



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL SUIT NO 194 OF 2008

PROF YAURI (SIC) ONYALO YAMBO.....1ST PLAINTIFF

MRS JOAN AKINYI YAMBO.....2ND PLAINTIFF

VERSUS

HOUSING FINANCE COMPANY (K) LIMITED.....1ST DEFENDANT

OTINDI INVESTMENTS LIMITED.....2ND DEFENDANT

RULING

INTRODUCTION

1. The Plaintiffs' Notice of Motion application dated 13th August 2013 and filed on 3rd October 2013 was brought under the provisions of Order 10 Rule 3, Order 2 Rule 15 of the Civil Procedure Rules 2010, Section 3A of the Civil Procedure Act Cap 21 (laws of Kenya) and all enabling provisions of the law. It sought the following orders:-
 - a. **THAT the 2nd Defendant's Defence dated 21st November 2012 be struck out.**
 - b. **THAT interlocutory judgment be entered for the Plaintiff against the 2nd Defendant as prayed in the Amended Plaint dated 24th June 2008.**
 - c. **THAT costs of this application be awarded to the Plaintiff against the 2nd Defendant.**
2. The grounds on which the Plaintiffs relied on in support of the application were as follows:-
 - a. **THAT the 2nd Defendant's Defence was filed out of time.**
 - b. **THAT the said Defence was filed without the requisite accompanying documents contrary to the provisions of the Civil Procedure Rules, 2010.**
 - c. **THAT the said Defence was filed with a view to delaying the hearing and determination of the suit.**
3. The Plaintiffs' application was supported by the Affidavit of Prof Mauri Onyalo Yambo that was sworn on 13th August 2013. He reiterated the grounds in the face of the application and emphasised that the 2nd Defendant served its Defence on 1st February 2013 which was almost four (4) months after the court issued it orders to file its Defence.
4. Dahabo Dirye filed a Replying Affidavit on behalf of the 2nd Defendant. The same was sworn on

- 22nd November 2013 and filed on 25th November 2013. His argument was that the 2nd Defendant was not able to file its Defence as the court file could not be traced. He averred that the 2nd Defendant was forced to file its Defence in a holding file, as a result of which there could not be said to have been any inordinate delay in filing the same.
5. It was the 2nd Defendant's contention that its Defence raised triable issues and that the Plaintiff had not suffered any prejudice when the 2nd Defendant filed its said Defence late.
 6. The 1st Defendant filed Grounds of Opposition dated 10th April 2014 on 5th June 2014. Its argument was that the Plaintiffs had not laid out a sufficient cause for the granting of the orders, the application was unmeritorious, the 2nd Defendant's Defence had raised triable issues and that the Plaintiffs had not established how they had been prejudiced by the inadvertent delay in the filing and service of the 2nd Defendant's Defence.
 7. The Plaintiff's written submissions were dated and filed on 2nd December 2013. Those of the 1st Defendant were dated 4th June 2014 and filed on 5th June 2014 while the written submissions by the 2nd Defendant were dated and filed on 17th December 2014.

LEGAL ANALYSIS

8. The Plaintiffs admitted that striking out of pleadings was a draconian remedy that had to be used sparingly but that it could be exercised in deserving cases. They placed reliance on the cases of **DT Dobie & Company Limited vs Joseph Muchina Mbaria & Another [1980] eKLR, Nitin Properties Limited vs Kalsi & Another [1995-1998] 2 EA 257, Civil Appeal No 37 of 1978 Mitsubishi Corporation Limited vs Anthony Massawa** (unreported) and **Wenlock vs Moloney & Others (1965) 1 W.L.R 1238** and **The Rules of the Supreme Court Vol 1, Part 1 (1989)** in this regard.
9. They, however, took issue with the failure by the 2nd Defendant to file its Defence within the stipulated period and to file a Memorandum of Appearance. It was their contention that their application was filed promptly.
10. The 1st Defendant also contended that the power to strike out a pleading was a discretionary one but that it had to be exercised cautiously. It referred the court to the cases of **DT Dobie & Company Limited vs Joseph Muchina Mbaria & Another** (Supra), **Nitin Properties Limited vs Kalsi & Another** (Supra) to buttress its arguments.
11. It was also its submission that the delay in the filing of the 2nd Defendant's Defence was not inordinate and that as had been held in the case of **Dhillon & Another vs Dhillon [2006] 1 EA**, the concern for the court ought to be to sustain rather than to strike out pleadings.
12. The 2nd Defendant cited several authorities where the common thread was that striking out of pleadings was a draconian step that had to be exercised sparingly especially where there were triable issues- See **Francis Kaloki Maingi vs Strategic Property Management Company Limited & 2 Others [2013] eKLR** and **John Wanduri Njoroge vs Esther Wangui Ngugi & Another [2013] eKLR**.
13. Upon careful consideration of the written submissions by the respective parties, the court notes that none of them addressed the question of the striking out of the 2nd Defendant's Defence pursuant to the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010 under which the Plaintiffs' present application was premised. The same stipulates that:-
 1. **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 may be otherwise an abuse of the court process of the court,**

And may order the suit to be stayed or dismisses or judgment to be entered accordingly as the case may be.

