



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 129 OF 2010

**FRANCIS BEN NJUGUNAT/A PROPENSITY PROPERTIES & CONSULTANTS:.....
PLAINTIFF**

VERSUS

HON. STANELY M.

GITHUNGURI:..... 1ST DEFENDANT

**TASSIA COFFEE ESTATE LIMITED:.....
2ND DEFENDANT**

R U L I N G

1. The Notice of Motion application before the court is dated 11th march 2013 filed by the Defendants under Order 2 Rule 15 of the Civil Procedure Act. The application seeks the following orders:-
 1. ***This application be certified urgent and heard ex-parte in the first instance.***
 2. ***The Honourable Court be pleased to strike out the Plaintiff and the Pleadings filed herein.***
 3. ***The Plaintiff be ordered to pay costs.***
2. The application is premised on the grounds set out therein and is supported by affidavit of **Stanely Munga Githunguri** dated **12th March 2013**.
3. The application is opposed by the Plaintiff's replying affidavit filed herein on 26th September 2013.
4. The Defendant now seeks to have the suit herein struck out summarily through this application on the grounds, *inter-a-alia*, that the court lacks jurisdiction to hear and determine the matter as the Plaintiff is alleged not to be a registered Estate Agent, and has not been so during the relevant period in this suit being years 2007, 2008 and 2009. On this ground, the Defendants submit that the suit herein is incompetent as the Plaintiff cannot claim on the basis of the Estate Agents Act. To support the application the Defendants have attached a letter dated 12th February 2013 written by the Registrar of Estate Agents Registration Board addressed to Kelvin Omogeni Advocate for the Defendants. In that letter, the said Registrar responding to an earlier inquiry by the said advocate's replies to confirm that indeed the Plaintiff is a member of the Estate Agents Registration Board, but that he did not have a Practising Certificate to practice in the years under question. On this basis, the Defendant/ Applicant now seeks to strike out the Plaintiff.
5. I have very carefully considered the application. The brief history of this matter is that the suit is

currently underway, and the Plaintiff's two witnesses out of three have already testified. What is remaining is the testimony of the Plaintiff's 3rd witnesses and then the filed will be left for the Defendant to tell the court his side of the story. It is noted for the record that the Defendant has not in his defence questioned the membership of the Plaintiff in Estate Agents Board, and neither is the issue of his practicing certificate been raised until these proceedings. The issues being raised now can as well be raised in evidence when the Defendant takes the stand to testify. The alleged letter from the Estate Agents Registration Board can be a good piece of evidence if the said registrar should be called by the Applicant, to give evidence upon which the Plaintiff can also cross-examine the said testimony.

6. It is noted for record, that on 26th October 2012, this court delivered a Ruling on another interlocutory application in the same suit, and observed as follows:-

“It is clear that a full hearing would be necessary to determine which party is telling the truth . . .”

7. I still believe that the matters in issue are best determined in a full hearing where the Defendant's testimony can be subjected to interrogation. In any case, and to avoid any doubt, this suit cannot be struck out on the strength of an annexure to the supporting affidavit, in which an officer of a 3rd Party body denies that the Plaintiff has a practising certificate. That officer, to be believed, must give oral evidence upon which he shall be cross-examined by the Respondent.
8. Again, considering the Plaintiff is about to close his case in this matter, it is easier to hear the defence case and render a final judgement than to determine this matter summarily. That would not be justice.
9. I have considered the authorities cited by the Applicant. The case of **Mapis Investment (K) Limited – Vs – Kenya Railways Corporation [2006] eKLR** deals with court's "***not enforcing illegal contracts***". This is not exactly the issue in this matter. Even if the Plaintiff is alleged not to have had the Practising Certificate, the Defendant still has to prove that the contract (which this court in the aforesaid Ruling found exists between the parties) herein between the parties was illegal. To the contrary, this court in the aforesaid Ruling found that:-

“ . . . It is clear from the affidavits and annexures thereto that there existed some kind of relationship between the parties and the averments by the 1st Respondent that such relationship was actually terminated is an acknowledgement of its existence, even if it was not written down. The affidavits also demonstrate a determined effort to deny the Plaintiff of the fruits of his labour by what appears to be a termination of a contract with one party only for the Respondents to “independently” approach the said party to conclude the deal started by the Plaintiff in a manner which points at, in the least, some irregularity, if not dishonesty”.

10. I also do not think that the case of **Abraham Mwangi Njihia – Vs – IEBC & 2 Others (2013) eKLR** is exactly applicable. To treat this matter in the same way as courts treat advocates who have not taken out practicing certificates, without oral evidence of the person making adverse allegations which is subject to cross-examination, would be severally unjust.
11. In my Ruling, the Defendant should submit to a process where his evidence can be verified. That place is the full trial. Since the hearing is currently underway, I direct that the hearing of the suit shall proceed with minimum interruption.
12. The upshot is that this application is dismissed with costs to the Plaintiff/Respondent.

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI THIS 17TH DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Gichuru for the Plaintiff

M/s Makori holding brief for Mogeni for the Defendants

Atelo – Court Clerk