



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

**ENVIRONMENT AND LAND CIVIL CASE NO.235 OF 2011**

ALLOYS MOSETI MATAYA T/A DIPLO GENERAL ENTERPRISES..... PLAINTIFF

VERSUS

KISII HOTEL LIMITED ..... 1<sup>ST</sup> DEFENDANT

THE LAND REGISTRAR KISII CENTRAL ..... 2<sup>ND</sup> DEFENDANT

**RULING**

1. The plaintiff brought this suit against the defendants on 25<sup>th</sup> October 2011 seeking the following reliefs:-
  - a. **A declaration that the destruction of documents showing or bearing the plaintiff as the registered proprietor of the leasehold property Kisii Town/Block II/6, the transfer and registration of the 1<sup>st</sup> defendant as the proprietor of the foresaid property is illegal, null and void and should be cancelled forthwith.**
  - b. **An order of permanent injunction restraining the 1<sup>st</sup> defendant and/or its agents, servants or employees from trespassing, encroaching into and/or in any other way whatsoever interfering with the plaintiff's use, possession and ownership of the property No. Kisii Town/Block III/6.**
  - c. **Cost of the suit.**
  - d. **Interest at court rates.**

In his plaint of the same date, the plaintiff claimed that the plaintiff is trading in the name and style of Diplo General Enterprises and in that capacity, the plaintiff is the registered proprietor of all that parcel of land known as LR No. Kisii Town/Block III/6 (hereinafter referred to as "**the suit property**"). The plaintiff claimed that he purchased the suit property from one Ms. Sabina KenyuriMosesti who was registered as the proprietor of the suit property way back on 14<sup>th</sup> June 1972. The plaintiff claimed that through acts of collusion and fraud involving the 1<sup>st</sup> and 2<sup>nd</sup> defendants, the suit property was transferred to the 1<sup>st</sup> defendant on 25<sup>th</sup> August 2011.

2. Among the particulars of fraud set out in the plaint against the 1<sup>st</sup> and 2<sup>nd</sup> defendants are: destroying and/or removing from the register/file documents bearing the name of the plaintiff as the registered proprietor of the suit property and forging documents to depict the 1<sup>st</sup> defendant as the registered proprietor of the suit property. The plaintiff claimed that following the registration of the 1<sup>st</sup> defendant as the proprietor of the suit property in the manner aforesaid the 1<sup>st</sup> defendant through its agents, servants or employees entered the suit property and pulled down the barbed wire and live hedge that had been put in place to secure the said property and started assembling building materials in readiness to commence putting up a building thereon. The plaintiff claimed that the 1<sup>st</sup> defendant has no rights over the suit property and its entry thereon which,has interfered

- with the plaintiff's peaceful use and enjoyment of the said property is illegal and unlawful.
3. The 2<sup>nd</sup> defendant filed its statement of defence on 3<sup>rd</sup> February, 2012 while the 1<sup>st</sup> defendant filed its statement of defence on 9<sup>th</sup> March, 2012. In its statement of defence, the 1<sup>st</sup> defendant contended that the plaintiff has no *locus standi* to institute this suit as he has no nexus with Diplo General Enterprises. The 1<sup>st</sup> defendant denied that the plaintiff is the registered proprietor of the suit property and contended that the 1<sup>st</sup> defendant is the bonafide registered proprietor of the suit property and that the registration of Diplo General Enterprises concurrently with the 1<sup>st</sup> defendant as proprietor of the suit property was fraudulent. The 1<sup>st</sup> defendant denied that the suit property was at any time registered in the name of Ms. Sabina Kenyuri Mosei as claimed by the plaintiff. The 1<sup>st</sup> defendant denied the plaintiff's claim that it colluded with the 2<sup>nd</sup> defendant to have the suit property transferred to its name. The 1<sup>st</sup> defendant contended that contrary to the plaintiff's claim, it is the plaintiff who acquired title to the suit property fraudulently.
  4. Among the particulars of fraud pleaded against the plaintiff by the 1<sup>st</sup> defendant in its statement of defence are; causing a parallel register for the suit property to be opened, colluding with the 2<sup>nd</sup> defendant to have Diplo General Enterprises registered as the proprietor of the suit property, colluding with the 2<sup>nd</sup> defendant to have Diplo General Enterprises issued with a title deed and using Diplo General Enterprises to falsely acquire parallel registration as proprietor of the suit property. The 1<sup>st</sup> defendant contended that it is the bona fide proprietor of the suit property and that its ownership of the suit property has been notoriously acknowledged on various occasions by the Municipal council of Kisii.
  5. On its part, the 2<sup>nd</sup> defendant merely denied the plaintiff's claim in its entirety and contended that in the event that both the plaintiff and the 1<sup>st</sup> defendant have titles to the suit property then one of the titles must have been acquired fraudulently. The 2<sup>nd</sup> defendant contended further that no notice was served upon it by the plaintiff prior to the institution of this suit contrary to the provisions of section 13A of the Government Proceedings Act, Cap 40, laws of Kenya. The plaintiff filed a reply to the 1<sup>st</sup> defendant's defence in which the plaintiff reiterated that it is trading in the name of Diplo General Enterprises and that it was registered as the proprietor of the suit property procedurally. The plaintiff denied the 1<sup>st</sup> defendant's claim that the plaintiff was registered as proprietor of the suit property fraudulently.
  6. From the pleadings highlighted above, the following issues arise for determination in this suit:-
    - i. **As between the plaintiff and the 1<sup>st</sup> defendant, who is the lawfully registered proprietor of the suit property.**
    - ii. **Whether the plaintiff has the locus standi to maintain this suit.**
    - iii. **Whether the plaintiff served a notice upon the Attorney General prior to bringing this suit against the 2<sup>nd</sup> defendant as required under section 13A of the Government Proceedings Act, Cap 40 Laws of Kenya and if not, what is the effect of such failure.**

What I have before me is the 1<sup>st</sup> defendant's application that was brought by way of Notice of Motion dated 18<sup>th</sup> April 2012 seeking an order to strike out the plaintiff's suit with costs. The 1<sup>st</sup> defendant's application was brought under section 1B, 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya and order 2 Rule 15 (b) (c) and (d) of the Civil Procedure Rules 2010. The 1<sup>st</sup> defendant's application was supported by a seven (7) page affidavit sworn by the 1<sup>st</sup> defendant's director Hon. George Omari Nyamweya to which there were twenty (20) annexures. In this affidavit, the 1<sup>st</sup> defendant's director aforesaid went into minute analysis of the plaintiff's case and the reasons why the case must fail.

7. In the affidavit, the 1<sup>st</sup> defendant contended that although the plaintiff has brought this suit in his personal name, the certificate of official search on which the plaintiff has put reliance as the basis for his claim shows that the suit property is registered in the name of Diplo General Enterprises. The 1<sup>st</sup> defendant has contended that there is no mention in the said certificate of official search of the name of the plaintiff. The 1<sup>st</sup> defendant has contended that it is only Diplo General Enterprises