2. No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the ground on which it is made.

14. There was no affidavit evidence that was presented to the court by the Plaintiffs to show that the 2nd Defendant's Defence was scandalous, vexatious, frivolous or that it was otherwise an abuse of the process of the court. From the facts presented, what the court deciphered, and it could be wrong as the Plaintiffs did not set out their case clearly, was that the said Defence disclosed no reasonable cause of action or defence in law or that it could prejudice, embarrass or delay the fair trial of the action.
15. As no affidavit evidence was required in respect of an application brought under Order 2 Rule 15 (1)(a) of the Civil Procedure Rules, 2010 and there was an affidavit that had been filed herein, the court can then only make an assumption that the Plaintiffs' application was brought pursuant to the provisions either of Order 2 Rule 15 (1)(c) or Order 2 Rule 15 (1)(d) of the Civil Procedure Rules, 2010 as the affidavit evidence seems to suggest that the 2nd Defendant's Defence would cause them prejudice or that the said Defence was intended to embarrass or delay the fair trial of the action or that it was otherwise an abuse of the court process of the court.
16. The court found it necessary to set out the possibilities of what the Plaintiffs intended as they did not specify which provision of Order 2 Rule 15 of the Civil Procedure Rules, 2010 they were coming under. They did not demonstrate how the 2nd Defendant's case was unarguable or an abuse of the court process.
17. Contending that the 2nd Defendant's Defence contained mere denials is not enough. It had to demonstrate how the same was a mere denial. Upon careful perusal of the 2nd Defendant's Defence that was annexed to the Affidavit in support of the Plaintiff's application and marked "A", the court noted that the 2nd Defendants raised the issues of being *bona fide* purchases for value without notice, the sale of the suit premises in exercise of the 1st Defendant's statutory power of sale, the indefeasibility of the title of the suit property and the extinguishment of the Plaintiff's right of redemption amongst others.
18. It is trite law that a party must be given a fair and reasonable opportunity to present its case. This is to afford such party that fair and reasonable opportunity to ventilate its case. The averments in the 2nd Defendant's Defence can in no way be deemed to have been mere denials. They are weighty and triable issues that would require ventilation in a full trial. The court is therefore in agreement with all the parties' written submissions and case law in support thereof that striking out of pleadings is a draconian move and ought to be used as a last resort. The court's objective ought to be to sustain rather than terminate a suit on technicalities.
19. The court finds that as the Plaintiffs did not place sufficient evidence to persuade it to strike out the 2nd Defendant's Defence under any of the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010, it is not inclined to strike out the said Defence as it had been urged to do by the Plaintiffs.
20. Having said so, it would be important to consider the purport of Order 10 Rule 3 of the Civil Procedure Rules, 2010 which was also relied upon by the Plaintiffs in seeking to strike out of the 2nd Defendant's Defence. The said provision provides as follows:-

“ Where a defendant fails to serve either the memorandum of appearance or defence within the prescribed time, the court may on its own motion or on the application by the plaintiff, strike out the memorandum of appearance or defence as the case may be and make such order as it deems fit in the circumstances.”

21. The Plaintiffs alluded to an order that was issued on 5th November 2012 granting leave to the 2nd Defendant to file its Defence within fourteen (14) days i.e. on or before 19th November 2012. They did not attach a copy of the said order. Whilst the court perused the court file and confirmed their averments, the importance of annexing copies of any documents that are referred to by parties cannot be over-emphasised.
22. The possibilities of court documents being misplaced from the court file are not far-fetched. Indeed, it is evident from the 2nd Defendant's Defence that the court file could not be traced at one

- point. It should not be the responsibility of the court to comb through the court files to look for documents that are being relied upon by the parties irrespective of whether such documents are part of the court record.
23. Be that as it may, the court is not persuaded by the Plaintiffs' submissions that the failure by the 2nd Defendant to file a Memorandum of Appearance would warrant the striking out of its Defence. The operative word in Order 10 Rule 3 of the Civil Procedure Rules, 2010 is **"or"**. A party may either file a Memorandum of Appearance **"or"** a Defence.
24. While the practise is that parties file both pleadings, it would not deal a fatal blow to a party's case if the party files a Defence only. The danger of interlocutory judgment being entered is, however, almost automatic if a party files a Memorandum of Appearance and fails to file a Defence within the stipulated period. The court therefore rejects the Plaintiff's submissions that the 2nd Defendant's Defence ought to be struck out on this ground.
25. Section 1A (3) of the Civil Procedure Act Cap 21 (Laws of Kenya) provides that:-

"A party to civil proceedings or an advocate for such party is under a duty(emphasis court) to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the court."

