REPUBLIC OF KENYA

High Court at Bungoma

Environmental & Land Case 15 of 2011

LUCY NANZUSHI ……..…….. PLAINTIFF/APPLICANT

VERSUS

1. BARCLAYS BANK OF KENYA LTD.

2. SOPHIA HERSI ……..…….……DEFENDANTS/RESPONDENTS

RULING

The plaintiff/applicant in an application dated 12th July 2011 has sought to have the defence struck out and judgment entered in her favour as prayed in the plaint. She also prayed to be awarded costs.

The application on its grounds state the defence is frivolous, vexatious and intended to delay the trial of this matter; the defence is without merit and amounts to abuse of court process; it is in the interest of justice that the defence be struck out and the defence discloses no reasonable defence to the plaintiffs claim.

The application is further supported by the affidavit of the applicant. At paragraph 8 of the affidavit, the applicant contends that the creation and registration of a further charge against the title of the property belonging to the applicant was without her consent, knowledge and execution of any document nor did she apply to the land control board to consent to a further charge for the sum of Kshs. 325,000/=. On this reasoning, the defence thus is frivolous, vexatious, a sham and discloses no reasonable defence to the claim.

The 1st defendant/respondent filed a replying affidavit on 8th October 2012 through their advocate on record Mr. Ogunde who swore the affidavit states that it is shocking that the plaintiff can claim that this matter is straight forward. He enclosed a statement of accounts showing the 2nd defendant still owes 1st defendant money. At paragraph 7, he gives information that the account was classified as closed to stop escalation of interest but the amount is still owed. At paragraph 9, he states the plaintiff/applicant signed a further charge which constitute security for all guarantees given by the plaintiff. He therefore prayed for the dismissal of the application.

Both parties relied on written submissions filed and enclosed authorities in support of their submissions. The applicant submits that the defendant did not comply with order 57 rule 5. The Civil Procedure Rules end at order 54. I would not read into the intentions of the applicant by implying which order she had in mind.

There is a replying affidavit filed on the 8th October 2012. So this answers the applicants submission that the application is not opposed.

What are the principles for striking out defence? Has the applicant established the grounds for striking out in the application, alternative questions – does the case merit summary judgment as envisaged in prayer 2 of the application? The prayers sought in the plaint are

1. A declaration that the creation and registration of the legal charge (s) that were subsequent to the one that was registered on the 16th February 1996 and/or any causing to be registered in the encumbrance section of any entry on the register in respect of the title E. Bukusu/S. Kanduyi/4606 in favour of the 1st defendant cannot hold the plaintiffs title deed as security for the further advanced facilities.

2. An order compelling the 1st defendant to prepare and register a discharge of charge causing the charges to be discharged.

3. Cost of the suit.

A look at prayer no. 1 requires the adducing evidence to prove there were subsequent advances granted to the 2nd defendant by the 1st defendant without consent or knowledge of the applicant. In the 1st defendants defence, it has alluded at paragraph 2 (c) that the charge and further charge created over the suit property were continuing securities.

This is a triable issue. And the defence has raised issues that are not vexatious or frivolous as put by the applicant.

The prayer sought in the plaint is in the nature that requires this suit to go through a full trial. The case law annexed to the applicant's submissions are for support of the main case and none in favour why the defence should be struck out at this stage. The 1st respondent has referred to the case of said Hamad Shamisi vs. Diamond trust of Kenya Ltd. Civil appeal no. 109 of 2005 at Nairobi [2010] e KLR.

The court of appeal quoted this case of D.T. Dobbie vs. Muchina [KLR 1982] page

1 where the court stated "***as the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly".***

In the Said Hamad case, the judges of the court of Appeal held that ***"The summary procedure ……. Is only appropriate to cases which are plain and obvious so that any master or judge can say at once that the statement of claim as it stands is insufficient even if proved to entitle the plaintiffs to what he asks"***

In the instance case, the prayers in the plaint are not obvious. There is documentation to be produced by either of the parties to prove their claim. The 1st defendant has filed a bundle of documents to support their claim. This court cannot ignore them by striking the defence at this state. The application has not been proved and I proceed to dismiss it with costs to the 1st defendant. The parties to finalize the preliminaries of pleadings and have the matter set down for hearing.

RULING DATED, SIGNED, READ AND DELIVERED in open court this 16th day of APRIL 2013.

A. OMOLLO

JUDGE