



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC NO. 358 OF 2019

CHINA BENTE INDUSTRY (K) LTD.....PLAINTIFF

-VERSUS-

SELINE J COMEN.....1ST DEFENDANT

LANDEX GROUP LIMITED.....2ND DEFENDANT

RULING

INTRODUCTION

1. Vide Notice of Motion Application dated the 25th June 2021, the 2nd Defendant herein has sought for the following Reliefs;

- a. The Honourable Court be pleased to Dismiss the Suit as against the 2nd Defendant for lack of Disclosure of a Reasonable cause action.*
- b. This Honourable Court be pleased to Strike Out the name of the 2nd Defendant as a Party in this suit.*
- c. Costs of this Application and the entire suit be borne by the Plaintiff.*

2. The subject Application is anchored on the various Grounds contained at the foot thereon and same is further supported by the Affidavit of one, Isaac Opicho sworn on the 26th June 2021, wherein the Deponent has enumerated the basis why the Application should be allowed.

3. Upon being served with the subject Application, the Plaintiff herein filed a Replying Affidavit through her Representative namely, Tao Lang, sworn on the 5th October 2021 and to which the deponent has attached one annexure being a copy of the Advocate's search result, showing that one Samson Nyamai Masila, advocate, who commissioned the affidavit in support of the subject Application, is actually a Partner in the Law firm acting for the 2nd Defendant/ Applicant in the matter.

DEPOSITIONS BY THE PARTIES:

2ND DEFENDANT'S/APPLICANTS CASE:

4. Vide Supporting affidavit sworn on the 25th June 2021, one Isaac Opicho, who has described himself as the Managing Director of the 2nd Defendant/ Applicant, has averred as hereunder;

5. The 2nd Defendant, namely Landex Group Limited, was duly contracted and/or appointed by the 1st Defendant as Property Managers/Agents, over and in respect of the Suit property, namely, L.R No. 1/624/Kilimani/Wood Avenue, Room G3-G9, Ground floor, with instructions to Rent, Lease, Operate and/or Manage the said Premises.

6. It is further averred that upon the retention by the 1st Defendant, an Agency Agreement was duly prepared and executed between the 1st and 2nd Defendant respectively, which therefore authorized the 2nd Defendant to act and/ or transact on behalf of the 1st Defendant herein.

7. Further, it is averred that upon being retained as the Property managers, the 2nd Defendant took up the instructions and indeed entered into a Lease agreement with the Plaintiff, whereby the 2nd Defendant covenanted *inter-alia* to lease a section of the Suit property, to and/or in favor of the Plaintiff.

8. It is further averred that though the 2nd Defendant was engaged as Property managers, the said Agency has since been terminated and hence the 2nd Defendant has ceased to be Property managers/agents of the 1st Defendant.

9. Be that as it may, the deponent has further averred that at the time of the entry into and/or execution of the Lease Agreement, the 2nd Defendant possessed Interest in the Lease Agreement, based and/or premised on the existence of the Agency Agreement, which had been entered into with the 1ST Defendant herein.

10. Nevertheless, the deponent has averred that upon the termination of the Agency Agreement, the 2nd Defendant does not have any Interest in the Lease Agreement and by extension on the Suit Property and in this regard same ought not to have been sued.

11. Essentially, the deponent has therefore implored the court to find and hold that the suit against the 2nd Defendant, does not disclose any reasonable cause of action or at all. In this regard, it has been contended that same ought to be struck out.

RESPONSE BY THE PLAINTIFF

12. Vide Replying Affidavit sworn on the 5th October 2021, the Plaintiff's Representative, namely Mr. Tao Lang, has opposed the Application and has averred as hereunder;

13. First and foremost, that the Supporting Affidavit in respect of the subject Application, which is sworn by Mr. Isaac Opicho, has been commissioned and/or sworn before one, Samson Nyamai Masila, Advocate/Commissioner of Oaths, who essentially practices under the name and style of *M/s S. N Masila & Company Advocates*.

14. It has further been averred that the firm of *M/s S.N Masila & Co. Advocates*, who are on record herein, is office and/or place where the Commissioner of Oaths, who commissioned the Affidavit herein practices.

