REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 813 OF 2002

SYMON THUO MUHIA……...……1ST PLAINTIFF

MARY NJOKI THUO……..….2ND PLAINTIFF

Versus

HOUSING FINANCE COMPANY OF KENYA LTD…DEFENDANT

RULING

[1] Before me is the Plaintiffs' application dated 18th November 2014. The application seeks the following orders *inter alia*;

> **1. THAT paragraphs 3 to 19 of the defence struck out an judgment be entered for the Plaintiffs in terms of prayers (a), (b), (c) and (g) of the Plaint.**
>
> **2. ALTERNATIVELY, paragraph 15 of the defence be struck out and judgment be entered in favour of the Plaintiffs in terms (a), (b), (c) and (g) of the Plaint.**
>
> **3. THAT the costs of this application be provided for.**

[2] The application is expressed to be brought under Sections 1A and 1B of the Civil Procedure Act and Order 51 Rule 1 of the Civil Procedure Rules. The application was further supported by the affidavit of Symon Thuo Muhia sworn on 18th November 2014.

Brief facts

[3] The issues raised in the instant application emanated from the Plaint filed by the Plaintiffs on or about 28th June 2002. In the Plaint, it was provided that the Defendant had on 3rd November 1994 made an offer to the Plaintiff for the amount of Kshs 1,200,000/- which amount was to be secured by a charge over the suit property. Subsequently a charge was created over the suit property, which charge instrument was dated 5th December 1994 and registered on 7th December 1994 as IR 52533/4. The offer dated 3rd November 1994 was accepted by the Plaintiffs on 5th December 1994. It was the Plaintiffs contention at paragraph 12 of the Plaint that the charge was registered without the requisite consent from the Land Control Board as the suit property was agricultural land requiring consent as provided under the Land Control Board Act. They therefore sought for the striking out of paragraphs 3-19 of the Defendant's Defence, or in the alternative paragraph 15 of the said Defence, and judgment in ether event be entered in favour of the Plaintiff in terms of prayers (a), (b), (c) and (g) of the Plaint.

Applicants' gravamen

[4] The best argument presented in support of the application is that; the charge instrument dated 5th December 1994 and registered on 7th December 1994 as IR 52533/4over LR No 3591/22 (hereinafter ''the suit property'') was null and void for all purposes owing to the failure to obtain consent from the Divisional Land Control Board to charge the land. It was argued that, therefore, the charge and/or agreement were of no legal effect. Thus, the charge registered against the title of the suit property was invalid. It was deposed that there was no application made to the Land Control Board for the charge to be created over the suit property and therefore there was no consent granted for the creation of the charge as provided for and required by law. The Applicants reinforced their said position through their submissions dated 4th March 2015 and supplementary submissions dated 19th March 2015. They cited Section 6 of the Land Control Board Act, Cap 302 of the Laws of Kenya as well as the decisions in **Onyango & Another v Luwayi [1986] KLR 513** and **Karuri v Gituru [1981] KLR 247**. According to the Plaintiffs, it was a mandatory requirement for the consent of the Land Control Board to be obtained prior to the registration of any charge or mortgage against the title of the suit property. The charge herein was created in contravention of the law.

Respondent says charge is OK

[5] The application was opposed through the Defendant's Replying Affidavit of Martin Machira. It was the Defendant's contention that the charge was legally and validly registered and is enforceable against the Plaintiffs. It was deposed to that the letter dated 9th May 2003 from the Chief Land Registrar Nairobi, confirmed that the charge was validly created, and the pre-requisite conditions as set out under the provisions of the Registration of Titles Act (now repealed) had been complied with. They argued that the registration of the charge was *prima facie* evidence that the requisite consent had been obtained, and that any questions as pertaining to the validity or otherwise of the charge document would be better disposed of at the hearing of the suit. Therefore, the application was premature. Again, they argued, that the Plaintiffs were acting in bad faith in seeking to nullify the charge instrument at this juncture. Furthermore the application was without merit and an abuse of the process of the Court.

[6] The Defendants filed dated 9th March 2015. They submitted that the application to strike out certain paragraphs of the Defendant's defence would not only deny the Defendant an opportunity to extensively defend its case, but also amounted to a denial of justice. It was submitted that the issues raised in the application would best be disposed of with the benefit of a hearing. In any event, however, the Plaintiffs had failed to meet the test required for striking out paragraphs of the defence. As to whether the consent of the Land Control Board was required, it was submitted that it was incumbent upon the Plaintiffs to show that the suit property was agricultural land which required consent of the Land Control Board. They added that the letter dated 22nd February 1990 only pertained to the transfer of the suit property. With regards to the validity of the charge, it was submitted that under the provisions of Section 20 of the Land Board Control Act, and further with reference to the letter by the Chief Land Registrar Nairobi dated 9th May 2003, the registration of the charge as against the title of the suit property was conclusive and irrefutable proof that the pre-requisites were met and/or satisfied. Reliance was placed on the case of **Tulip Apartments Ltd v Southern Credit Banking Corporation Ltd (2009) eKLR,** In the absence of evidence that the charge was registered by fraud or misrepresentation, the same would be deemed as conclusive evidence by the Court.

