



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 1670 of 2007

MENNO TRAVEL SERVICES LTDPLAINTIFF/APPLICANT

=VERSUS=

MENNO PLAZA LTDDEFENDANT/RESPONDENTS

RULING:

The applicant herein **Menno Plaza Ltd** has brought this **Notice of Motion** dated 25th January, 2011 **Under Order 2 Rule 15 (1) (a) and Order 51 Rule 1 of the Civil Procedure rules 2010** for orders that:-

- a) The Plaintiff herein be struck out and the suit against the defendant be dismissed.
- b) That cost of the application be borne by the plaintiff.

The application was founded on the ground that to the extent there is no Agreement in existence within the meaning of Section 3(3) of the **Law of Contract Cap 23**, the plaintiff discloses no reasonable cause of action against the Defendant.

The Plaintiff /Respondent opposed the application and stated that the Law of Contract that is applicable in this suit is the one that came into force in 1961. That according to Section 3 of the Law of Contract, (1961), It does not make it necessary to have the Agreement in writing. All that is required is a Memoranda or note or anything in writing signed by the Defendant showing the existence of an agreement for the disposition of an interest on law. .

He relied on the Court of Appeal **Case No. 112 of 1998 Gharib Suleiman Gharib Vs Abdulrahman Mohamed Agil**. The Plaintiff submitted that they have exhibited such evidence of Memoranda in writing and so the provisions of Section 3 of the Law of Contract has been satisfied. Applicant submitted that no case has been laid out for striking out the Plaintiff.

The applicant filed its written submissions and submitted that the plaintiff has no reasonable cause of action as the Plaintiff filed by the plaintiff talks of “ **By an oral agreement entered into by the parties ...the plaintiff agreed to sell and the Defendant agreed to purchase all that parcel of land**”.

The applicant submitted that plaintiff cannot maintain its suit premised upon an oral contract for disposition of an interest on land as that offends Section 3 (3) of the law of contract Act which provides;-

“ No suit shall be brought upon a contract for the disposition of an interest in Law unless:-

- a) The contract upon which the suit is founded is

- (i) In writing
- (ii) Signed by all the parties thereto.

b) The signature of each party has been attested by a witness who is present when the contract was signed by such a party”.

Applicant further submitted that the plaintiff oral agreement did not meet the requirements of Sub-Section 3 (a) (ii) of Section 3 of the Law of Contract Act and cannot be the foundation for a suit upon which any Court would grant relief. Applicants relied on the case of **Patrick Tarzan Matu & Another Vs Nassim Shariff Nassir Abdulla & Others (2009) eKLR, DT Dobie Vs Muchina 1982 KLR 1& J P Machira t/a Machira & Co.Vs Wangethi Mwangi & Nation Newspapers** Ltd Civil Appeal No. 179 of 1997.

The plaintiff /Respondent filed a further affidavit and annexed **WDK1** to show that it effected transfer of the same land parcel to the Defendants on condition of payment of the purchase price.

Order 2 Rule, 15 of the Civil Procedure Rules gives the Court powers to strike out any pleadings at any stage on various grounds. Among the grounds is that the pleadings **discloses no reasonable cause of action or defence in law**. The applicant alleges that the Plaintiff relies on oral agreement and that offends the **Provision of Section 3(3) of the law of Contract Act Cap 23** . The Plaintiff on the other hand states that it relies on Law of Contract that was in force in 1961 and that does not make it necessary to have the Agreement in writing.

Having considered the Notice of Motion dated 25/11/2011 and the rival arguments, I will rely on the case of **DT Dobie & Co. (Kenya) Ltd Vs Muchina Civil Appeal No. 37 of 1978.**

“ As the power to strike out pleadings is exercised without Court being fully informed of the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously”.

I take into account that striking out pleading is a draconian relief as was held in the **Dobie & Co. Ltd Vs Muchina’s** case and find that, I should use it **“Sparingly and cautiously”**.

The plaintiff has alleged that the applicable law is the law of contract in force in 1961 and that did not make it necessary to have the agreement in writing. The applicant was of contrary opinion. That is an issue of law and fact that requires evidence for a decision to be made. The Plaintiff raises triable issues and it discloses reasonable cause of action.

I will not take the draconian action sought by the applicant/defendant for striking out the plaintiff. Consequently, the Court dismisses the Defendant / Applicant Notice of Motion dated 25/11/2011.

Costs in the cause.

Dated, signed and delivered this 24th May, 2013

L. N. GACHERU

JUDGE

In the Presence of:-

.....For the Plaintiffs

.....For the Defendants

..... Court Clerk

L. N. GACHERU

JUDGE