



REPUBLIC OF KENYA

IN THE LAND AND ENVIRONMENT COURT AT NYERI

E.L.C. NO. 136 OF 2010

TERI CRANE1ST PLAINTIFF

PROJECT KENYA INTERNATIONAL LIMITED2ND PLAINTIFF

VERSUS

PETER WANJOHI KAMAUDEFENDANT

RULING

The defendant has through application dated 16th February 2012 sought orders that the plaint dated 12/10/2010 be struck out with costs. Moreover he prays for the costs of the application. The application is premised on grounds that the plaintiffs lack *locus standi* to file this suit and therefore the suit is incompetent.

The defendant also claims that the suit is an *abuse of the process* of court since the plaintiffs have filed a claim for a refund of the purchase price allegedly paid against M/s Gathiga Mwangi and Co. Advocates and that the suit is *scandalous, frivolous* and solely intended at *embarrassing* the defendant.

The 1st plaintiff is an adult female residing in Sevierville Tennessee within the United States of America and is represented by Muthoga Gaturu and Co. Advocates.

The 2nd plaintiff according to the plaint is a company incorporated in the Republic of Kenya under the Companies Act Cap 486 Laws of Kenya. She is also being represented by the firm of Muthoga Gaturu and Co. Advocates.

The Defendant is an adult male of sound mind residing and working for gain in the Republic of Kenya within the County of Nyeri.

Though the defendant denies the assertion that the 2nd plaintiff is a company incorporated in the Republic of Kenya the 2nd plaintiff has listed documents No. 51 and 52 at pages 191 to 202 being the *Certificate of Incorporation* and the *Memorandum and Articles of Association* for Project Kenya International Ltd. Though it is an issue to be determined by court, certificate No. CPR/2010/22884 indicates that the Registrar of Companies certified that Project Kenya International. Ltd was incorporated on the 4/5/2010, at least five months before the filing of the suit. The issue as to whether the second plaintiff is an incorporated person should go for trial as it is denied by the defendant.

The 1st plaintiff's asserts that she is a director of the 2nd plaintiff, an alleged affiliate of Project Kenya inc (USA) a non profitable organization incorporated in the United States of America dedicated to empowering Nationals to achieve freedom from poverty and disease. Further she asserts that she is a director of the United States of America based Project Kenya Inc(USA) a claim the defendant states that

he is a stranger to and puts the plaintiff to strict proof thereto. This court is of the considered view that the locus standi of the plaintiff can only be established after resolving this issue.

The plaintiff claims that on diverse dates between the year 2004 and 2007, the 1st plaintiff on behalf of Project Kenya Inc (USA), set out on a missionary assignment within the Rift Valley and Central Provinces within the Republic of Kenya. It is during this period that the 1st plaintiff met Reverend Peter Wanjohi Kamau (*the Defendant herein*) in Nyeri, where he was a Pastor at the Nyeri Town Baptist Church. This claim is denied by the defendant who asserts that he met the 1st plaintiff long before he was posted to Nyeri as a pastor in charge of Nyeri Town Baptist Church. This issue must go for full trial to determine whether the allegations are true.

According to the plaintiffs, the 1st plaintiff and by, extension, Project Kenya Inc (USA) developed a cordial relationship with the church in Nyeri through the defendant and other members of the church wherein the plaintiff and the other members would from time to time assist Project Kenya Inc (USA) achieve its missionary objectives and other charitable activities in Nyeri District, Central Province within the Republic of Kenya, an allegation that is denied by the defendant who puts the plaintiff to the strict proof thereof. However, the documents availed by the plaintiffs show Board minutes of meetings held on **6th July, 2006, 26th June, 2006, 7th July, 2008, 17th November, 2009, 17th March, 2010 and 1st June, 2010** which indicate that there was a relationship between the plaintiffs and the defendant. The court has a duty to find out the nature of this relationship which can only be after the hearing of the suit but not way of interlocutory application.

The plaintiffs' claim, that in various Board meetings of Project Kenya Inc (USA) held before in Kenya and in the United States of America which the Defendant was invited to attend, it was resolved and agreed that Project Kenya Inc (USA) would besides registering an affiliate institution locally purchase permanent premises in Nyeri town from where it could run certain aspects of its local operation besides offering accommodation for its members who would from time to time visit Kenya while on duty, was denied by the defendant however, a casual glance at the documents filed by the plaintiff obliges the court to allow this issue to go to full trial.

The plaintiffs further assert, which Assertion is denied, that it was resolved that while awaiting Project Kenya Inc (USA) acquiring legal status locally to enable it own immovable property, any such property would be identified and purchased but it would in the first instance be registered in the name of the defendant who would hold the same in trust on behalf of and/or for project Kenya Inc (USA) until such time as an affiliate institution would be registered locally. This is an allegation that requires proof to show that the defendant was to hold the purchased property in trust for the plaintiffs. This claim cannot be determined on an application but through a full trial. It is further claimed by the plaintiff, which is denied by the defendant, that four properties were identified and Project Kenya Inc (USA) in pursuance of the agreements stated in paragraph 1 of the plaint put on course arrangements to remit funds to the defendants and in some isolated instances paid funds directly to the Vendor for purchase of the properties. The plaintiffs have filed a list of documents as items Nos. 24 to 50 at pages 127 to 190 which cannot be ignored in the determination of the dispute as to whether the defendant was registered as the proprietor of the suit property as a trustee for Project Kenya Inc(USA).