- which can maintain an action concerning the suit property and not the plaintiff. The 1<sup>st</sup> defendant has contended further that if indeed the plaintiff is trading as Diplo General Enterprises then the said Diplo General Enterprises is a mere trade name and as such could not have been registered as a proprietor of land as it has no legal capacity to hold property in its own name.
8. The 1<sup>st</sup> defendant contended that the registration of the suit property in the name of Diplo General Enterprises was therefore null and void *ab initio* and as such could not confer upon the plaintiff capacity to institute this suit. The 1<sup>st</sup> defendant contended that there is no relationship between the plaintiff and Diplo General Enterprises which, does not exist in any event according to the information obtained by the 1<sup>st</sup> defendant from the registrar of companies. The 1<sup>st</sup> defendant contended that Diplo General Enterprises has not been registered either as a company or as a business name. The 1<sup>st</sup> defendant contended that in the absence of any nexus between the plaintiff and the said Diplo General Enterprises, the plaintiff has no interest in the suit property and that even if Diplo General Enterprises is the plaintiff's trade name, it had no capacity to hold property in its name. The 1<sup>st</sup> defendant contended further that failure to join the Attorney General in this suit and to serve a statutory notice upon the Attorney General pursuant to section 13A of the Government Proceedings Act, Cap 40 Laws of Kenya is fatal to the plaintiff's suit.
  9. After analyzing and discrediting the plaintiff's claim, the 1<sup>st</sup> defendant went to great length to demonstrate the strength of its defence against the plaintiff's claim over the suit property. The 1<sup>st</sup> defendant highlighted the fact that it has been recognized over the years as the proprietor of the suit property by the Municipal Council of Kisii before and after its lease over the suit property was renewed. The 1<sup>st</sup> defendant exhibited among others, a certificate of official search and rates demand note from the Municipal Council of Kisii to demonstrate its title over the suit property. Interestingly though, the 1<sup>st</sup> defendant did not place any evidence before the court on the origin of its title to the suit property.
  10. The 1<sup>st</sup> defendant's application was opposed by the plaintiff through a replying affidavit sworn on 5<sup>th</sup> June, 2013. In his affidavit, the plaintiff reiterated that the plaintiff is trading under the name and style of Diplo General Enterprises which is registered under the registration of Business Names act, Cap 499 Laws of Kenya. The plaintiff exhibited a copy of the certificate of registration of Diplo General Enterprises. The plaintiff contended that upon purchasing the suit property, he caused the same to be registered in the name of Diplo General Enterprises and that at the time he was not advised by the Land Registrar that Diplo General Enterprises being only a business name could not hold property in its name. The plaintiff contended that he has since instituted judicial review proceedings to compel the 2<sup>nd</sup> defendant herein to rectify the register of the suit property by cancelling the name of Diplo General Enterprises and replacing it with the plaintiff's name, Alloys Mataya Moseti.
  11. The plaintiff contended that pending the rectification of the register of the suit property as aforesaid, reference to Diplo General Enterprises must be taken for all intents and purposes as reference to plaintiff since Diplo Enterprises is the plaintiff's trade name. The plaintiff contended further that once the register for the suit property is rectified, the plaintiff would apply to amend the plaint accordingly. The plaintiff contended that this suit raises a good cause of action which should proceed to trial. The plaintiff contended that the issues raised herein cannot be determined summarily. The plaintiff contended that the issue as to who is the lawful and bonafide proprietor of the suit property cannot be determined without a plenary hearing. The 1<sup>st</sup> defendant filed a supplementary affidavit sworn by Hon. George Omari Nyamweya on 11<sup>th</sup> July 2013 in which the 1<sup>st</sup> defendant contended that Diplo General Enterprises was not in existence according to its certificate of registration as at 30<sup>th</sup> June 2008 when it was purportedly registered as the proprietor of the suit property. The 1<sup>st</sup> defendant also took issue with the failure by the plaintiff to place before court a copy of the transfer document through which the suit property was transferred to Diplo General Enterprises. The 1<sup>st</sup> defendant wondered how stamp duty could have been assessed for payment by an entity that was not in existence. On the judicial review application, the 1<sup>st</sup> defendant termed the same as an admission by the plaintiff that this suit is incompetent. The 1<sup>st</sup> defendant contended further that the orders sought in the judicial review application are not available to the plaintiff because to allow the application would have the effect of replacing the

