



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELC CIVIL SUIT NO. 515 OF 2011

BAKARI KALAMU SULEIMANPLAINTIFF/APPLICANT

VERSUS

JOSEPH MUTUA MAKAUDEFENDANT/RESPONDENT

RULING

1. In the notice of motion dated 8th September, 2014 the Plaintiff/Applicant has sought orders to have the defence and counter-claim by the defendant struck out for disclosing no reasonable defence. The application is brought under Order 2 rule 13(a) and 2 and order 51 rule 1 and 3 of the Civil Procedure Rules. The application is supported by the grounds on the face of it and the supporting affidavit.
2. The application is opposed by grounds of opposition filed by the defendant. The defendant contends in his grounds that his defence raises triable issues in law which can only be determined after a full trial. The issues of law alluded to by the defendant includes the doctrine emanating from the case of ***Inward and Others Vs Bakar (1965) /ALLER 488***. Secondly the defendant says another triable issue is whether a party who fails to fulfill a contractual obligations can raise an irregularity based on that failure to obtain an advantage.
3. The advocates on record made oral submissions for and against the application. Mr. Masika for the applicant submitted that it is not contested that no consent of the Land Control Board was obtained within the time provided. It is also not contested that some consideration was paid but how much was paid is not agreed. Lastly that the defendant is in occupation and the defendant is holding the original title deed. He submitted further that the law applicable is section 6 and 22 of Cap 302 of Laws of Kenya adding that principles of equity is applicable only where there are no statutory provisions. He urged the Court to allow the application and enter Judgment in favour of the plaintiff.
4. In opposition, Mr. Aziz submitted that it is only during a full trial where explanation can be given why consent was not obtained. He also submitted on whether a party in breach of the law can come to Court and rely on that law to lock out an innocent purchaser. Further, that the defendant will address the Court that the lack of consent does not deprive him of the proprietary rights. Mr. Aziz continued that striking out goes against the overriding objectives of this court and urged the court to dismiss the application.
5. In reply, Mr. Masika submits that the fact of the vendor failing to obtain the land control board consent does not change the position in law. Further the defendant has not taken any steps to apply to extend the time for getting consent. Lastly that whether the land is developed or not is not relevant to the fact of the

contract that is null and void. He urged that there are no triable issues and the application be allowed.

6. The motion was brought under Order 2 rule 13. Rule 13 refers to close of pleadings therefore irrelevant in the circumstances. The court shall proceed on the premise that the application is brought under Order 2 rule 15. Rule 15(1) provides that at any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that;

“(a) It discloses no reasonable cause of action or defense in law.

Sub rule (2) (a) No evidence shall be admissible on an application under 1(a) but the application shall state concisely the grounds on which it is made”.

The present application is asking the Court to strike out the defence and counter-claim for disclosing no defence or claim.

7. The case law in place has also held that courts must act with restraint in striking out suits/defences as striking out is seen as a draconian process. This was expressed in the case of **Ranji Megji Gudka Ltd. Vs. Alfred Morfat Muchira & 2 Others (2005) eKLR** where the Court of Appeal held as follows;

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given careful consideration by this Court in DT Dobie and Company (K) Ltd Vs Muchina (1982) KLR in which Madam J.A. at page 9 and said:-

The court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a cause of action or being otherwise an abuse of the Court process”.

8. This court is tasked to determine the matter raised by the plaintiff that the failure to obtain the relevant land control consent made the transaction between him and the defendant null and void therefore there can be no defence to his claim. The defendant on his part has alluded to having a good defence for the reason that the doctrine of equity protects him and that the applicant should not be allowed to use his failure to perform his obligation to use the provisions of the law to his benefit. The two major issues here; are that; there was no consent obtained and that the defendant is in occupation of the land. The defence pleaded in his grounds of opposition filed that there is a good reason why the consent was not obtained and he had made efforts to have the plaintiff provide the consent.

9. In one of the prayers in the plaint reads

“(a) A declaratory order declaring the sale agreement between the plaintiff and the defendant dated 6/7/07 as null and void”

(b) The defendant or his agent be evicted from the suit premises known as Kwale/Ukunda/4083 at the defendants costs”.

In the defence statement at paragraph 9, the defendant denied every allegation contained in paragraph 7, 8, 9 10 and 11. In paragraph 10 it is stated, **” For the reasons aforementioned, the defendant shall rely on the principle of estoppel, the doctrine of legitimate expectation as well as the doctrine of natural justice”**, and enumerated the particulars in 10(i) – (iv). Does this defence raise a triable issue? In my view I think so for instance raising the doctrine of estoppel. It is also held in the jurisprudence of this Country that where a defence raises any one triable issue the case should be allowed to proceed to full trial.

10. Further besides the striking out of the defence, the applicant is seeking to strike out the defendant's suit as contained in the counter claim. The oxygen principles of the Civil Procedure Act and Article 50(1) of the Constitution provides for a right to a fair hearing. In striking out the counter- claim will obviously

amount to a denial of that right. In any event if the application is allowed, this matter still has to proceed to be heard on formal proof for the plaintiff to prove his case on the required standards. The law allows the defendant to participate during the formal proof. The result of which is conducting a hearing so the courts time is not saved as it's envisaged by the applicant in this application. I am therefore not satisfied the application has merit and do hereby make an order dismissing it with costs to the defendant.

Ruling dated, delivered and signed at Mombasa this **30th** day of **July, 2015**.

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A. OMOLLO

JUDGE

In the presence of:-

Learned Counsel for the Plaintiff/Applicant

Learned Counsel for the Defendant/Respondent

Court Assistant Jescah