



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO. E159 OF 2021**

**CHRISTOPHER NEIL PAPE.....PLAINTIFF/RESPONDENT**

**- VERSUS -**

**MINOLTA LIMITED.....1<sup>ST</sup> DEFENDANT**

**MICHAEL ADEDE.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

**I. Introduction**

1. The 2<sup>nd</sup> Defendant/Applicant filed a Notice of Motion application dated 24<sup>th</sup> January 2022 for determination by this Honorable Court. It was brought under the provisions of Order 1 Rules 9, 10 (1) and (2) and Order 2 Rule 15 (a) of the Civil Procedure Rules, 2010.

**II. The 2<sup>nd</sup> Defendant/Applicant's case.**

2. The 2<sup>nd</sup> Defendant/Applicant sought to have the suit instituted against himself by the Plaintiff/Respondent be struck out on two grounds a). for being a misjoinder; and b). for lacking a cause of action. The application is not grounded on the facts of a Supporting Affidavit. The Deponent averred that the actions of the 2<sup>nd</sup> Defendant/Applicant could not be attributed to the 1<sup>st</sup> Defendant, incorporated as a company by limited guarantee under the provisions of the Company Act, Cap. 486 of the Laws of Kenya and for him being its director. His contention was that the 2<sup>nd</sup> Defendant/Applicant served no purpose in the suit herein since no cause of action had been raised and/or shown against him by the plaintiff/Respondent. For that reason, he argued there was a misjoinder in the suit and his names ought to be struck out from the pleadings thereof.

**III. The Plaintiff/Respondent's case**

3. On 24<sup>th</sup> January 2022, the Advocates for the Plaintiff, the law firm of Messrs. Khalid Salim & Company Advocates filed a three (3) pointer Grounds of Opposition to the application. The Plaintiff urged Honorable court to dismiss the said application by the 2<sup>nd</sup> Defendant/Applicant with costs for being fatally incompetent, incurably defective, frivolous, vexatious, and scandalous and an abuse of the court process. The application ought to be struck out for being filed without a Supporting Affidavit.

**IV. SUBMISSION**

4. On 25<sup>th</sup> January, 2022, while all the parties were present in Court, they were directed to have this Notice of Motion Application dated 24<sup>th</sup> January, 2022 to be canvassed and disposed off by way of written submission. From the records, only the Plaintiff/Respondent complied and a ruling date was reserved by Court.

#### **A. The Written Submission by the Plaintiff/Respondent.**

5. On 2<sup>nd</sup> February 2022, in opposition of the application, the Learned Counsel for the Plaintiff/Respondent filed their written submission dated even date. Mr. Khalid Counsel submitted that the Plaintiff had brought out a clear case of various illegalities directly and personally perpetrated by the 2<sup>nd</sup> Defendant/Applicant on behalf of the 1<sup>st</sup> Defendant as its director. These actions included creating fictitious court proceedings and orders which were used to illegally transfer the deceased properties to the 1<sup>st</sup> Defendant. To buttress his case, the Learned Counsel relied on the case of “**Stephen Njoroge Gikera & another – Versus - Econite Mining Company Limited & 7 others (2018)eKLR**”, where the court held that, where a company committed fraud, the person behind it would be held accountable. That Honorable Court would go behind the mere status of a company as a legal entity distinct from its shareholders to the directors, controlling its activities. The Learned Counsel argued that the 2<sup>nd</sup> Defendant was personally instrumental in perpetuating illegalities and court should not allow him to hide under the doctrine of the corporate veil.

6. The Learned Counsel referred to the provisions of Order 1 Rule 9 of the Civil Procedure Rules, 2010 which provided that a suit could not be defeated by reason of misjoinder. More to that, Counsel submitted that the claim against the 2<sup>nd</sup> Defendant/Applicant served the interest of justice and met the overriding objective. The Counsel argued that no prejudice would be occasioned by the 2<sup>nd</sup> defendant being party to the suit. Further the Counsel denoted Order 1 Rule 3 that provides, persons may enjoined as defendants where relief sought against them arise from the same acts or transactions. The application was termed as a tactic to delaying the hearing of the suit and to deprive the Plaintiff of his right to the suit properties. The Learned Counsel argued that the participation of the 2<sup>nd</sup> Defendant/Applicant was necessary for court to effectively adjudicate over the matter and resolve all issued while avoiding the filing of separate suits over the same subject matter.