DETERMINATION

[7] The Plaintiffs have sought striking out of paragraphs 3 to 19 of the Defence which relate to the agreement between the parties and that judgment be accordingly entered in favour of the Plaintiff in terms of prayers (a), (b), (c) and (g) of the Plaint. The reason given is that the Defendant cannot possibly have any defence to the Plaintiffs' claim given the fact that there was

no consent that was applied for and obtained from the relevant Land Control Board as required under the Land Control Act. They cited the case of **Onyango & Another v Luwayi** (supra), and also the case of **Karuri v Gituru** (supra).

[8] Although the application seeks striking out of only paragraphs 3 to 19 of the Defence, it is essentially a request to strike out the entire defence because those paragraphs carry the essential core and content of the defence. And, the reason given also falls within Order 2 rule 15 of the Civil Procedure Rules. I will, therefore, determine the application from that perspective. The powers of the Court to strike out pleadings is to beexercised sparingly and cautiously so as not to send a deserving defendant away from the seat of judgment arbitrarily. Under Order 2 Rule 15 of the Civil Procedure Rules, the Court may strike out or order for the amendment of pleadings if it is of the opinion that the same is frivolous, vexatious, scandalous, does not disclose any reasonable cause of action or defence, may embarrass or delay the trial of the action or that the same is an abuse of the process of the Court. The said Order 2 Rule 15 sub-rule (1)(a)- (d) reads;

> **At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-**
>
> **(a) it discloses no reasonable cause of action or defence in law; or**
>
> **(b) it is scandalous, frivolous or vexatious; or**
>
> **(c) it may prejudice, embarrass or delay the fair trial of the action; or**
>
> **(d) it is otherwise an abuse of the process of the court,**
>
> **and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.**

[9] See cases such as **DT Dobie & Co Ltd v Muchina & Another [1982] KLR 1**Madan, JA (as he then was) that;

> **"The power to strike out should only be exercised after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.'"**

Also the case of **Republic of Peru v Peruvian Guano Company 36 Ch. Div 489**which Madan, JA referred to that;

> **"It has been said more than once that the rule is only to be acted upon in plain and obvious cases and in my opinion the jurisdiction should be exercised with extreme caution."**

And the case of **Moore v Lawson & Another (1915) 31 TLR 418**that;

> **"It is a very strong power indeed. It is a power which if it is not carefully exercised might be conceivably lead a court to set aside an action in which there might be after all be a right and in which the conduct of the defendant might be very wrong and that of the plaintiff might be explicable in a certain way. Unless it is a very clear case indeed, I think the rule ought not to be acted upon…This is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases."**

[10] In consideration of the foregoing, the Court has to take into account the circumstances of the case, without necessarily delving into the merits of case. In this case, the major issue is

whether the charge registered herein was valid and legal. The Plaintiff argues it is not; because consent of the Land Board was not obtained. The Defendant on the other hand asserted that the Plaintiffs have not established that the charged land is agricultural land as defined under Section 1 of the Land Control Act, or that as such consent by the Land Control Board was required as per Section 6(1) of the Land Control Act. They also relied on the letter by the Chief Land Registrar Nairobi dated 9th May 2003 which they said was conclusive evidence that all pre-requisites to the transaction had been adhered to, including the relevant consent, and therefore the charge as registered was valid and enforceable. These issues are contentious and unclear and do not sanctify the court to strike out the defence. They will require resolution in a trial where all parties are given ample opportunity to lay evidence in support of their respective cases. For instance, the issue as to whether the charged land is agricultural land within the meaning of Section 1 of the Land Control Act will require evidentiary material to be presented to, for the court to determine the issue. The letter in question also alluded to some consent which is not quite clear matter; thus, will also need to be unraveled through evidence. My view of the matter is that, validity of a charge herein is better determined in a trial rather than in an application such as this. I do not think this is a clear case where a summary rejection of the defence will serve justice in the suit. In the circumstances, the court is not inclined at denying the Defendant an opportunity to be heard on merit. In line with the thinking in the case of **Kelsey v Foot & Others (1952) AC 345** referred to in **DT Dobie & Co Ltd v Muchina & Another** (supra);

> **"If there is a sufficient substratum of fact to be implied, the offending paragraph in a pleading will not be struck out."**

[11] Accordingly, in consideration of the facts and circumstances of this case, the facts relied upon are obscure which give room for underlying implications of facts that prevents the court to be so sure on the matter as to strike out the offending paragraphs in the defence. The visibility of the issues is impaired; only mirages are seen; there is no clear view of the matter at hand. For those reasons, the discretion of the court is exercised in favour of sustaining rather than striking out the defence. The upshot is that the application by the Plaintiffs is dismissed. I will not, however, make provision for costs given the circumstances of the case. Each party shall bear own costs. It is so ordered.

Dated, signed and delivered in court at Nairobi this 23rd day of July 2015.

F. GIKONYO

JUDGE