



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 100 OF 2020

FAMILY SHADE AFRICA LIMITED.....PLAINTIFF

=VERSUS =

JAMES GITAU MUKURIA.....1st DEFENDANT

JANE WANJIKU GITAU.....2nd DEFENDANT

RULING

1. This ruling is in respect of the Plaintiff's Notice of Motion dated 9th July 2021. The application seeks the following orders:

i) THAT the Honourable Court be pleased to strike out the Defence filed herein and judgement entered in favour of the Plaintiff against the Defendants as prayed in the plaint.

ii) That the costs of this Application and of the suit be awarded to the Plaintiff in any event.

2. The Application is premised on six (6) grounds on its face which are explicated in the supporting affidavit of **William Mureithi** a director of the Plaintiff company and sworn on 9th July 2021.

3. The Defendants are opposed to the Application and in so doing they have filed a Replying Affidavit sworn by the 1st Defendant on 3rd November 2021.

4. During the hearing of the application counsel for the parties were directed to make oral submissions in respect to the same. **Learned Counsel Mr. Mungai** made oral submissions on behalf of the Plaintiff while **Learned Counsel Mr. Owoucha** submitted on behalf of the Defendants.

5. It was the Plaintiff's submission that the defence filed herein is a sham and there were no triable issues capable of raising a defence. Counsel submitted that the Plaintiff is a purchaser for value without notice of any defect in title since the Plaintiff had purchased the property through a public auction on 28th May 2015 and the property was subsequently transferred on 16th July 2019, the time period for challenging the sale had lapsed.

6. Counsel for the Plaintiff further submitted that the issue of spousal consent having been raised by the defendants was immaterial and cannot amount to a triable issue. Counsel concluded his submissions and urged the Court to consider the reasons advanced and the contents of their supporting affidavit and strike out the defence.

7. It was the Defendants contention that the defence raised serious triable issues and that before striking out the same, the Court ought to look at the defence on record and consider whether it is worth a hearing. Counsel further referred to paragraph 18 of the Defence which had stated that there was another suit challenging the legality of the sale. The suit had been filed before the High Court vide **High Court (Commercial and Tax) Case No. 230 of 2019.**

8. The Defendants further submitted that lifting of the caution against the suit property did not in any way validate the sale. It was the Defendants further contention that the defence raised at least three triable issues which included the following; whether the charge was lawfully established, whether the spousal consent was obtained and required at the point of establishing the charge and whether the purported sale by auction was in strict compliance with the laws of the land.

9. I have considered the application, the supporting grounds and those in opposition. I have also considered oral submissions by parties and

the decisions relied on. The applicant has moved this court under Order 2 rule 15 (1) b, c and Order 7 rule 5 of the Civil Procedure Rules to strike out the Respondents' defence. The rule provides that a party may at any stage of proceedings apply to strike out pleadings for disclosing no reasonable cause of action; being scandalous, frivolous or vexatious; for being prejudicial or embarrassing or for being an abuse of the court process.

10. The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In ***Postal Corporation of Kenya v I. T Inamdar & 2 Others [2004] 1 KLR 359***, the court stated that the law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.

11. In ***Olympic Escort International Co. Ltd. & 2 Others v. Parminder Singh Sandhu & Another [2009] eKLR***, the court opined that a triable issue is not necessarily one that the defendant would ultimately succeed on but it need only be bona fide.

12. In ***The Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa (Civil Appeal No. 54 of 1999)*** the Court of Appeal stated:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court”.

13. In ***Yaya Towers Limited v Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000)*** the same court expressed itself thus:

“A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved”.

14. Similarly, in ***D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another [1980] eKLR, Madan JA***, stated:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”.

15. Having perused the defendants' defence, it is evident that striking out the same without hearing the parties would be draconian since the same discloses triable issues that can only be determined after trial. Taking all the above into account, I do not consider this to be a proper case for striking out the said defence.

16. The upshot of the above is that the Notice of Motion dated 9th July 2021 is devoid of merit. It is accordingly dismissed with costs to the Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 15TH DAY OF FEBRUARY 2022

E. K.WABWOTO

JUDGE

In the presence of: -

Masinde h/b for Mungai for the Plaintiff.

N/A for the 1st & 2nd Defendants.

Court Assistant; Caroline Nafuna.