



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 70 OF 2013

ALICE WACHICHI KARIUKI ::: PLAINTIFF

-VERSUS-

JOHN MAATHARA MWANGI ::: 1ST DEFENDANT

CONSOLIDATED BANK OF KENYA LIMITED ::::::::::: 2ND DEFENDANT

THE CHIEF LAND REGISTRAR ::: 3RD DEFENDANT

R U L I N G

INTRODUCTION

1. The **Notice of Motion** application before the court is dated **24th October 2014** and filed in court on 28th October 2014 by the 2nd Defendant pursuant to Order 2 Rule 15 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The application seeks the following prayers:-
 1. ***That the Plaint dated 20th February 2013, be struck out and suit be dismissed as prayed in its defence.***
 2. ***That the costs of this application as well as costs of the suit be provided for.***
2. The application is premised on the grounds that the Plaintiff has no proprietary interest in the suit property and therefore is non-suited against the 2nd Defendant. The Plaintiff therefore lacks locus standi in law to bring this suit against the 2nd Defendant. That being so, Plaintiff herein does not disclose any reasonable action in law and is therefore scandalous and vexatious.
3. The application is supported by affidavit of **Janet Mwalimu**.
4. The application is opposed by the Plaintiff vide Grounds of Opposition dated 18th February 201. The 1st Defendant and the 3rd Defendant are ambivalent to this application and did not participate in it.
5. The brief history of the application is as follows. The Plaintiff and the 1st Defendant are wife and husband respectfully. The Plaintiff filed the suit herein seeking permanent injunctive orders against all the Defendants including her husband, who had used the suit property to secure a loan, now Kshs.15,000,000/= from the 2nd Defendant bank. The Plaintiff stated that the suit property is a matrimonial property which was contributed to by herself and her husband the 1st Defendant, and that the 1st Defendant, without here authority or knowledge mortgaged the suit property. This allegation is despite the fact that the suit property is registered in the name of the husband alone. The 1st Defendant having defaulted in repaying the loan, the bank sought to exercise its statutory power of sale of the suit property and the Plaintiff came to court seeking injunctive orders and also

orders which will allow here to be registered as a co-owner of the suit property. This court dismissed the Plaintiff's application holding that the Plaintiff was a busy body with no *locus standi* to bring this suit as she had no interest in the suit property. This court also observed that there was a clear collusion between the Plaintiff and the husband. The husband admitted having taken the loan and put forth the suit property as security without involving the Plaintiff or seeking her authority.

6. Pursuant to the aforesaid Ruling of the court of 7th April 2014, the 2nd Defendant has now filed this application, to strike out the suit herein as against the 2nd Defendant on the grounds that the Plaintiff has no *locus standi* to bring this suit.
7. On her part the Plaintiff submitted that under the Matrimonial Property Act, 2013 she is a co-owner with her husband of their matrimonial home Section 7 of the Act states thus:-

Section 7 “. . . ownership of matrimonial property vest in the spouses according to the contribution of either spouse towards its acquisition. . .”

8. The Applicant also cited Section 93 of the Land Registration Act 2012, which states in part as follows:-

Section 93 (1) (c) “. There shall be a presumption that the spouses shall hold the land as joint tenants . . .”

9. The 2nd Defendant/Applicant on its part submitted that the saving clauses to the Land Act and Matrimonial Property Act protected the rights of parties who entered into contracts before those acts came into operation.
10. I have carefully consider the application before the court. The rule of the thumb is that a court will not strike out pleadings unless the necessity to do that is clear on the face of the record. In this case, the Plaintiff has alleged that the suit property is matrimonial property, and that being so, her rights are protected under the Matrimonial Properties Act. Again her shares in the property are protected under the Land Act. These are allegations worthy of verification. The 1st Defendant admits that the suit property is indeed a matrimonial property, and that the Plaintiff contributed to its acquisition. The extent of the Plaintiff's contribution is an issue to be verified in trial. Indeed it is noted that the Plaintiff has sued also her husband as the 1st Defendant. If she proves a case against her husband who is the 1st Defendant, the presence of the 2nd Plaintiff in these proceedings, at least as an Interested Party, is clearly necessary.
11. When this court on 7th April 2014 delivered a Ruling rejecting the Plaintiff's application for injunctive orders, the said Ruling was based on *prima facie* findings, and on that basis, injunctive prayers were denied, pending the hearing of the suit and production of evidence. So, even though the Plaintiff failed in her application to secure an injunction, the finding by this court that Plaintiff lacked *locus* was a finding pending hearing of the suit. It is not a finding upon which this court can now strike out the suit as against the 2nd Defendant without hearing oral evidence from the parties.
12. Pursuant to the foregoing, I make the following orders:-
 - a. ***The application before the court is dismissed.***
 - b. ***The parties are directed to complete pre-trial directions within 30 (thirty) days.***
 - c. ***Cost of the application shall be in the cause.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 15TH DAY OF MAY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for the Plaintiff

No appearance for the 1st Defendant

Mrs. Ndago holding brief for Issa for the 2nd Defendant

No appearance for the 3rd Defendant

Teresia – Court Clerk