



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MALINDI
CIVIL SUIT NO. 7 OF 2015

AMINA MOHAMED HARITH.....PLAINTIFF

VRS

CHAKAMA RANCH COMPANY LTD & 4 OTHERS...DEFENDANTS

RULING

This suit was filed on 9th February 2015. The plaintiff obtained leave to institute the proceedings as a pauper as well as leave to institute this suit on behalf of and for the benefit of Chakama Ranch Company Limited. The 2nd defendant, Nyamu & Nyamu Company Advocates entered appearance on 16th March 2015 and contemporaneously filed a notice of preliminary objection. The main issues being raised in the preliminary objection are that:-

1. The plaintiff is not a client of the 2nd defendant and therefore cannot seek the information being sought in her application dated 9/2/2015.
2. That compliance with the orders being sought by the plaintiff will violate advocate-client privilege.
3. The plaintiff was not a party to the sale transaction and lacks *locus standi* to file the suit.
4. The suit is incompetent as the plaintiff failed to obtain resolutions of the company.
5. No dates are provided in the plaint and the suit is time barred.
6. The plaintiff misled the court by claiming that she is a pauper yet she has engaged an advocate.
7. That the suit and the application are frivolous, scandalous, vexatious, misconceived and wanton abuse of the court process.

Mr. Kitonga, learned Senior Counsel for the applicant submitted that the 2nd defendants were advocates for Chakama Ranch Company Limited and not the plaintiff as an individual. There is no advocates-client relationship between the two parties. Even if the plaintiff is a director or shareholder of Chakama Ranch, that does not entitle her to the information being sought as the same is privileged. Section 134 of the Evidence Act protects the relationship between the 2nd defendant and the company. It is only Chakama Ranch that can seek information from the 2nd defendant.

It is further submitted for the 2nd defendant that the order granting leave to the plaintiff only allowed her

to file the suit but does not empower her to obtain information from the 2nd defendant. Mr. Kitonga maintains that the suit is time barred as it is based on contract. The cause of action arose in 2008. Six years have since elapsed. The plaintiff has gone around the issue of limitation by alleging fraud. Counsel relies on the Case of **King Woolen Mills Ltd & Another v Kaplan and Straton Advocates; [1990 – 1994] E.A 244.**

Miss Marubu, counsel for the plaintiff opposed the preliminary objection. Counsel filed written submissions. It is argued in the submissions that this is a derivative suit and it is filed for and on behalf of Chakama Ranch Company Ltd. This settles the issue of *locus standi* as well as the issue as to whether the plaintiff was a party to the suit.

On the issue of limitation, counsel contends that the action is brought to recover proceeds of sale of land. Under section 19 of the Limitation of Actions Act, such a suit can be brought within 12 years and therefore the suit is not time barred. Further, it is due to the lack of information that has caused the delay in filing the suit.

The record shows that apart from the 2nd defendant, none of the other four defendants have entered appearance or filed their respective defences. On 17/3/2015 the matter was listed for hearing of the plaintiff's application dated 9/2/2015. Miss Luta, state counsel, appeared for the 3rd, 4th and 5th defendants but had not filed any document to that effect. One Joseph Kasena Yeri alleged to be the Chairman of Chakama Ranch Company Limited but has since then failed to appoint any advocate.

The gist of the preliminary objection is that Chakama Ranch Company Limited is a Corporate personality different from the plaintiff. The 2nd defendant was instructed by the company and is not under any duty to disclose any information to the plaintiff. It is also premised on the provisions of section 134 of the Evidence Act which provides for privilege of advocates.

As indicated herein above, there is no information from the defendants. The defendants were duly served but non has filed its defence. As held in the Case of **Rawal V Rawal 1991 KLR 24**, a point in *lamine* must be one which when accepted, avoids the necessity of the hearing of the matter pending for determination. In other words, such a point determines the dispute and hence dispense with the necessity for hearing the matter. The 2nd defendant seeks to have the plaintiff's suit struck out mainly against him. The main issue is whether by having the 2nd defendant deleted from the pleadings or in other works having the suit against the 2nd defendant struck out, this will dispense with the need to have the dispute between the plaintiff and the 2nd defendant heard.

