



REPUBLIC OF KENYA

High Court at Kitale

Civil Suit 118 of 2009

KENNEDY WASIKE..... PLAINTIFF

VERSUS

CHRISTOPHER WASIKEDEFENDANT

RULING

By an application dated 24th January, 2011, the Defendant/Applicant moved the Court for orders that the Plaintiff's plaint herein be struck out. The application was brought under the provisions of Order 2 Rule 15 (1) (a) and (d) of the Civil Procedure Rules and Section 1 A and 1 B of the Civil Procedure Act. The application is supported by the Affidavit of the Applicant sworn on 24th January, 2011. The Applicant depones in the Affidavit that sale of the suit land to the Respondent was based on an agreement which was not fully honoured and that the same is not enforceable as there was no consent of the Land Control Board. The Applicant therefore contends that the Plaintiff's suit does not disclose a reasonable cause of action and hence the same ought to be struck out.

The application was opposed by the Respondent based on a Replying Affidavit sworn on 11th March, 2011. In the Affidavit, the Respondent depones that the Defendant/Applicant is his biological father who sold him the suit land and that he did not default in payment as alleged. The Respondent further depones that after he filed the suit, the Respondent witnessed a sale transaction in which the Respondent sold part of the suit land to a third party. He annexed a copy of the sale agreement which shows that the Respondent was a witness to a transaction between the Respondent and a third party. The Respondent therefore contends that had he not paid the entire sale price to the Applicant, the Applicant would not have authorized him to sell part of the suit land to a third party.

I have carefully considered the application herein as well as the Supporting Affidavit and the objection thereto by the Respondent. The Applicant is seeking to strike out the plaint on the ground that it discloses no reasonable cause of action. Under Order 15 (1) (a) a pleading can be struck out if it does not disclose a reasonable cause of action. Where Order 15 (1) Rule (a) is invoked by virtue of the provisions of Rule (2) no evidence is admissible on an application made under Sub rule 1 (a). What the Applicant is required to do is to state concisely the grounds on which it is made. However, in the present case, the Applicant has also invoked the provisions of Order 15 Rule 1 (d) which means that Affidavit evidence can be admitted.

Striking out a pleading is a discretion which is only exercised in the clearest of cases. In Bullen, Leak and Jacob's Precedents of Pleadings, 12th edition Page 142, the authors wrote thus:-

“A reasonable cause of action means a cause means a cause action with some chance of success when only the allegations in the pleadings are considered.” The authors went on to state as

follows:-

“Accordingly, as long as the statement of claim, including the particulars served thereunder, discloses some cause of action or some question fit to be decided by the Court, whether it be a question of law or of fact or of mixed fact and law, the mere fact that the case is weak or not likely to succeed at the trial, is no ground for striking it out.”

In the same book at Page 148, the authors wrote thus:-

“The term “abuse of the process of the Court” is a term of great significance. It connotes that the process of the Court must be carried out properly, honestly and in good faith; and it means that the Court will not allow its function as a Court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the Court by stay or even dismissal of proceedings, “lightly it should not be highly done, yet it may often be required by the very essence of justice to be done”.

Following the above principles, the question which emerges for determination in the present application is whether the plaint herein is so hopeless as to call the powers of the Court to have it struck out. A look at the pleadings show that there are mixed questions of fact and law which the Court ought to decide. Some of these include the fact whether there was full payment of the purchase price, whether the contract of sale is enforceable and whether the land in issue is subject to the jurisdiction of the Land Control Board. A pleading can only be struck out where it is plain that it cannot be saved even by amendment.

In the present case, I find that the plaint and other pleadings filed subsequent thereto raise issues which ought to be determined at the hearing. The upshot of this is that I find that the application has no merit. The same is hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 25th day of February, 2013.

**E. OBAGA
JUDGE**