15. Owing to the foregoing, the deponent has averred that the affidavit in support of the subject Application has therefore been sworn and/or Commissioned before an Advocate who is acting for a Party in the subject matter and in this regard, the supporting affidavit is Bad in the law.

16. On the other hand, the deponent has further averred that during the execution of the lease, it is the 2nd Defendant herein who acted for and/or on behalf of the 1st Defendant and same is the one who executed the lease agreement between the Plaintiff on one hand and the 1st Defendant on the other hand.

17. Suffice it to say, that the Deponent has further averred that the Lease Agreement over and in respect of the Suit property was generated and contained on the Letter head of the 2nd defendant and in any event, the payments at the foot of the rents were also remitted to the 2nd Defendant.

18. Further, the deponent has averred that in the course of the dealings, pertaining to and/or concerning the Lease Agreement the 2nd Defendant herein, vide its letter dated the 4th April 2018, wrote to and indicated in favor of the Plaintiff that in the event the suit premises were found not to be suitable and/or ready for occupancy, same undertook to fully refund all and any moneys paid to the 1st Defendant.

19. Based on the foregoing, the deponent has averred that the 2nd Defendant herein made several Representations to and in favor of the Plaintiff, which the Plaintiff acted upon and hence the 2nd Defendant cannot now be heard to allege that same is not bound by the Pleadings herein.

20. On the other hand the deponent has averred that the 2nd Defendant herein, is a necessary Party to and in respect of the suit dispute and hence same has lawfully been impleaded and/or sued.

21. Finally, the deponent has averred that the claim for refund of the rents and all the monies that were paid over and in respect of the suit property, are recoverable from both the Defendants.

22. In the premises, the Deponent has averred that the issues in dispute can only be fully and/or effectively be determined in the presence and participation of the 2nd defendant and not otherwise. For clarity, it has been emphasized that the 2ND Defendant is a Necessary Party and thus her presence is imperative to facilitate the effective and efficacious determination of the subject Disputes.

RESPONSE BY THE 1ST DEFENDANT

23. The 1st Defendant herein did not file any response, either in terms of grounds of opposition or Replying affidavit.

24. Nevertheless, Counsel for the 1st Defendant indicated that same would be supporting the Application by the 2nd Defendant.

SUBMISSIONS

25. The matter came up on the 12th October 2021, for hearing of the Application dated the 25th June 2021, when directions were given, pertaining to and/or concerning the manner of disposal of the subject Application.

26. For the avoidance of doubt, it was ordered and/or directed that the subject Application be disposed of by way of written submissions and in this regard, timelines were set and/or circumscribed for the filing of the said written submissions.

27. Pursuant to and in line with the directions, relating to the filing of written submissions, the 2nd Defendant/Applicant filed her written submissions on the 23rd November 2021, whereas the Plaintiff/Respondent filed her written submissions on the 10th February 2022.

28. It is imperative to note that the two sets of written submissions form part and parcel of the Court Record and that same have been duly considered and shall be taken into account in determining the issues in Dispute herein.

ISSUES FOR DETERMINATION:

29. Having reviewed the Notice of Motion Application dated the 25th June 2021, the Affidavit in Support thereto, the Replying Affidavit sworn in Opposition and having similarly considered the written submissions filed by and/or on behalf of the Parties, the following issues are germane for determination;

a. Whether the Supporting Affidavit has been Commissioned by an Advocate acting for the 2nd Defendant in the subject matter and if so, whether such an Affidavit is valid.

b. Whether the Plaint herein Discloses a Reasonable Cause of action as against the 2nd Defendant.

c. Whether the subject Application has met the threshold to warrant Striking out of the name of the 2nd Defendant, either as sought or at all.

ANNALYSIS AND DETERMINATION:

ISSUE NUMBER 1

Whether the supporting Affidavit has been commissioned by an Advocate acting for the 2nd Defendant in the subject matter and if so, whether such an affidavit is valid.

