



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ELC CASE NO. 277 OF 2011

**JIM'S FRESH VEGETABLE GROWERS & EXPORTERS
LIMITEDPLAINTIFF**

VERSUS

**LOCLAND LIMITED1ST
DEFENDANT**

AJIT PATERL.....2ND DEFENDANT

RULING.

1. By Notice of Motion dated 18th July , 2012, brought ***under Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules , 2010 Section 3A of the Civil Procedure Act*** and all enabling provisions of Law, the Defendant/Applicant have sought for these Orders:-

- i. That prayers No (a), (b) , (c) in the Plaintiffs re-amended Plaintiff re-amended on 12th June 2012 be struck out as they disclose no reasonable cause of action .
- ii. Costs of this application be borne by the Plaintiff.
- ii. The application was based on the grounds stated on the face of the application notably;

a. Prayers No (a), b & c in the Plaintiff Re-amended plaintiff claim against the 1st Defendant for:-

- Permanent injunction restraining the 1st Defendant by itself, its servants and/or agents or otherwise howsoever from selling , alienating , disposing of and/or dealing with the two parcels of land known as **Kajiado/Kitengela/5110** and **Kajiado/Kitengela/8125** respectively .
- Specific performance of the said agreement or damages in liue thereof
- An order that the 1st Defendant transfer the Titles of the said properties to the Plaintiff.

b. That the 1st Defendant is the lawful and duly registered proprietor of **LR No. Kajiado/Kitengela /5110** and **LR No. Kajiado/Kitengela /8125**.

c. No such claim can be made in a suit involving a disposition of interest in land unless there is a subsisting contract in writing in accordance with section 3(3) of the Law of Contract Act (Cap 23) laws of Kenya.

d. No such claim validly exists in law and in contract by the Plaintiff against the Defendants as the

Plaintiff's claim is based on an alleged existence of a contract by correspondence and part performance.

e. That the Plaintiff's claim discloses no reasonable cause of action.

3.The application was vehemently opposed by the Plaintiff/Respondent who filed grounds of opposition. In opposing the Notice of Motion, the Respondent stated that the application is misconceived and bad in law and does not lie.

Further, that the application is an abuse of the process of court and striking out is an extreme and draconian remedy which should be exercised in the rarest of cases.That the supplication is a move to forestall a proper enquiry by the Court into the fraudulent conduct of the Defendants towards the Plaintiff.That fraud cannot be determined on affidavit evidence alone. The Respondent also relied on the Replying affidavit of Sudhir Kent , the Managing Director of the Plaintiff.

4.The parties herein canvassed the application herein by way of Written Submissions which the Court has carefully considered.The applicant reiterated that the Plaintiff's re-amended plaint discloses no reasonable cause of action in law.Defendant submitted that the suit herein is basically to enforce the disposition of an interest in land and the same is bad in law as it does not conform with the law of Contract Act.Applicant quoted section 3 (3) of the law of Contract Act which states that:-

i. *No suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is founded;*

a-

b -

a. *Is in writing*

b. *Is signed by all the parties thereto and ;*

ii. *The signature of each party signing has been attested by a witness who is present when the consent was signed by such party.*

5.Applicants also submitted that 1st Defendant is the registered proprietor of the two parcels of Land **LR Kajiado/Kitengela /5110** and **LR No.Kajiado/Kitengela/18125** (suit properties).That though the Plaintiff claimed to have acquired an interest and title to suit properties, there was no contract for sale of suit property signed as provided by Mandatory provisions of Section 3(3) of the Laws of Contract Act .It was therefore alleged that failure to comply with section 3 (3) of the Laws of Contract Act, means that there is no valid claim over the suit property which can be sustained.The applicant relied on various authorities notably **Western Pumps Ltd Vs Joseph Wainaina Iraya T/A Queen Chick Inn & Another HCCC No. 186 of 2006, Jonathan Msuko Shoka Vs Samuel Gona Nodoro & Another 2010 eklr 33 and Schon Norani Vs Damji Ramji Patel , Civil Suit No. 7 of 2006 Page 16,** which cases dealt with the issue of a valid contract for sale of land should meet the requirements of section 3 (3) of the Law of contract Act.

6.The Plaintiff/Respondent also filed their submissions and reiterated their grounds of opposition; however, the Plaintiff also raised a preliminary point of objection.It submitted that the application is fatally defective, bad in law and does not lie.That the application seeks to strike out prayers in the re-amended plaint.It further submitted that Order 2 Rule 15 deals with striking out of pleadings but not prayers.

That prayer do not disclose the cause of action but are only a mere expression of relief sought.

Further, the plaintiff submitted that the applicant is asking the Court to consider the exhibits and witness statements and make a determination at an interlocutory stage before the said evidence is determined in a *viva voce evidence*.That the prayers sought can only be determined at a full trial where the Court will

have an opportunity to consider all the evidence. The Respondent further submitted that the defendant is guilty of fraud and cannot purport to hide under the provisions of sections 3 (3) of the Law of contract Act. That a party cannot benefit from its own wrong doing.

