being *bona fide* in this respect and are clearly placing on the legal-playing ground, boulders in the hope that theApplicant may not be able to move them, thus, steal a match on the Applicant in this suit. The action and response by the Respondents is just but an attempt to defeat the noble purpose of discovery in the sphere of administration of justice. I should also state that, the arguments presented by the Respondents on burden of proof are completely oblivious of the nature and character of discovery in litigation. Whereas the burden of proof rests with the person asserting, that does not affect the obligation of a party to make discovery of relevant documents and or information in his custody, knowledge or possession for purposes of exercising or asserting a right in a court of law. In fact, discovery is aconstitutional remedy as the enabler of access to information; it is a means of or type of disclosure system of information and documents held by anotherbut which are relevant, necessary and required in enforcing a right in a court of law.

[18] Despite having cited the law on striking out correctly, the tone of the submissions by the

Respondentsseems to suggestotherwise, that;becausestriking out of a pleading is a draconian measure, it should never be granted. The law is; in apt circumstances, a pleading may be struck out by the court in spite of the unpleasant effect of such action if such measure is the only effective sanction a court should take for purposes of attaining justice in the case.But I am reminded that such action should be of last resort and in very clear cases. In that connection, I need not remind that, where there is deliberate disobedience of court orders especially on orders for disclosure, striking out a pleading is an option under what is now commonly known as the ‘’unless orders’’.I do not, however, think the extreme measure of striking out the defence is appropriateat the moment. Instead, I will give the Respondents an opportunity to produce the documents sought as well as provide succinct and specific details of those documents and the oral assignments they claimed they made to third parties. This they should do within 14 days of today. Depending on the response from the Respondents I will give further orders on the matter including a possibility of striking out of the defence if it becomes absolutely necessary and appropriate. Accordingly, the Motion dated 7th July 2014 succeeds to the extent I have expressly stated. Costs of the application shall be paid by the Respondents. It is so ordered.

Dated, signed and delivered in open court at Nairobi this 18th day of May 2015.

F. GIKONYO

JUDGE