26. It is therefore evident from Section 1A (3) of the Civil Procedure Act that the counsel for 2nd Defendant was enjoined to adhere to the orders and directions that had given by the court. The said orders and directions are given by the court, not for the sake of it, but rather to maintain order in the administration of justice.
27. The 2nd Defendant was therefore required to comply with the orders issued by the court. It did not do so as it filed its Defence on 21st November 2012. This was two (2) days after the period that had been granted by the court. The two (2) days delay in filing its Defence would have been sufficient for a court to strike out if the circumstances warranted such an action.
28. However, whilst the court has discretion to strike out pleadings that have been filed out of time or without leave of the court, a window for discretion has been left to enable it consider the circumstances of a particular case before striking out any pleading that has been filed outside the period it has granted or such period that has been provided under the Civil Procedure Rules, 2010.
29. The 2nd Defendant asserted that the court file herein could not be traced for some time. This evidence was unchallenged by the Plaintiff. It would therefore be a travesty and miscarriage of justice to strike out the 2nd Defendant's Defence on the technical ground that the 2nd Defendant filed its Defence on 21st November 2012 and not 19th November 2012 as had been envisaged in the order issued by the court on 5th November 2012. The delay of two (2) days was not in any way inordinate bearing in mind the circumstances of the case.
30. The court also noted the holding made by the Court of Appeal in the case of **Stanley Gitonga vs Gerald Mwithia [2013] eKLR** which recognised the emotive nature of land necessitating the court to tread cautiously before granting the orders that had been sought by the Plaintiffs herein.
31. The 2nd Defendant submitted that the Plaintiffs were still in possession of the suit premises and they did not therefore suffer any prejudice occasioned by the late filing of its Defence. Its defence was that the 1st Defendant exercised its statutory power of sale and it purchased the suit premises following an auction.
32. From the facts that have been placed before the court, the court was not satisfied that the Plaintiffs suffered any prejudice for the reason that they did not demonstrate what prejudice they suffered or had been occasioned to them by the filing of the 2nd Defendant's Defence on 21st November 2012 and not on 19th November 2012 particularly as they were still in occupation of the suit premises. For the reason that the real issues in controversy or dispute ought to be placed before the court for hearing and determination, this would indeed not be a suitable case for striking out of 2nd Defendant's Defence.
33. Additionally, failure by the 2nd Defendant to file its documentation at the time of filing its Defence would not be a ground to strike it out. However, the said Defence could have been struck out during the Pre-Trial Conference under Order 11 Rule 3(2) (o) (i) of the Civil Procedure Rules,

- 2010 if the 2nd Defendant had failed to comply with the court's directions issued at that time.
34. Parties in this case are yet to reach the Pre-Trial Stage when the court could have exercised its powers to strike out the 2nd Defendant's Defence. Once again, the court is also not persuaded by the Plaintiffs' argument that the omission by the 2nd Defendant to have filed its documents at the time it filed its Defence would have been a suitable ground for it to strike out the 2nd Defendant's Defence.
35. The new Constitutional dispensation frowns upon striking out of pleadings based on technicalities. Article 159 (2) (d) of the Constitution of Kenya, 2010 enjoins the court to administer justice without undue regard to procedural technicalities. The same provides as follows:-

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles....

(d) justice shall be administered without undue regard to procedural technicalities.”

36. In the circumstances foregoing, having considered the parties' pleadings, written submissions and case law in support of their respective cases, the court is more persuaded by the arguments that were advanced by the 1st and 2nd Defendants herein and rejects the Plaintiffs' submissions in their entirety.
37. Finally, this is a very old matter. It has been pending in court over the last six (6) years. Consequently, in the same manner that the court is enjoined to facilitate the just, expeditious, proportionate and affordable resolution of the dispute, advocates and their parties ought to assist the court in furthering the said objective. There is therefore need to have the matter herein heard and determined expeditiously.

DISPOSITION

38. Accordingly, the upshot of this court's ruling is that the Plaintiffs' Notice of Motion application dated 13th August 2013 was not merited and the same is hereby dismissed with costs to the 1st and 2nd Defendants.
39. The parties are hereby directed to take such necessary steps as soon as is practically possible with a view to having this matter heard and determined without any further delay.
40. It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of September 2014

J. KAMAU

JUDGE