30. From the supporting affidavit, sworn on the 25th June 2021, it is evident that same has been commissioned by one Samson Nyamai Masila, Commissioner for oaths of P.O Box 11597 -00100, Nairobi.

31. Other than the foregoing details, it is also imperative to note that the said affidavit, as well as the subject Application have been Drawn by the Lawfirm, namely;

M/s S. N Masila & Company Advocates,

Afya Massionates,

Unit 3,

Kamburu Road off Ngong Road,

P.O Box 11597 -00100,

Nairobi.

32. It is apparent and/or evident that the person, who bears the name Samson Nyama Masila, who commissioned the affidavit, is indeed the one practicing under the name and style M/s S. N Masila & Co. Advocates. For clarity, this position has been underscored by the fact that even the postal addresses alluded to in the rubber stamp affixed at the foot of the supporting affidavit, corresponds with and/or replicates the postal address shown at the foot of the Instrument or subject Pleadings.

33. Be that as it may, the Plaintiff herein also carried out and/or conducted a search with the Law society of Kenya and the search revealed that the Commissioner for oaths, namely Mr. Samson Nyamai Masila, is the one who trades under the name and style of M/s S.N Masila & Co. Advocates.

34. Based on the foregoing, there is no dispute that the Supporting affidavit, upon which the subject Application is anchored, was indeed sworn and/ or commissioned before an advocate who is acting for the 2nd Defendant.

35. Owing to the foregoing, the question that then arises is whether an advocate who is acting for a Party in respect for a particular matter, can commission and/or administer oath in respect of any affidavit to be used in the matter, where such an advocate is acting and/or concerned with, like in the instant case.

36. Before endeavoring to answer the foregoing question, it is important to take note of the provisions ***of Section 4 Oaths and Statutory***

Declarations Act, Chapter 15 Laws of Kenya, which states as hereunder;

4. Powers of commissioner for oath

(1) A commissioner for oaths may, by virtue of his commission, in any part of Kenya, administer any oath or take any affidavit for the purpose of any court or matter in Kenya, including matters ecclesiastical and matters relating to the registration of any instrument, whether under an Act or otherwise, and take any bail or recognizance in or for the purpose of any civil proceeding in the High Court or any subordinate court: Provided that a commissioner for oaths shall not exercise any of the powers given by this section in any proceeding or matter in which he is the advocate for any of the parties to the proceeding or concerned in the matter, or clerk to any such advocate, or in which he is interested.

37. My reading of the foregoing Provision of the law denotes that an advocate and/or a Partner in a law firm that is acting for any of the Parties and in a particular matter, cannot administer oath to any litigant and/or witness in the subject matter, in which same is retained and/or engaged as such advocates.

38. It is also important to note that the bar and/ or prohibition herein is absolute and therefore an advocate who administers oaths and/or commissions an affidavit in such matter, breaches a Fundamental law that goes to the root of the impugned affidavit and/or statutory declaration.

39. Consequently, where an Affidavit and/or Statutory Declaration is sworn before an Advocate retained in the subject matter, such an affidavit is rendered invalid, null and void. Simply put, same is rendered useless and irredeemable.

40. In view of the foregoing, it is my finding and holding that the impugned affidavit in support of the subject Application, is null and void, same be and is hereby struck out for contravening the provisions of Section 4 of the Oaths and Statutory Declarations Act Chapter 15 Laws of Kenya.

41. I must point out that the subject issue has hitherto received Judicial sanction vide the Decision in the case of **Caltex Oil (k) Ltd v Stadium Service Station Ltd & Another (2002) eKLR**, where the court stated as hereunder;

I still stand by what I did say in the case of James Francis Kariuki & Another vs. United Insurance Co Ltd HCCC No. 1450 of 2000 that such an Affidavit sworn in violation of section 4(1) of the Oaths and Statutory Declarations Act is for all intents and purposes not an affidavit as envisaged in law and is not capable of being received under Order 18 Rule 7 as it offends a provision of an Act of Parliament and does not represent a mere irregularity either in defect as to form or by misdirection of the parties, or in the title.