7. In conclusion, the Counsel turned to the provisions of Order 51 Rule 4 which provides that every notice of motion shall be supported with an affidavit where the motion is grounded on evidence. The Counsel argued the 2<sup>nd</sup> Defendant/Applicant failed to support the allegations that the he is a director of the 1<sup>st</sup> Defendant/Applicant. The Counsel urged court to proceed to full trial and make a final determination.

#### **V. Analysis and determination**

8. I have considered the Notice of Motion application dated 24<sup>th</sup> January, 2022 by the 1<sup>st</sup> Defendant/Applicant, the response thereto, the written submissions made and the relevant provisions of the law.

The issue before me for consideration is whether the suit against the 2<sup>nd</sup> Defendant can be struck out for being a misjoinder and lack of a cause of action.

#### **Brief Facts.**

9. Prior to embarking on the analysis of the fore going issue for determination, the Honorable Court feels it imperative to provide brief facts surrounding this case. On 14<sup>th</sup> June, 2021, the Plaintiff acquired Grand Letters of Administration Ad Litem, in Succession Cause (Mombasa) No. 431 of 2014 on behalf of the Estate of the late Antony Paul Pape (hereinafter referred to as “The Deceased”). Thereafter, he instituted a Plaint dated 16<sup>th</sup> August, 2021 on behalf of the deceased against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein.

10. At the time of his death, the estate comprised of among other assets – Land Reference No. 841 Section III Mainland North CR No. 39861 – Kuruwiti Kilifi; Land Reference No. 844 Section III Mainland North CR No. 39864 – Kuruwiti Kilifi Land Reference No. 840 Section III Mainland North – Kuruwiti Kilifi (Sub – divided into various portions). Prior to his death he had caused parcel No, 841 Section Mainland II North CR No. 39861 to be sub divided. The Sub – division was complete but just awaiting the issuance of the title deeds. However, on 26<sup>th</sup> April, 2019 when the Advocate for the deceased decided to undertake official search he discovered that the parcels of land had been transferred to the 1<sup>st</sup> Defendant sometimes on 17<sup>th</sup> January, 2019 allegedly by the strength of a Court Decree of the Court issued in Mombasa ELC No. 4 of 2013 dated 18<sup>th</sup> February, 2014 in a case of “**Minolta Limited – Versus – Antony Paul (Junior)**”. At the same time, the Plaintiff realized that the above parcel had been sub – divided into six (6) portions being 9885 to 9890 and titles issued to the 1<sup>st</sup> Defendant. On close perusal, the Plaintiff the

afore said Court documents and acts were all fraudulent as though the case existed by the parties were totally different and the same was still pending and not concluded as alleged by the 1st Defendant. On 24th January, 2022 the Defendants filed their Defence herein and the instant application. That is enough on the facts.

11. Now turning to the issues for analysis. The 2<sup>nd</sup> Defendant/ Applicant has relied on the provisions of Order 1 Rule 9, of the Civil Procedure Rules, 2010 to seek the suit against him struck out. The rule provides thus:-

**“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.**

From plain meaning of this rule, it is clear that a suit cannot be defeated by misjoinder or non-joinder of parties. The clarity of the same is that the suit against the 2<sup>nd</sup> Defendant/Applicant cannot be struck out on that front. From the given facts herein, where apparently, the 2<sup>nd</sup> Defendant/Applicant personally played such a pivotal role in the matter it is critical to have him retained as a party in the suit as his role will effectually and effectively assist this court arrive at an informed decision in the final determination of the suit. By so doing, he will not suffer any prejudices whatsoever.

12. Be that as it may, the Honorable Court now proceeds to determine the main issue, whether the Plaintiff/Respondent has a cause of action against the 2nd Defendant/Applicant. The 2nd Defendant has invoked the provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010 to claim that the Plaintiff/Applicant had not shown any cause of action against him. For the reason that the actions of the 1st Defendant should not be attributed to him as its director, since the 1st Defendant, a Company incorporated under the Company Act, Cap 486 is a body corporate capable of being sued on its own. The Rule provides that:-

**“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.**

13. A reasonable cause of action was defined by the **“Court of Appeal in D.T. Dobie & Company (Kenya) Limited – Versus - Joseph Mbaria Muchina & another [1980] eKLR**, as a cause of action with some chance of success. The court held that:-

***“A cause of action is an act on the part of the Defendant which gives the Plaintiff his cause of complaint.”***

***Words and Phrases, Vol, 1 p. 228.***

***There is some difficulty in affixing a precise meaning to the term reasonable cause of action. In point of law, and consequently in the view of a Court of justice, every cause of action is a reasonable cause. But; obviously some meaning must be assigned to the term 'reasonable'... a pleading will not be struck out unless it is demurrable and something worse than demurrable.”***

The powers of court to strike out pleadings as provided by Court by Order 2 Rule 15 are not mandatory but discretionally. These powers will be cautiously exercised by court only after the party seeking to have the suit struck, presents a plain and obvious case that the pleadings raise no cause of action and the only remedy available is to strike them out.

14. It is well settled that a suit should not be struck out and the Plaintiff/Respondent driven from the judgement seat unless the case is unarguable. It is therefore necessary to consider whether or not the Plaintiff’s suit herein has an arguable case. From the surrounding inferences and facts adduced herein, the Plaintiff filed this suit against the 1st and 2nd Defendants vide a Plaint ‘multi-track’ dated 16th August 2021 seeking judgement against the 1st and 2nd Defendants and orders to restrain them from dealing with the suit properties and cancellation of titles. In a nutshell, the Plaintiff is alleging that the 1st Defendant forged a Mombasa ELC No. 4 of 2013 “Minolta Limited – Versus - Antony Paul (Junior)”, out of the fictitious court file the 1st Defendant entered a non-existing judgement and subsequent decree that he used to illegally transfer the suit properties into the name of the 1st Defendant. These are extremely serious

allegations and out to be treated as such. As indicated above, this is one of those exceptional and a very unique circumstances whereby the presence of the 2nd Defendant/Applicant as a party and not a mere witness or otherwise in the matter is critical and crucial.

15. When considering whether a pleading discloses a reasonable cause of action, the court ought to be careful not to embark on a trial. In **D. T Dobie (supra)** the court held:-

*“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.*

*If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.*

*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.*

16. As stated, court should aim at preserving a suit, in this case the Honorable Court finds that there is a cause of action against the 2nd Defendant/Applicant. Under the contents of paragraphs 21 to 34 of the Plaintiff herein, the Plaintiff has raised serious allegations of fraud against the 2nd Defendant/Applicant personally as a director of the 1st Defendant. These allegations include but not limited to; falsifying a court file together with a judgement and decree that the 2nd Defendant/Applicant used to transfer ownership of the suit properties into the name of the 1st Defendant. This court takes the allegations of fraud very seriously and such allegations can only be proved by producing evidence and through testimonies during trial proceedings.

17. The Plaintiff/Respondent has alleged that the 2<sup>nd</sup> Defendant/Applicant, who is a director of the 1st Defendant directly perpetuated fraud on behalf of company and as such ought to be held personally liable for these actions. The 1st Defendant has a corporate personality cloaked in a veil of incorporation which means that in its dealing it is directly and independently responsible for its acts and its directors are not personally liable. (See the legal ratio in the famous case of **“Salamon – Versus - Salammon (1897) AC 22**). There are instances where the veil can be lifted and the law goes behind the corporate personality to attach responsibility to the individual director, thereby ignoring the separate personality of the company.

18. Therefore, there are instances where a director can be sued in their personal capacity for the actions of company. The Plaintiff/Respondent is tasked with proving his case against the 2nd Defendant/Applicant, to demonstrate to court how one Mr. Michael Adede wore a different hat to avoid legal obligations while hiding under the veil of incorporation. The Plaintiff/Respondent would be tasked at trial to prove on a higher standard of proof how Mr. Michael Adede created the 1st Defendant only to use it as a mask to defraud the estate of his later father of its properties.

## **VI. Conclusion and Disposition**

19. The Honorable Court herein finds that the presence of the 2<sup>nd</sup> Defendant/Applicant is crucial in this case. As stated in Order 1 Rule 10 of the Civil Procedure Rules, 2010 the court has the powers to join any person whose presence in the suit is necessary for the final determination of the issued between the parties. Therefore, the Honorable Court reiterate and finds that the 2nd Defendant/Applicant's presence is necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.

20. The upshot of this ruling, the Honorable Court wishes to make the following directions hereof:-

a) **THAT** the Notice of Motion application dated 24<sup>th</sup> January 2022 by the 1<sup>st</sup> Defendant/Applicant herein is dismissed with costs to the Plaintiff.

b) **THAT** in the fullness of time and going forward, this Honorable Court, “Suo Moto” for its own personal reasons wishes to recuse itself from the matter. The same to be mentioned on 16<sup>th</sup> June, 2022 before ELC no. 1 for reallocation to another Court for further adjudication and/or direction thereof.

21. IT IS ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22<sup>ND</sup> DAY OF MARCH, 2022.

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

**In the presence of:-**

M/s. Yumnah Hassan, the Court Assistant.

Mr. Khalid Salim Advocate for the Plaintiff/Respondent.

No Appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants/ Applicants