The defendant denied the allegation by the plaintiff and states that between 1st April, 2007 and 11th October, 2007, he received donation and construction from well wishers and gospel parties both from Kenya and the United States of America amounting to Kshs.6,238,862 as consolation following the untimely death of his wife during child birth on the 30th March, 2007 which donation he topped up to buy the suit properties at a cost of Kshs.8,500,000. These donations according to him were gifts which he was at liberty to utilize in whatever manner he deemed fit. However he appears to state otherwise in the affidavit supporting the Notice of Motion for striking out the plaint at paragraph 2 that the plaintiffs filed the suit against him in respect of money donated to him by a United States of America charity known as Project Kenya Inc (USA) in which the 1st plaintiff claims to be a director and the 2nd plaintiff claims to be affiliated to.

In a further statement in the defense the defendant avers that the plaintiffs claim is an afterthought

conceived by the 1st plaintiff after her attempt to seduce him to remarry her failed and therefore the suit is a revenge mission. The defendant has further counter claimed for defamation of character on the claim that he stole a sum of over 100,000 US Dollars from the plaintiff.

In their reply to the defense the plaintiffs joined issue with the defendant in his statement of defense save where the same consists of admission, and, reiterated the contents of the plaint. The plaintiff *inter alia* did not admit the allegation that the defendant received donations and contributions from well wishers which money he used to purchase the suit property.

The above facts have been elaborately set out to assist the court to find out whether at this point it can determine the issue of *locus standi* without hearing the parties and their witnesses.

The plaintiffs allege the existence of a *trust* between the plaintiffs and the defendant. This issue of trust cannot be determined on the basis of the interlocutory application as the court will be required to interrogate the parties and their witnesses. For this court to reach an informed decision on *locus standi* the relationship between the plaintiffs ,defendant and Project Kenya Inc (USA) must be thoroughly verified and this can only be determined after hearing viva voce evidence where witnesses will be cross examined and re -examined.

The second ground relied upon by the defendant in the application is that the suit is an abuse of the process of the court since the plaintiffs have filed a claim for a refund of the purchase price allegedly paid against M/s Gathiga Mwangi & Co. Advocates.

I do not find the statement of claim by the plaintiffs an abuse of the process of court as it neither raises an issue that has been determined by any court nor one based on speculation. The facts raised in the plaint ,witness statements and the listed documents are sufficient for a full trial. The complaint before the Advocates Complaints Commission is not a court process and nothing has been availed to court to enable it conclude that the matter has been determined by the Advocates Complaint Commission. The court finds that the defendant has failed through affidavit or otherwise to prove that the suit is an abuse of the process of court.

Moreover, the court does not agree with the defendant that the suit herein is scandalous as alleged. A pleading is scandalous if the same is *indecent* or contains *offensive* matter or has allegation made for the purpose of abusing or prejudicial to the other party. The defendant's claim that the suit is frivolous is not substantiated as nothing is on record to show that the suit is clearly frivolous that the put forward would be an abuse of the process of the court. A statement of claim is prejudicial and embarrassing if intends to delay the fair trial of an action or fair dealing with the main issue or raises a claim that the plaintiff is not entitled to make.

In Nyati (2002) Kenya Ltd -vs- KRA (2009) E KLR High Court at Nairobi in Civil Suit No. 67 of 2007 it was held that:

“A matter would only be scandalous frivolous and

vexatious, if it would not be admissible in evidence to show the truth of any allegation in the pleading which

is sought to be impugned, for example, imputation of character where character is not in issue. A pleading is frivolous if it lacks seriousness. It would be vexatious, if it annoys or tends to annoy. It would annoy if it is not serious or contains scandalous matter, irrelevant to the action or defence. A scandalous and/or frivolous pleading is ipso factor vexatious.”

In DT Dobie & Co. (K) Ltd -vs- Mr. Chire, Court of Appeal Nairobi Madam Martha & Rottor JJA held that:

“That court ought to act very cautiously and carefully and consider all facts of the case without

embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summary 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 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 upshot of the above is that the application is dismissed on ground **(b)** and **(c)** as it lacks merit. However ground **(a)** whose import is that the plaintiffs lacks locus standi to file the suit and therefore the suit is incompetent cannot be determined without hearing the parties and their witnesses.

Having found that the court requires evidence to determine the issue of locus standi and the other grounds of the application lack merit, the application dated 16/2/2012 is hereby dismissed with costs to the plaintiff. Orders accordingly.

Dated, signed and delivered at Nyeri this 28th day of August, 2013.

A. OMBWAYO

JUDGE