Mr. Kitonga made reference to the Case of **Mukisa Biscuit Company Limited V West End Distributors [1969] E.A 696.** It was stated by law JA in reference to preliminary objection as follows:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

In same Case, Sir Charles Newbold, J. A states as follows:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

There is no issue of jurisdiction being raised in the preliminary objection. The 2nd defendant has not filed any replying affidavit to the plaintiff's application or defence to the suit. Even the contention that he was instructed by Chakama Company Limited but not by the plaintiff cannot be ascertained at this stage. There is no document from Chakama Ranch Company giving instructions to the 2nd defendant. This can only be established when parties respond to the plaintiff's suit. The plaintiff contends that a deposit of Ksh.13 million was paid to the shareholders. It appears that the plaintiff is aware of that payment and it was done through the offices of the 2nd defendant. There is also the contention that the 2nd defendant, apart from being the advocate for Chakama Ranch Co. Ltd also doubled up as the Company Secretary. The plaintiff further contends that she has made several visits to the plaintiff's offices with a view of knowing the status of the balance of the purchase price but all in vain. It is also contended that there is a possibility either the government failed to remit the balance of the purchase price or that the same was remitted to the 2nd defendant who failed to disburse the money to the shareholders.

Given all those and other allegations against the 2nd defendant, it is clear that the striking out of the suit against him will not dispose the suit against him. There is even the possibility that the other defendants might indicate that the funds were released to the 2nd defendant and if he is excused from the suit at this stage, there could be need to having him re-enjoined in future so that he can explain to the other defendant the whereabouts of the funds.

The pleadings show that on 24/4/2012 the second defendant wrote to the Registrar General seeking to know the Directors of Chakama Ranching Company Ltd. The response by the Registrar of companies dated 26/4/2012 indicate that the plaintiff is one of the directors holding 800 shares out of the 4000 ordinary shares share capital. The sale transaction started in 2007. On 17/10/2007, ksh13 million was paid as deposit. Since then nothing has happened. It is clear to me that the matter cannot be held to be time barred. The defendants have opted to keep quiet and there is no indication as to whether the contract was rescinded. Further, the plaintiff is seeking prayers to the effect that either the balance be paid or the agreement be rescinded. The claim is partly for payment of the balance of sale proceeds of land transaction and falls within the ambit of section 19 of the law of Limitation Act. Under section 19, the limitation period is 19 years.

The only point of law raised in the preliminary objection is the contention that the communication between the 2nd and the Chakama Ranching Co. Ltd is privileged and that Chakama Ranch Company is different from the shareholders. The rest of the issues being raised are purely factual and can only be dealt with after the matter is heard. The plaintiff obtained leave to initiate this suit on behalf of Chakama Ranch.

There is no averments that the shareholders of the company are opposed to the filing of this suit. On the issue as to whether the plaintiff is a pauper or not, that cannot be a preliminary point which can lead to striking out of pleadings. It is an issue that must be canvassed during the hearing and if the plaintiff is not found to be a pauper, the court can call for all the required court fees.

In the end, I do find that the preliminary objection lacks merit and is not entirely based on points of law. The application is hereby dismissed. In order to properly manage the proceedings herein, I do order that the defendants file their respective defences and reply to the plaintiff's application dated 9/2/2015 within twenty one (21) days hereof. In the event that no defences or responses are filed as directed herein, the plaintiff shall be at liberty to proceed ex-parte and request judgment against the defaulting defendants. Costs shall follow the outcome of the main suit.

Dated, signed and delivered at Malindi this 23rd day of July, 2015.

SAID J. CHITEMBWE

JUDGE