



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
COMMERCIAL CASE NO. 136 OF 2014

MAVJI KARSAN HIRANIPLAINTIFF

VERSUS

MWANALIMA MWINYIKAI CHIRIWACHO.....1ST DEFENDANT

SALIM ALI NYAWA2ND DEFENDANT

RULING

1. The plaintiff has approached this court with a Notice of Motion dated 19th March 2015. By that application the plaintiff seeks that the defendant's Defence and Counter- Claim be struck out and judgment be entered as prayed in the plaint; and for an order of injunction to stop the 2nd defendant from alienating his property namely KWALE/DIANI S. S./414.

BACK GROUND

2. The plaintiff orally agreed to buy from the defendants parcel No KWALE/GALU KINONDO/351 (herein after called the suit property) which the defendant represented as being registered in their names. The agreement was oral because although an agreement for sale was prepared stating that the plaintiff was purchasing the suit property from the defendants for Ksh 25 millions, the plaintiff and the defendants did not sign the agreement for sale.

3. The plaintiff paid to the defendants Ksh 12,909,300 as part payment of the purchase price. Both the defendants signed and acknowledgment of receipt of that amount on 27th June 2014 which was witnessed by J. N. Matara Advocate.

4. As deponed by the plaintiff and which has not been controverted by the defendants, the defendants undertook to have the transfer of the suit property registered into the plaintiff's name. The defendants did indeed provide the plaintiff with a title of the suit property registered in his name. However, on further inquiry the plaintiff found out that the suit property belonged to an entity called Elephant Oil Mills Limited. Before transferring the suit property in the plaintiff's name, as aforesaid the defendant filed a suit in this court being Mombasa Environment and Land Court civil case No 43 of 2014 and in that suit they sought and obtained ex parte, a vesting orders against Elephant Oil Mills Limited. On obtaining that order that the suit property be vested into their names the defendants proceeded to have the suit property registered in the plaintiff's name.

5. Elephant Oil Mills Limited later had the ex parte order set aside and obtained an order nullifying the plaintiff's title to the suit property. As a result of that failed transaction the plaintiff by this suit seeks an order for judgment against the defendants for Ksh 12,090,700.

THE APPLICATION

6. The plaintiff by his application under consideration also seeks an order for prohibition or inhibition to stop the 2nd defendant alienating Parcel No KWALE/DIANI S.S/414. The purpose of that prayer is to ensure that once judgment is entered in favour of the plaintiff in this case, the plaintiff will have an asset to execute that judgment.

7. The defendants filed a defence and counter claim to the plaintiff's claim.

8. In their Defence they confirm they received Ksh 12,090,700 which money they said was intended to assist them to meet the costs of a court case. The defendants then pleaded in paragraph 7 of their Defence as follows:

“The defendants further states that if the plaintiff is claiming any money from the defendants is for the refund of sum loaned/paid to the defendant for the cost of the case HCC (OS) No 109/2005. Mombasa which the defendants are ready and willing to refund.”

9. It follows that the defendants do not oppose the prayer for entry of judgment against them for Ksh 12,090,700. Judgment for that amount will therefore be entered.

10. The plaintiff prayer in the Notice of Motion for prohibition and inhibition to issue in respect of the 2nd defendant's property was not opposed. The defendants did not file any affidavit to oppose the plaintiff's application. Indeed the defendants learned counsel did not attend the hearing of the application. That prayer too will be granted.

11. I approach the prayer for the striking out of the defendant's Defence and Counter Claim being very aware that I can only exercise the power to strike out pleadings in clear cases where the pleadings do not show reasonable cause of action. This is what was stated in the case **BLUE SKY EPZ LIMITED –V- NATALIA POLYAKOVA & ANOTHER (2007) eKLR** where the court stated:

“the power to strike out pleadings is draconian, and the court will exercise it only in clear cases where, upon looking at the pleading concerned, there is no reasonable cause of action or defence disclosed. In the case of a defence, a mere denial or a general traverse will not amount to defence. A defence must raise a triable issue.” underling mine.

12. To consider the plaintiff's prayer for striking out defendant's pleading I need to consider that pleading in detail. The defence, as stated before, amounts to an admission by the defendants to owing the plaintiff Ksh12,090,700. The Counter Claim however refers to the defendants' claim that they are the registered owners of the suit property and further that they are in possession of the same.

13. Since the defendant's did not controvert plaintiffs deposition the court accept them as being correct. Those depositions are that the suit property is registered in the name of elephant Oil Mills Limited and to that end the plaintiff annexed a title document of the suit property to prove that registration.

14. The defendant Counter –Claim is in respect to their claim that they are the registered owners of the suit property and that they are in possession of it. If that is their claim then, the registered owners of the suit property, Elephant Oil Mills Limited ought to be parties to this claim. They are not and since they are not the defendant's Counter- Claim cannot be sustained. In my view the Counter-Claim, which refers to a third party, who is not a party in this cause, will only go towards delaying the fair conclusion of the plaintiff's claim. Since it will cause that delay the same is ripe for dismissal as provided under Order 2 Rule 15 (1) (c) of the Civil Procedure Rules. Accordingly there is merit in dismissing or striking out the defendant's Defence and Counter-Claim as sought by the plaintiff.

CONCLUSION

16. In the end I grant the following orders:

(a) The defendant's Defence and Counter-Claim is hereby struck out with costs to the plaintiff.

(b) Judgment is hereby entered for the plaintiff as prayed in the plaint.

(c) A prohibition/Inhibition is hereby issued in respect to the property KWALE/DIANI S.S./414 pending execution of the plaintiff's judgment herein.

(d) Plaintiff is awarded costs of the Notice of Motion dated 19th March 2015 and costs of this suit.

Dated and delivered at Mombasa this 25th day of June 2015.

MARY KASANGO

JUDGE

25.6.2015

Coram

Before Justice Mary Kasango

C/Assistant- Kavuku

For the Plaintiff:

For the Defendant:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE