



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL MISC. NO. 851 OF 2012

KIGWE LIMITED.....PLAINTIFF

VERSUS

NJEWAR ACADEMY.....DEFENDANT

RULING

The Plaintiff by an application dated 12th November 2013 expressed to be brought under Order 2 Rule 15(1) (b) and (d) Order 51 Rule 1 of the Civil Procedure Rules 2010 and section 1A, 2B and 3A of the Civil Procedure Act seeks orders that:-

1. That the Defence and counterclaim filed by the Defendant on 13th December 2012 be struck out with costs.
2. That judgment be entered for the plaintiff herein as prayed in the plaint.
3. That the Defendant do pay the costs of this application and the suit.

The application is premised on the grounds that the defence dated 13th December 2012 is a sham and does not raise any triable issue and is frivolous, and that the defence consists of bare and mere denials and that the same is intended to delay justice in the matter and is otherwise an abuse of the court process.

The application is further supported on the facts and grounds set out in the supporting affidavit of **Christopher Kangethe** a director of the plaintiff dated 12th November 2013. The plaintiff depones that it instituted this suit against the Defendant on 16th November 2012 seeking an order that the defendant vacates the suit property **L.R. NO. 10823/5 Juja**. The plaintiff depones that the original title **L.R. NO.10823** measuring **6,618 acres** or thereabouts was registered in the name of **KALIMONI LIMITED** as per the copy of the Grant annexed to the supporting affidavit and that the property (**L.R. NO. 10823**) was transferred to **Kigwe Limited** on 3/12/1968 as per entry number 4 endorsed on the grant. Further the plaintiff deposes that the suit property was at all material times registered in the name of the plaintiff company.

The plaintiff avers that sale agreement dated 26th May 2006 which the Defendant relies on was between **Christopher Kangethe** and **Godfrey Ngugi** and not **Kigwe Limited** the plaintiff herein who is the registered owner of the suit property. The plaintiff contends that the Defendant has unlawfully occupied

the suit property identified as **L.R.NO.10823/5** and the defence and counterclaim as against the plaintiff is unsustainable and no triable issues arises to enable or warrant the matter to go to trial.

The Defendant in opposition to the plaintiffs application filed a replying affidavit sworn by **Godfrey MCN Ngugi** on 14th February 2014. The Defendant deposes that the plaintiff's director one **Christopher Kangethe** signed the agreement of sale and let him (the defendant) into possession and allowed the Defendant to construct a school on the suit premises which the Defendant has been running for over 10 years. The Defendant avers that the said **Christopher Kangethe** who is a director of the plaintiff is being fraudulent and dishonest and asserts that the defence is not a sham and urges the court to allow him to have his day in court to demonstrate the validity and efficacy of the impugned agreement for sale. The Defendant further avers that the plaintiff is seeking similar orders as was sought earlier in a previous application and dismissed by the court. It is noteworthy that the Defendant in his filed defence acknowledged that he was carrying on business in the suit property in the name and style of NJENA ACADEMY.

The parties counsel filed written submissions in which they highlight their respective positions. The plaintiff in its submissions reiterates that it is the registered proprietor of the suit property the same having been transferred to it in the 1960S. The plaintiff did not enter into any agreement with the Defendant and as far as the plaintiff is concerned even if there was an agreement for sale, the sale would have been subject to the provisions of the Land Control Act Cap 302 of the Laws of Kenya and as no consent of the Land control Board has been sought and obtained the agreement became void by operation of the Law and the same is unenforceable. The plaintiff submits that on the material the Defendant has placed before the court, the Defendant has not demonstrated he has a defence that raises any triable issue to merit the matter proceeding to full hearing and urges that the Defendant's defence be struck out.

The Defendant's counsel in his submissions reiterated that the plaintiff's instant application is mischievous and an abuse of the court process since a similar and/or related application dated 29th November 2012 had been dismissed by the court. The Defendant further contended he has constructed a fully fledged school in the suit property and has furnished evidence by way of a sale agreement to show the basis upon which he occupied the suit property. the Defendant submits that the plaintiff acquired the title in 2009 after the Defendant's director had entered into a sale agreement for the excision of 5 acres out of **L.R.NO.10823/5** and thus the plaintiff acquired the title subject to easements, license and any encumbrances that the property may have had and therefore the plaintiff cannot properly seek to have the Defendant's defence and counterclaim struck out without hearing and determination of the matter on its merits.

The court has carefully reviewed the pleadings, the instant application together with the affidavits sworn in support and opposition thereto together with the annexures and has further considered the submissions by the parties. The issues that stand to be determined is whether on the material placed before the court the Defendant's defence and counterclaim as against the plaintiff's claim raises any triable issue to warrant the matter to proceed to full trial for hearing.

