



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 231 OF 2010

FRANCIS KALOKI MAINGI.....PLAINTIFF

VERSUS

STRATEGIC PROPERTY MANAGEMENT

CO. LTD1ST DEFENDANT

CHIEF LANDS REGISTRAR.....2ND DEFENDANT

MAURICE MULI NZAVI T/A

NZAVI & COMPANY ADVOCATES.....3RD DEFENDANT

RULING

There are two Notices of Motion before the court for determination. The first one is dated 14th May 2012 and is brought by the 3rd Defendant, seeking to have the suit against him and his name struck out of these proceedings for misjoinder.

The second Notice of Motion is by the Plaintiff and is dated 24th September 2012. The Plaintiff is seeking orders that the 1st and 3rd Defendants statement of defence filed on 15th May 2011 and 8th May 2011 respectively as amended be struck out with costs, and that interlocutory judgment be entered in his favour against the 1st and 3rd Defendants in the sum of Kshs.6,550,000/= with interest from 8th April 2009 until payment. Further, that in the alternative the 1st Defendant be ordered to restore all that property known as L.R. No. 12715/188 (hereinafter referred to as the suit property) to the Plaintiff. The Plaintiff claims that the said defences only serve to prejudice, embarrass or delay the trial of the suit filed herein.

Both Notices of Motion arise from a sale agreement dated 8th April 2009 entered into between the Plaintiff and 1st Defendant in which the 3rd Defendant acted as Advocate for both parties. The sale was with respect to the suit property at a purchase price of Kshs 9,500,000/=, and the Plaintiff claims in a supporting affidavit sworn on 6th September 2012 that he was paid 2,950,000/=, and the balance of Kshs 6,550,000/= remains unpaid. Meanwhile, that the suit property was transferred to the 1st Defendant while the said balance remained unpaid, and the Plaintiff alleges in his Plaint as amended on 13th March 2011 that this was done fraudulently and upon misrepresentation by the 1st and 3rd Defendant. He further claims that the 3rd Defendant acted negligently and in breach of his professional duty in this regard.

The Plaintiff further averred in a supplementary affidavit sworn on 16th January 2013 that he did not authorize the 3rd Defendant to release completion documents to the 1st Defendant without payment of the balance of the purchase price, and that the supplementary agreement he executed on 22nd July 2007 did not state that the documents were to be released to the 3rd Defendant in absence of the purchase price. Further, that the 3rd Defendant in further abuse of his fiduciary duty to the Plaintiff drew up sale agreements over the suit property for the 1st Defendant to sell the said property to third parties. The Plaintiff also filed Grounds of Opposition dated 12th March 2013 to the 3rd Defendant's Notice of Motion and stated therein that the said Notice of Motion was intended to delay the hearing and determination of the suit filed herein on merit, and to absolve the 3rd Defendant from liability.

The 1st and 2nd Defendants did not respond to the two Notices of Motion under consideration.

The 3rd Defendant on his part opposed the Plaintiff's Notice of Motion in a replying affidavit sworn on 3rd December 2012, wherein he stated that he had a valid and triable statement of defence on record, and that his law firm is not holding on the Plaintiff's account the money the Plaintiff is claiming and summary judgment cannot therefore lie against him. Further, that the Plaintiff and the 1st Defendant formally authorized his law firm to release the completion documents to the 1st Defendant to carry out the registration process, and his law firm being an agent of the parties followed their instructions. He annexed a copy of letter of the said instructions signed by the 1st Defendant and Plaintiff on 22nd July 2009.

In support of his Notice of Motion, the 3rd Defendant in a supporting affidavit sworn on 14th May 2012 described the actions he undertook upon receiving instructions from the Plaintiff and 1st Defendant to act for them in the sale of the suit property. He stated therein that the Plaintiff and 1st Defendant instructed him on 22nd July 2009 to prepare a supplementary agreement, and to release the completion documents to the 1st Defendant to personally carry out the registration process. He attached copies of the sale agreement dated 8th April 2009, the supplementary agreement dated 22nd July 2009 and of the instruction letter signed by the Plaintiff and 1st Defendant on 22nd July 2012.

The 3rd Defendant further stated that the 1st Defendant transferred the property into its name, but did not pay up the balance of the purchase price as agreed in the supplementary agreement or at all. Further that his law firm wrote a demand letter to the 1st Defendant dated 22nd January 2010, which was attached, and when it became apparent that no payment was forthcoming he advised the Plaintiff to seek independent legal representation. The 3rd Defendant averred that he was wrongly enjoined and sued in this matter in view of the fact that he acted within instructions given by the Plaintiff and 1st Defendant.