Mr. Rebello has asked me to consider that it was a mistake by a third party namely the advocate and that being the case, the error should not be visited upon the deponents. My answer to that is first that as this was a breach of an Act of Parliament, the deponents cannot hide under the advocate concerned as ignorance of the law is no defence. They chose the person to swear Affidavits before. They knew only too well that the same Commissioner for Oaths was representing second Defendant who is alleged to be a director and shareholder of the first Defendant. They cannot all of a sudden turn round and say they did not know what they were doing. Secondly if they did not know that Wekesa should not have commissioned the affidavits, (and it is possible a person like Dr. Oluka may not have known that) then their counsel who did draw all the offending affidavits knew that Wekesa was involved in this matter and the same counsel as the agent of the deponents had a duty to ensure the affidavits were sworn before the correct person.

I feel certain in my mind that whatever way one looks at those affidavits, they were simply not Affidavits at all for purposes of the law. I have considered the affidavits in support and I do not think the errors were inadvertent.

42. Other than the foregoing decision, I feel obliged to refer to and reiterate the holding in the Decision of the court in the case of **Lesrima Simeon Saimanga v Independent and Electoral Boundaries Commission & 2 others [2017] Eklr**, where the court found as follows:

“The key question here is whether the defect in the impugned affidavits is merely procedural or substantive. Order 19 Rule 7 of the Civil Procedure Rules also provides that the court may receive any affidavit sworn for the purpose of being used in any suit notwithstanding any defect, inter alia misdescription of the parties or otherwise in the titles or other irregularity in the form thereof or any other technicality...In my view however, the above rule cannot act as a cure for the affidavits commissioned contrary to Section 4 of Cap 15 which is a statutory provision while Order 19 is subsidiary legislation. In my considered view, since the affidavits are commissioned in contravention of Section 4 of Cap 15 they do not amount to affidavits known in law...I agree with the finding in the Caltex Oil Case which is on point with this case and find that the defect in the three affidavits goes to the substance and not the form. They contravene Section 4(1) of the Cap 15 and are hereby struck out.”

43. Based on the foregoing position, it is apparent that the subject application, is fatally incompetent and therefore devoid of any legal foundation, to the extent that same is anchored on a void affidavit.

ISSUE NUMBER 2:

Whether the Plaintiff herein discloses a reasonable cause of action as against the 2nd Defendant.

44. The 2nd Defendant has contended that the subject suit does not raise and/or disclose any reasonable cause of action as against the same.

45. Be that as it may, it is worthy to recall that the 2nd Defendant vide the Supporting affidavit averred as hereunder;

Paragraph 7

That I am advised by the 2nd Defendants advocates, which advise I verily believe to be true that the 2nd Defendant possessed interests in the lease agreement insofar as the agency agreement between the 1st & 2nd Defendant was still in place.

46. From the contents of paragraph 7, which I have reproduced herein before, it is evident that the 2nd Defendant concedes that same had a stake and/or interests in the lease agreement that was executed between the Plaintiff and the 1st Defendant over the suit property.

47. Indeed, the Plaintiff's claim as against both the Defendants, is premised and/or predicated on the terms and condition of the Lease Agreement which was contained on the letter head of the 2nd Defendant and which was duly executed between the Parties.

48. Besides, it is also imperative to note that the claim by the Plaintiff relates to the duration when the 2nd Defendant was still retained and/or engaged as Property Managers/Agents, on behalf of the 1st Defendant and not the period ex-post the determination of the said agency.

49. Notwithstanding the foregoing, I must also point out that in determining whether or not a suit discloses a reasonable cause of action against a Party, it is incumbent upon the court to take cognizance of the Plaintiff's statement of claim only and thereby assess same to ascertain whether that statement of claim exhibits any semblance of a cause of action.

50. Based on the foregoing, I have looked at the Plaintiff's statement of claim dated the 7th November 2019, and particularly paragraph 6 and 7 thereof, which are pertinent.

51. For clarity, I beg to reproduce the said paragraphs and same are reproduced as hereunder;

Paragraph 6:

The 2nd Defendant through a letter dated 4th April 2018, notified the Plaintiff of a change in the commencement date which was unilaterally moved to the 1st June 2018, and that the premises would be ready for occupation on 15th February 2018, which did not take place.