The principle argument by the plaintiff is that it did not contract with the Defendant and that the agreement that the Defendant relies on to found his claim was not entered with the plaintiff and the same cannot therefore be enforced against the plaintiff by the Defendant. The plaintiff further states that it is the registered owner of the suit property and was so registered at the time in 2006 when the Defendant allegedly purchased a portion of the suit property. The court has reviewed the sale Agreement dated 26th May 2006 entered into by one **Christopher Kangethe Kigwe** as "the vendor" and one **Godfrey MCN Ngugi** as "the purchaser" and it is clear that under the agreement "**Christopher Kangethe Kigwe**" is described as the vendor and the land the subject of the sale was **L.R.NO.10823/5** from which a portion of 5 acres was to be excised.

The plaintiff in support of its application annexed a copy of the provisional certificate of title **I.R.20695** in respect of **L.R.NO.10823** which shows that this property was Transferred to **Kigwe Limited** the plaintiff herein on 3/12/1968 as per the endorsement of entry NO.4 against the title. From a review of the copy of the provisional title it is clear and apparent that **L.R.NO.10823** was subdivided and subtitled

transferred to various parties and on 16/2/2009 a certificate of Title of **NO.I.R.11565** in respect of subdivision **L.R.NO.10823/5** was issued to **Kigwe Limited** as per entry **NO. 27** made against the mother title. As the mother title was held in the name of **Kigwe Limited** it means **L.R.NO.10823/5** was comprised in the mother title and was therefore owned by the plaintiff. In the agreement of 26/5/2006 there is no representation whatsoever that the said **Christopher Kangethe Kigwe** was acting for and on behalf of the plaintiff company and there is no basis upon which the company could be bound by any acts and/or contracts made by its directors and/or shareholders in their own individual capacities. A limited liability company has a separate legal capacity from its directors and shareholders and for a company to be bound, the contract has to be entered into by an authorized officer and/or director on its behalf in conformity with the company's memorandum and Articles of Association.

In the instant matter there was not even any pretence that the said **Christopher Kangethe** was acting for the plaintiff company. The court in the circumstances holds and finds that the plaintiff was not a party to the alleged agreement with the defendant and that there was no privity of contract to entitle the Defendant to make a claim against the plaintiff founded on the said agreement for sale. The court thus finds there can be no cause of action by the Defendant as against the Defendant.

In my view the Defendant really has himself to blame as he ought to have carried out the basic due diligence to establish the ownership and status of the property he proposed to buy. A search of the property at the lands office would have revealed that the said **Christopher Kangethe Kigwe** was indeed not the registered owner of the suit property. The plaintiff yet raises another important issue that indeed the sale agreement the Defendant relies on required the sanction of the Land Control Board under the provisions of the Land Control Act Cap 302 Laws of Kenya. Under paragraph 6 of the agreement of 26/5/2006 it is apparent and clear that the parties expected to obtain the consent of the Land Control Board. The said paragraph 6 provides:-

6. That the vendor shall accord to the purchaser or his agent all co-operation necessary in obtaining the requisite land control board consent to transfer the subject matter to the purchaser Godfrey MCN Ngugi and shall pursuant thereto sign all requisite transfer papers in favour of the purchaser.

No consent from the Land Control Board has been furnished by the Defendant in regard to the sale transaction. In the absence of any consent from the Land Control Board of the area, the sale agreement between **Christopher Kangethe** and the Defendant became void for all purposes on the expiry of 6 months from the date of the agreement in terms of section 8(1) of the Land Control Act. The Defendant at any rate not being the registered owner of the property could not apply for the consent of the Land Control Board as it would be the plaintiff being the registered who would lawfully have been mandated to apply for the consent. As the plaintiff did not apply for the consent it is the finding of the court that no Land Board consent for the sale transaction was sought within the prescribed period and therefore the Agreement for sale dated 26/5/2006 became void for all purposes 6 months thereafter.

On the basis of the material presented to the court and which I have reviewed analysed and considered I am satisfied that there cannot be any triable issue in the defence and the counterclaim to entitle me to allow this matter to proceed to full hearing and to do so would merely amount to delaying justice being done and that would be prejudicial to the plaintiff. The essence of striking out pleadings that prima raise no triable issues is so that the wheels of justice are expedited. There can be no justification to drag a party through a full trial when it is plain and clear that there is no case for him to answer at the trial. In the present case I find that the plaintiff has no case to answer not having been privy to the agreement the defendant relies on to found his counter-claim and there definitely can be no basis to require that the matter proceed to full trial.

In the premises I allow the plaintiffs application dated 12th November 2013 and order the defence and counter-claim filed by the Defendant struck out with costs to the plaintiff.

I accordingly enter judgment for the plaintiff on terms that the Defendant shall vacate and deliver vacant possession of the portion of **L.R. NO.10823/5 Juja** that he occupies on or before 31st December 2014

failing which the plaintiff shall be at liberty to apply for an eviction order. I make no award for any mesne profits as no basis has been laid to award the same.

I award the plaintiff the costs of the application and of the suit.

Orders accordingly.

Ruling dated signed and delivered this.....26th.....day of...September.....2014.

J.M. MUTUNGI

JUDGE

In presence of:

..... For the Plaintiff

..... For the Defendant