Parties were directed to file written submissions, and the Plaintiff's counsel filed submissions dated 8th May 2013 on the 3rd Defendant's Notice of Motion, and submissions dated 27th May 2013 on its Notice of Motion. The counsel argued that the letter purportedly signed by the Plaintiff on 22nd July 2009 giving instruction to the 3rd Defendant was fraudulent. Further that the 3rd Defendant as the Plaintiff's fiduciary acted *mala fides* by letting the 1st Defendant take title to the suit property without payment of the purchase price. The counsel relied on the decisions in **King Woolen Mills Ltd (formerly Manchester Outfitters Suiting Division Ltd) vs Kaplan and Stratton Advocates, (1993) KLR 273** and in **Greenview Lodge Ltd. vs Harit Sheth Advocates and Another, 2012 e KLR** in this regard.

Counsel for the Plaintiff further submitted that the 1st Defendant had not opposed its Notice of Motion and that it was duly served by way of registered post under Order 5 Rule 3 of the Civil Procedure Rules and an Affidavit of service to this effect filed in court. As regards the prayers against the 2nd Defendant, the Plaintiff's counsel submitted that they were prepared to abandon the said prayers, but reiterated the arguments made in the foregoing.

The Counsel for the 3rd Defendant filed two sets of submissions both dated 27th March 2013 with respect

to the two Notices of Motion under consideration. The counsel submitted that the 3rd Defendant's defence raises triable issues and the Plaintiff's Notice of Motion did not meet the legal threshold set out in Order 2 Rule 15 of the Civil Procedure Rules. The 3rd Defendant's counsel further submitted that joining the 3rd Defendant as a party to the suit means that he would have to give evidence against the Plaintiff for whom he acted, and would be compelled to violate the principle of client confidentiality as set out in sections 134 to 137 of the Evidence Act. The counsel relied on the decisions in Apollo Insurance Co. Ltd vs Flavia Rodrigues (T/A M/s Flavia Rodrigues & Co Advocates), HCCC 431 OF 2002, Moses Kipkolum Kogo vs Nyamogo & Nyamogo Advocates, Civil Appeal No. 53 of 2003 and Juma Muchemi vs Charles Waweru Gatonye T/A Waweru Gatonye & Co. Advocates, (2006) eKLR

I have carefully considered the pleadings filed herein, together with the evidence and submissions made by the Plaintiff and 3rd Defendant. There are three issues for determination: The first issue for determination is whether the Plaint should be struck out against the 3rd Defendant. The second issue is whether the Defences filed herein by the 1st Defendant and 3rd Defendant should be struck out for reasons given by the Plaintiff. The final issue is whether the judgment sought by the Plaintiff can issue against the Defendants herein.

The first and second issues of striking out the Plaint and Defences filed are governed by the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rules. The said Rule provides as follows:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) it discloses no reasonable cause of action or defence in law; or**
- (b) it is scandalous, frivolous or vexatious; or**
- (c) it may prejudice, embarrass or delay the fair trial of the action; or**
- (d) it is otherwise an abuse of the process of the court,**

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be. “

It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 at p. 9 by Madan, J.A.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. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

The overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. It is evident from the pleadings filed by the parties that triable issues have been raised by both the Plaintiff and by the 1st and 3rd Defendants, particularly the issue of fraud and negligence if any on the part of the Defendants as alleged by the Plaintiff; whether instructions were given to and complied by the 3rd Defendant; and whether representations were made by the Plaintiff as regards possession and resale of the suit property by the 1st Defendant. These issues cannot be decided at this interlocutory stage without the benefit of, and examination of further evidence, and can only be decided upon after a full trial. It is therefore the finding of this Court that both the Plaint filed herein as against the 3rd Defendant and the 1st and 3rd Defendants' Defences merit adjudication by this Court. Any

prejudice that the 3rd Defendant may suffer as a result of misjoinder in this respect can be adequately addressed by way of costs.

On the issue whether the prayers of judgement sought by the Plaintiff can issue, judgement upon a liquidated demand and interlocutory judgment can only issue under Order 10 Rule 4 and Order 10 Rule 6 of the Civil Procedure Rules, and even then only upon a Defendant failing to appear and/or file a defence. These reliefs are therefore not available to the Plaintiff in the present suit as the 1st and 3rd Defendants have appeared and filed defences which are still on the court record. The applicable provision in the circumstances of this case is Order 11 of the Civil Procedure Rules which provides for the pre-trial procedures to be followed by the parties after close of pleadings.

Lastly, the alternative prayer sought that the 1st Defendant be ordered to restore the suit property to the Plaintiff amounts to a mandatory injunction which cannot be granted at this interlocutory stage. This finding is for the reasons that the Plaintiff has not shown that he has a *prima facie* case, neither has he shown that this is a simple and clear case to warrant the issue of such an injunction as held by the Court of Appeal in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**. The court also notes from the Plaintiff and the 1st Defendant's Defence that the suit property has been sold to third parties who are not parties in the suit herein, and who would be affected by any orders that the court may make with regards to the suit property.

The 3rd Defendant's Notice of Motion dated 14th May 2012 and the Plaintiff's Notice of Motion dated 24th September 2012 are accordingly denied for the reasons given in the foregoing. The costs of the two Notices of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____29th____ day of____July____, 2013.

P. NYAMWEYA

JUDGE