The Respondent/Plaintiff relied on various authorities notably **DT Dobie Vs Muchina (1978) LR 9 (CAK), Cleophas Wekesa Vs Cooperative Merchant Bank of Kenya Ltd & Others HCCC No. 23 /2003** and **Charles Wachira Ngundo Vs Corporate Insurance Co. Ltd** which cases stipulated that striking out is a draconian act which can only be resorted to in very plain cases.

7. That being the submissions before me, the issue for determination is whether the Applicant/Defendant has satisfied the Court that indeed the three prayers should be struck out.

Plaintiff raised a preliminary objection to the effect that Order 2 rule 15 under which this application is brought deals with striking out of pleadings. Indeed, the said section reads as follows:-

“ At any stage of the proceedings the court may order to be struck out or amended any pleading on the grounds that:-

a-

b-

c-

- a. *It discloses no reasonable cause of action.*
- b. *It is scandalous, frivolous and vexatious.*
- c. *It may prejudice, embarrass or delay the fair trial of the action.*
- d. *It is otherwise an abuse of the process of Court.*

8. It is therefore evident that the quoted Order deals with pleadings. Applicant has sought for striking out of prayers No. a, b, & c. Are prayers the same as pleadings?

Section 2 of the Civil Procedure Act defines what pleadings are:-

“Pleadings include a petition or summons and the statements in writing in writing of the claim or demands of any Plaintiff and or defence of any defendant thereto and the reply of the Plaintiff to any defence or counter claim of the defendant”.

I will concur with the Plaintiffs submissions that prayers are mere expression of the relief sought and cannot be called pleadings for the purpose of Order 2 Rule 15. Prayers sought do not disclose the cause of action and therefore the relief sought by the applicant do not fall under the purview of Order 2 Rule 15. I would concur with the Plaintiff submission that the application does not lie. The court consequently uphold the preliminary objection raised by the Plaintiff and finds that the application dated 18/7/2012 by the Defendant is defective, bad in law and does not lie. However, supposing the said application has not been found to be defective, is it merited?.

9. The applicant has sought for striking out of the above the indicated prayers on the ground that the Plaintiffs claim is based on breach of contract, which contract was allegedly not written or signed and therefore does not comply with section 3 (3) of the law of contract Act. Order 2 rule 15 of the Civil procedure Rules gives instances when pleadings can be struck out. The prayers as drawn by the plaintiff cannot be said not to disclose any reasonable cause of action or are scandalous.

Again, the applicant is relying on provisions of section 3 (3) of the law of Contract Act. For the court to determine whether the contract relied on does not comply with the said Section, the court will have to consider the pleadings; the exhibits and the witness statements. In that way, the court will be dealing with

the issues without the benefit of full trial. That is not what is envisaged by Order 2 Rule 15. Order 2 Rule 15 (2) provides that:-

“ No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made”.

The Court can only determine whether plaintiff failed to comply with section 3 (3) of the Law of Contract Act after evidence has been called at a full trial. The Court finds that the issues herein raised by the Applicant can well be determined after a full trial and if the trial court finds that the applicant submissions have merit, the court will definitely not give an award on the said prayers or will otherwise dismiss the Plaintiffs suit.

10. The Courts in Kenya have variously held that striking out is a draconian Act which can only be resorted to in every plain cases. I will be guided by the findings in the case of notably **DT Dobie & C Kenya Ltd Vs Joseph Mbaria Muchina & Another Civil Appeal No. 37 of 1988 KLR 1** where the court held that :-

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal”.

I find that it is prudent to allow the plaintiff herein to advance its case as it had pleaded in its re-amended plaint and the trial court to decide the suit on merit.

For the above findings, I rely on the case of **Cleophas Wekesa vs co-operative Merchant Bank of Kenya Ltd & others HCCC No. 23 /2003** where the Court held that :-

"whether or not the plaintiff will eventually be able to mount evidence to prove his claims against the defendant is of course a matter to be determined by the court during trial of the main suit and not to be indulged at this interlocutory stage".

11. Having now carefully considered the pleadings, the annexures thereto and the written submissions, the court finds that the Application herein by the applicant is defective and does not lie.

Again the applicant relies on section 3 (3) of the Law of the Contract Act. Which allegation can only be determined after a full trial and not at this interlocutory stage?

Section 3A of the Civil Procedure Act gives the Court inherent Jurisdiction to give such orders that will ensure that end of justice is met. The Court finds that the **end of justice** herein will be met by allowing the Plaintiff to present its case as it has drawn it and the trial court to finally decide the case on merit.

13. For the above reasons, the Court finds that the Defendants/Applicants notice of motion dated 18/7/2012 is not merited. The same is dismissed entirely with costs to the Plaintiff/Respondent.

It is so ordered.

Dated and Delivered this 2nd day of September, 2013.

L N GACHERU

Coram Hon. Gacheru

Court ClerkLukas

Miss Otieno holding brief for Nagpal for Plaintiff/Respondent

L N GACHERU

None attendance for the Defendant/Applicant though notified.

L N GACHERU

Court :

Ruling read in open Court .

L N GACHERU