



REPUBLIC OF KENYA

High Court at Mombasa

Civil Suit 269 of 2010

1. MARIAM ACHAR

2. PETER C. ACHAR.....PLAINTIFFS
VERSUS

THE REGISTERED TRUSTEES OF POSTAL CORPORATION OF KENYA STAFF PENSION
SCHEME.....DEFENDANT

RULING

Before court is the notice of motion dated 5th November, 2012 in which the defendant/applicant seeks the following orders:

“1.THAT this Honourable court be pleased to strike out the plaintiffs’ plaint herein.

2.

THAT costs of this application and the suit be awarded to the defendant.”

The application was opposed by the respondent who filed their replying affidavit on 30th November, 2012.

At the heart of this dispute is the property known as **plot No. MSA/BLOCK XXVI/645/MI** situated in Kizingo Estate (hereinafter referred to as ‘*the suit property*’). This property and the developments thereon were owned by **The Registered Trustees of Postal Corporation of Kenya Staff Pension Scheme**, who are the defendants in the matter. **MIRIAM ACHAR** and **PETER CHRISTOPHER ACHAR**, the 1st and 2nd plaintiffs respectively are tenants who occupy one maisonette on the suit property (hereinafter referred to as ‘*the suit house*’). The plaintiffs were both employees of The Postal Corporation of Kenya and were both members of the Staff Pension Scheme. The 1st plaintiff retired in May, 2009 whilst the 2nd plaintiff is still an employee of the Postal Corporation. Sometime in July, 2010 the defendants put an advertisement in the Daily Nation inviting bidders to tender for the purchase of the suit property. The plaintiffs filed this suit on 6th August, 2010 claiming that the defendant’s failure to give them first priority to purchase was discriminative, irrational, amounted to bias and an abuse of office given that they already occupied one of the maisonettes on the suit property. The plaintiffs in their plaint sought a declaration that the advertised sale was unprocedural and illegal, and sought an injunction to restrain the defendant from

disposing of the suit property by sale without giving first priority to the plaintiffs.

Simultaneously with the plaint filed on 6th August, 2010 the plaintiffs did file an application seeking interlocutory orders. This application was heard by **Hon. Justice Ojwang** who on 20th February, 2012 dismissed the prayer for interlocutory orders. Before the main suit could be heard the defendants filed this present application seeking that the suit be struck out.

With regard to the present application dated 5th November, 2012 both sides filed their written submissions and the matter is now for ruling. The application is based on the grounds on the face of the application as well as the supporting affidavit of **Deborah Jepchumba Limo**, the Pension Scheme Administrator of the defendant scheme. In a nutshell the defendant's submit that as the legal proprietor of the suit property, it has the right to deal with and dispose of the suit property as it wishes without interference from the plaintiffs who are merely tenants on the premises.

In their replying affidavit sworn by the 1st plaintiff on 30th November, 2012 the defendants insist that their suit is neither scandalous, vexatious, frivolous nor an abuse of court process. The plaintiffs maintain that they had the right to be accorded first priority in any sale of the property and cite company policy as backing for this.

I have read and have given careful consideration to the submissions filed by both sides. I am also mindful of the fact that as a general practice courts are loathe to strike out suits as this is deemed to be a drastic step not to be taken lightly. In the case of **D.T. DOBIE & COMPANY LIMITED VS. JOSEPH MBARIA MUCHIU 1982 KLR 1** Hon. Justice Madan (as he then was) held as follows:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”

Does the plaintiffs' suit fall under the above categorization?

It is a fact one to which the plaintiffs readily concede that the suit property belongs wholly and entirely to the defendants. The plaintiffs do not claim any legal or equitable right to the suit property. Their only interest was as tenants who had for several years occupied one maisonette on the property. As such the relationship between the two parties was one of landlord and tenant. As such the defendant as sole proprietor had all legal rights to deal with and/or dispose of its asset as it wished. There was no requirement that the defendant consults and/or defers to the plaintiffs in so doing.

The plaintiffs claims that the manner in which the sale was conducted was discriminatory. How so? There is evidence that the defendant put out an advert in a National Newspaper inviting tenders for the sale of the suit property. As such any individual including the plaintiffs had the right to submit a bid. As it turns out the plaintiffs did in fact submit a bid of 50 million. However, the eventual purchaser surpassed the plaintiffs tender by bidding at Kshs. 63 million. It made good business sense for the defendants to accept the higher bid (which was in excess of the plaintiffs bid by 13 million). This was more so given the fact that the defendant had an obligation to act in the best interests of the wider membership of the Pension Scheme. Having been availed of the opportunities to participate in an open and transparent tendering process (no fraud or illegalities has been alleged in the manner in which the tender was conducted), the plaintiffs cannot now turn around and claim to have been discriminated against.

The relationship between the two parties did not go beyond that of landlord and tenant. The defendant had no **legal** obligation to consider the plaintiffs in priority to any other potential purchaser.

As matters now stand the suit property has already been sold to a third party and the full purchase price has been paid to the defendants. By a letter dated 1st November, 2012 the defendant's advocate confirms receipt of Kshs. 56,700,000/= being the balance of the purchase price. The property was sold to **Shella Properties Limited**. The new owners who stand to be adversely affected by any orders given in this

matter have not been enjoined to the suit. The fact is that the suit has now been overtaken by events. To proceed would be tantamount to denying the new purchasers the right to be heard and the right to defend their interest in the suit property.

The basis of the plaintiffs' suit was the alleged company policy that tenants be allowed priority to purchase. Such policy cannot be said to be legally binding. In any event the plaintiff was only a tenant and had no legally valid or enforceable claim upon the suit property. In my view this suit is certainly frivolous and vexatious. It is only meant to delay the transfer and to annoy. The court will not uphold such suits which amount to an abuse of court process. As such I do allow this application and I hereby strike out the plaintiffs' suit with costs to the defendant.

Dated and delivered in Mombasa this 12th day of April, 2013.

M. ODERO

JUDGE

In the presence of:
No appearance by either party
Court Clerk Mutisya