- name of an alleged owner of a property with another.
12. On 3<sup>rd</sup> June 2013, I directed that the 1<sup>st</sup> defendant's application be heard by way of written submissions. The 1<sup>st</sup> defendant filed its submissions on 23<sup>rd</sup> October 2013 while the plaintiff filed his submissions on 24<sup>th</sup> February 2014. I have considered the 1<sup>st</sup> defendant's application together with the two (2) affidavits filed in support thereof. I have also considered the plaintiff's replying affidavit filed in opposition to the application and the respective written submissions by the advocates for the parties together with the cited cases. The law on striking out of pleadings is now fairly well settled. The power to strike out a pleading is normally exercised with great caution and only in circumstances where the court is satisfied that no life can be injected into the suit through an amendment. See the case of, **Chatte vs. National Bank of Kenya Ltd. Civil Appeal No. 50 of 1996 (unreported)** that was cited by the plaintiff in his submissions. See also the case of, **D.T. Dobie & Company (K) Ltd. vs. Joseph Mbaria Muchira & Another, Civil Appeal No. 37 of 1978 (unreported)**, where Madan J.A stated as follows regarding the exercise of this power to strike out pleadings; **"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment."** In the case of, **Murri vs. Murri and another [1991] E.A 209(CAK)**, the court of appeal held that summary remedy of striking out pleadings is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the court process or is unarguable. In the case of, **J.P. Machira vs. Wangethi Mwangi & Another, Court of Appeal, Civil Appeal No. 179 of 1997 (unreported)**, that was cited by the 1<sup>st</sup> defendant, Omolo J.A, rendered himself as follows on the court's power to strike pleadings; **"I do not think the unfettered power in the courts to allow amendments at any stage is to be used to enable the parties to create all sorts of fanciful defences in the course of litigation. Nor do I understand the decision of this court, particularly that of Madan J.A in the case of D.T. Dobie & Company (Kenya) Ltd. vs. Joseph Mbaria Muchina & Another, Civil Appeal, No. 37 of 1978 (unreported) to mean that no pleading could ever be struck out even where it is patently clear that no useful purpose could ever be served by a trial on merits.....I agree that these powers are drastic and as the court said.....the powers are to be exercised with great caution and only in clearest of cases. But once such caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on the merits, the court is perfectly entitled to strike out a pleading for as I have said, there is no magic in holding a trial on the merits particularly where it is obvious to everyone that no useful purpose would be served by it."**
13. The 1<sup>st</sup> defendant has sought the striking out of the plaint filed herein on the grounds that; the same is scandalous, frivolous or vexatious, it may prejudice, embarrass or delay the fair trial of this suit and, that it is otherwise an abuse of the process of the court. In the book, **Pleadings: Principles and Practice by Sir Jack Jacob and Iain S. Goldrein**, a pleading or an action is said to be frivolous when it is without substance or unarguable. Examples of pleadings which are frivolous are given as those which are put forward to waste the court's time and those which cannot possibly succeed. On the other hand, a vexatious pleading or action is defined in the said book as a pleading or action which lacks bona fides, is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. A pleading or action is said to be tending to prejudice, embarrass or delay fair trial when; it is ambiguous or unintelligible, when it states immaterial matter and in the process raises irrelevant issues, when it contains unnecessary or irrelevant allegations and when it involves a claim or defence which a party is not entitled to make use of. Lastly, an action which is an abuse of the process of the court is defined in the said book as one which is absolutely groundless.
14. It is on the foregoing principles that the present application falls for consideration. The case before me concerns a situation which is now common in our country due to endemic corruption, insatiable greed and undue attachment to land. The plaintiff has claimed that he is the owner of the suit property which he purchased from one Sabina Kenyuri Mosei and caused to be registered in the name of an entity known as Diplo General Enterprises on 30<sup>th</sup> June 2008. I have on the record before me; a certificate of lease in respect of the suit property issued in favour of Diplo General Enterprises on 30<sup>th</sup> June 2008 and a certificate of official search in respect of the said property dated 25<sup>th</sup> November, 2011. The said certificate of official search shows that Diplo General