Paragraph 7:

The 2nd Defendant further in its letter dated 4th April 2018 undertook to refund all and any monies paid to the 1st Defendant in the event the premises were not ready by the said date.

52. From the foregoing two paragraphs, it is apparent that the 2nd Defendant gave some sort of Undertaking and/or made Representation to the Plaintiff, which Representations appeared to have been acted upon, to the detriment and/or prejudice of the Plaintiff.

53. As concerns the extent and scope of the undertaking, if any, that was made by the 2nd Defendant to the Plaintiff, I must point out that same shall await a plenary hearing, when evidence shall be adduced and Parties be subjected to cross examination, which stage is not yet due.

54. For me, I beg to state that the Plaintiff's statement of claim filed by and/or on behalf of the Plaintiff herein, discloses a reasonable cause of action as against both the Defendants and in particular the 2nd Defendant herein, who appears, from the various Documents filed herein to have played a prominent role in the transaction between the Plaintiff and the 1st Defendant.

55. Consequently, I am not inclined to strike out the name of the 2nd Defendant from the said proceedings. In any event, I am equally not ready to carry out and/or undertake any mini trial on the issues of facts, to ascertain whether the 2nd Defendant may or may not be liable to the Plaintiff.

56. Suffice it to observe that striking out of a cause of action and/or otherwise, the application of summary procedure, must only be resorted to in the clearest of cases and upon the court taking and/or exercising necessary caution and circumspection.

57. If any decision, was required to anchor the foregoing observation then the decision in the case of **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another[1980] eKLR, would suffice and** where the honourable court observed as hereunder;

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.

Whether the Subject Application has met the threshold to warrant striking out of the name of the 2nd Defendant, either as sought or at all.

58. Vide the plaint dated the 7th November 2019, the Plaintiff herein has raised claims as against both the Defendants, including but not limited to refund of the rents that were paid as well as special Damages, incurred as a result of breach of the Lease Agreement that was executed between the parties.

59. According to the Plaintiff, the claim before hand touches on both the Defendants and the extent of liabilities to be borne by either of the Defendants or otherwise, shall be determined by the court.

60. In short, the Plaintiffs claim herein is essentially anchored and/or predicated upon the Provisions Order 1 Rule 3 of the Civil Procedure Rules, which provides as hereunder;

Who may be joined as defendants [Order 1, rule 3.]

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

61. Based on the foregoing provisions, it is my finding and holding that the Plaintiff has clearly shown that same has a right as against the 2nd Defendant, premised and/or anchored on the action, omission and representations by the said 2nd Defendant.

62. Be that as it may, it is important to point out that as to whether or not the Plaintiff shall succeed, is not a matter to be addressed and/or canvassed at this juncture. Simply put, the court must eschew an invitation to engage with the nitty – gritty details of the Evidence, which shall amount to usurping the mandate of the trial court.

63. In the premises, I find and hold that the 2nd Defendant has not met the threshold to warrant the expunction of her name from the subject proceedings.

64. Contrarily, the 2nd Defendant appears to have been a prime mover and a participant, in the preparation, execution and engrossment of the Lease Agreement, including giving an undertaking to refund the rents and hence same is a necessary Party to the Proceedings.

FINAL DISPOSITION:

65. In conclusion and having reviewed the issues enumerated herein before, I now make the following orders;

a. The supporting impugned affidavit which was sworn before the very advocate acting for the 2nd Defendant breached and/or violated the provisions of Section 4 of the Oaths and Statutory Declaration Act Laws of Kenya.

b. The Impugned affidavit be and is hereby struck out.

c. The Notice of Motion Application dated 25th June 2021, be and is hereby rendered incompetent and same is similarly struck out.

66. Nevertheless, even on the merits thereof, I would still have found and held that the subject Application is bereft of Merits and would have been a candidate of Dismissal. However, having struck out same, nothing remains to be Dismissed.

67. As pertains to costs, I award same to and in favor of the Plaintiff only.

68. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE