



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL SUIT NUMBER 314 OF 2010**

**CATHERINE MUTHONI KINYUA. .... PLAINTIFF**

**VERSUS**

**LUCY MUTHONI KAROBIA. .... 1<sup>ST</sup> DEFENDANT**

**CLAY CITY DEVELOPERS. .... 2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The application before the court is the Notice of Motion dated 14<sup>th</sup> June, 2012. it was filed by the 2<sup>nd</sup> Defendant and it seeks that the court the Plaintiff's suit against the 2<sup>nd</sup> Defendant be struck out with costs on the grounds that the suit as against the 2<sup>nd</sup> Defendant is scandalous, frivolous and vexatious or that it amounts to an abuse of the court process and/or that it is time barred contrary to the Limitation of Actions Act, Cap 22 of the Laws of Kenya.

The Plaintiff/Respondent filed a statement of grounds of opposition in which he asserted that the reliefs sought in the plaint, as against the 2<sup>nd</sup> Defendant, were proper and showed a cause of action. He as well attacked the above application as being incompetent.

Thereafter on 29<sup>th</sup> November, 2012 the parties agreed and the court ordered that the application would be disposed of through written submissions within 14 days. By 22<sup>nd</sup> January, 2013, the Plaintiff had not filed his submissions in opposition to this application as ordered by Odunga J.

When the file was placed before me on 28<sup>th</sup> October, 2013, the Plaintiff had severally failed to file his submissions but the court once again, gave him further indulgence on the said date to 9<sup>th</sup> December, 2013. On this later date he still had not shown interest. The court then fixed the matter for this ruling.

I have carefully considered the grounds upon which the application to strike out the claim against the 2<sup>nd</sup> defendant is based. In paragraph 20 and 21 of the Plaint, the Plaintiff alleges that the Defendants jointly and severally and without authority of the Plaintiff fraudulently and maliciously, sold the Plaintiffs Plot No.115 on L.R. No. 57/34 originally belonging to the 2<sup>nd</sup> defendant. The Plaintiff alleges that the 2<sup>nd</sup> Defendant having already sold the plot to the Plaintiff, remained with no further interest in the plot, to sell to one Becky Waigara. The Plaintiff completes her claim by seeking what she calls a mandamus to reverse or restore the plot back to herself. In the alternative, she seeks compensation by a similar plot in the same locality.

It may be argued that the claim is not properly drawn or that the reliefs sought could have been constructed differently and/or in a more professionally manner. It cannot however, be so easily said that Plaintiff has not demonstrated a prima facie cause of action. In any case, where there is a semblance of a good cause of action, and if there is still time to amend the plaint, a court of law, whose basic purpose is to sustain a suit to give a party access to the seat of justice, will be slow to strike out a plaint. As stated (Obiter) by Madan, J. A. in **Transport Commissioner Vs Gohil [1959] EA 936** the courts aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and is incurable by amendment.

In this case the court is satisfied that the claim against the 2<sup>nd</sup> Defendant is not such a weak case that it is beyond redemption and that it cannot be cured by amendment.

What however has bothered me is the the Plaintiff's professional conduct in the protection of his client's interests in this case. The counsel or firm of advocates representing the Plaintiff, persistently failed to file documents in defence and protection of its client. In other circumstances, such conduct could have led to orders of court that would undermine the Plaintiff's interest in this suit.

Having said what I have said above, I find the application dated 14<sup>th</sup> June, 2012 without merit and hereby dismiss the same. However, due to the poor performance and conduct of M/s Thuita Kiiru & co. Advocates who represented the Plaintiff, I decline to grant the Plaintiff and her counsel costs of this application. Orders accordingly.

Dated and delivered at Nairobi this 24<sup>th</sup> day of March, 2014.

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**D A ONYANCHA**

**JUDGE**