- Enterprises was registered as proprietor of the suit property on 30<sup>th</sup> June 2008 and that it was issued with a certificate of lease on the same date. Strangely, when the said entity known as Diplo General Enterprises was being registered as proprietor of the suit property, it had not been registered under the Business Name Act, Cap 499 Laws of Kenya. It was therefore neither a limited liability company nor a business name. It was not registered as a business name until 27<sup>th</sup> May 2009 which, was about a year after it had been registered as proprietor of the suit property. As a business name, Diplo General Enterprises had no capacity to hold property.
15. That notwithstanding, it was registered as the proprietor of the suit property and issued with a certificate of lease. The plaintiff has contended that Diplo General Enterprises being his trade name, the suit property which is registered in the name of Diplo General Enterprises belongs to him. The plaintiff has claimed that the 1<sup>st</sup> defendant herein has fraudulently got himself registered as the proprietor of the suit property through collusion with the 2<sup>nd</sup> defendant. The plaintiff has therefore sought a declaration that the registration of the 1<sup>st</sup> defendant as the proprietor of the suit property is illegal, null and void and should be cancelled and a permanent injunction issued to restrain the 1<sup>st</sup> defendant from trespassing on the suit property or interfering with the plaintiff's possession, use and enjoyment of the suit property. The 1<sup>st</sup> defendant has in his defence claimed that he is the bonafide and lawful proprietor of the suit property. The 1<sup>st</sup> defendant has also accused the plaintiff of concurrently causing himself to be registered as the proprietor of the suit property fraudulently.
16. On its part, the 2<sup>nd</sup> defendant has contended as I have stated above that in the event that both the plaintiff and the 1<sup>st</sup> defendant have certificates of leases for the suit property then one certificate of lease was acquired fraudulently. As I have pointed out at the beginning of this ruling, the main issue that I will need to determine at the trial of this suit is the bona fide and lawful proprietor of the suit property. In this endeavor, I will have to determine who as between the plaintiff and the 1<sup>st</sup> defendant holds a fraudulent title over the suit property. As was held in the case of **Mutsonga – vs- Nyati [1984] KLR 425**, that was cited by the 1<sup>st</sup> defendant, allegations of fraud must be strictly proved and the standard of proof must be something more than a mere balance of probabilities and whether fraud has been proved is a question for the trial judge to answer. On the affidavit evidence before me, I am unable to determine the allegations of fraud made by the parties herein against each other. I am of the view that this is not an appropriate case to determine summarily. I am of the view that the issues raised in this suit should be determined at the trial.
17. I am in agreement with the 1<sup>st</sup> defendant that Diplo General Enterprises could not hold property in its own name and more so, before it was registered. The plaintiff has attempted to explain the circumstances under which Diplo Enterprises was registered as proprietor of the suit property. Whether the plaintiff's explanation holds any water can only be determined at the trial. The plaintiff had made an application for judicial review in, Kisii High Court Misc. Civil Application No. 30 of 2012 seeking an order of mandamus to compel the 2<sup>nd</sup> defendant to amend the register for the suit property by cancelling the name of Diplo General Enterprises and replacing it with the name of the plaintiff. The defendants herein objected to the said application on the ground that the issues that had been raised by the plaintiff in the said application were the subject of this suit and should be determined herein. I disallowed the plaintiff's said application for judicial review. In my ruling, I observed that since the issue as to whether Diplo General Enterprises was lawfully registered as the proprietor of the suit property was before this court for determination, it was not proper to disturb the status quo by ordering the cancellation of the name of Diplo General Enterprises in the register of the suit property and replacing it with the name of the plaintiff while this suit is pending.
18. Now that this is the only suit left in which all the issues that were raised in the said judicial review application and before this court can be determined, I am of the view that I would do great disservice to the cause of justice if I was to determine this suit summarily without a trial. In my view, if I was to take that route, the bona fide proprietor of the suit property would never be known as to between the plaintiff and the 1<sup>st</sup> defendant, a situation which may generate more litigation. I am of the opinion that if I was to allow the 1<sup>st</sup> defendant's application, I would have determined this suit on mere technicalities and left the substantive issues which have been brought before court by the parties undetermined.

19. In conclusion, it is my finding that this is not a fit and proper case to determine under Order 2 Rule 15 of the Civil Procedure Rules, 2010. The plaintiff's suit herein cannot be described as scandalous, frivolous or vexatious, or, as a suit which may embarrass, prejudice or delay fair trial or as an abuse of the process of the court. I therefore find no merit in the 1<sup>st</sup> defendant's application dated 18<sup>th</sup> April 2012. The same is accordingly dismissed with costs to the plaintiff.

**Delivered, signed and dated at KISII this 31<sup>st</sup> day of July, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

N/A for the plaintiff

Mr. Ogari h/b for Nyamurongi for the 1<sup>st</sup> defendant

N/A for the 2<sup>nd</sup> defendant

Mr. Mobisa Court Clerk.

**S. OKONG'O**

**JUDGE**