REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 204 OF 2008

JOMUNJO EDUCATION FOUNDATION LTD……..PLAINTIFF

VERSUS

DANIEL KIPURKET LEPATEI…….1ST DEFENDANT

PETER SANE LEPATEI……..2ND DEFENDANT

THE REGISTRAR OF TITLES…….....3RD DEFENDANT

RULING

The application before me for determination is a Notice of Motion dated 20th December, 2011 filed by the 1st and 2nd defendants, hereinafter *"the 2 defendants"* seeking orders that the plaint dated 7th November, and filed in court on 12th November, 2008 be struck out. That upon so striking out, this court do vacate and set aside all consequential orders made in respect thereof, inclusive of but not limited to the *exparte* order prohibiting dealings in respect of Land parcel Kajiado /Kaputiei/North/807, hereinafter *"the suit premises"*. Finally, the defendants prayed that costs of the application and the suit be paid by the plaintiff.

The grounds in support of the application are that the 2 defendants are the registered proprietors of the suit premises having been issued with the title thereto on 24th October, 2008 by the 3rd defendant. They therefore became absolute and indefeasible owners. That the prayer for an injunction, which was the only substantive prayer in the plaint cannot stand in law alone as long as the 2 defendants remain the registered proprietors.Otherwise the plaint was scandalous, frivolous and vexatious. It had prejudiced, embarrassed and or delayed the fair trial of the action and was otherwise an abuse of the process. In support of the latter grounds, an affidavit was sworn by the 1st defendant.

From the pleadings so far filed, this appears to be the story of the dispute; the suit premises measures approximately 66.53 hectares. The 2 defendants are the current registered proprietors which registration was effected after the hearing and determination of a claim lodged with Kajiado Land Disputes Tribunal in Case No. TC 465/7/008, whose award was subsequently adopted as a judgment and decree of the court by Kajiado Resident Magistrate's Court in Miscellaneous Application Number 30 of 2008. A decree was subsequently issued and further orders were issued directing the Executive Officer of the Court to execute the documents of transfer in the event that the plaintiff, who previously was the registered owner, refused. It is common ground that no appeal was preferred by the plaintiff or another person in respect of the decision aforesaid, nor has the decree been reviewed and or set aside.

Nonetheless by the instant plaint dated 7th November, 2008, the plaintiff has sought as against the 2 defendants an injunction to restrain them from building structures on or carrying out any form of construction work, charging, selling, subdividing, offering for sale or in any way giving possession to anyone other than the plaintiff or otherwise dealing with it, or obstructing the plaintiff and or its employees and servants from accessing the suit. Apart from this prayer, the plaintiff made no other substantive plea other than to ask the court to grant other remedy that the court may deem fit, as well as costs of the suit.

Simultaneously with the filing of the suit, the plaintiff took out a Notice of Motion under a certificate of urgency seeking an order of interlocutory injunction against the 2 defendants with regard to the suit premises pending the hearing and determination of the suit on merit. The application came before **Lenaola,J** *ex-parte* on 2nd December, 2008 when he ordered that the application be heard *interpartes* on 22nd April, 2009 and that pending such hearing, *status quo* then obtaining be maintained. Though the 2 defendants were served with the application for purposes of *interpartes* hearing and subsequently filed their papers in opposition, the application has yet to be exhausted.

In the interim, the plaintiff again moved the court by a certificate of urgency dated 14th December 2009 claiming that they feared that the 2 defendants were in the process of transferring the title. The court again heard the application *ex-parte* and once again **Lenaola,J** granted an order to the effect that *status quo* be maintained in respect of the suit premises until further orders of the court and that the Registrar of Titles do comply with the order.

Thereafter, it would appear the file disappeared and or was misplaced in the registry. This forced the 2 defendants to apply for the reconstruction of the court file. This was done by consent of the parties vide a consent letter dated 15th December, 2011 and filed in court the following day. Upon reconstruction, the applicants mounted this application.

When the application came before me for *interpartes* hearing on 6th June, 2012, **Mr. Ongoto** and **Mr. Nyandieka,** learned counsel for the plaintiff and the 2 defendants respectively agreed to canvass the same by way of written submissions. Those submissions were to be filed and exchanged by 22nd June, 2012. However, this was not done. On 5th July, 2012, the application again came before me. This time round counsel for the plaintiff indicated that he had filed an application seeking to amend the plaint and sought directions on the way forward. Counsel for the 2 defendants responded by saying that he was not aware of the application as he had not been served. Otherwise he had filed and served on the plaintiff his written submissions on the application to strike out the plaint. The court then ordered that the 2 applications be heard simultaneously. The court further directed the plaintiff's counsel to serve his application on the 2 defendants so that they could respond and file written submissions on the same. Similarly, the plaintiff was granted leave to file its written submissions in response to the 2 defendants' submissions on the application seeking to strike out its suit. The matter was then set for mention on 20th July, 2012 with a view to finding out whether there had been compliance with the above directions. Come that date and only counsel for the 2 defendants appeared. Counsel confirmed to court that the plaintiffs had yet to comply with the court's orders aforesaid as he had neither been served with the application to amend the plaint nor written submissions on his application to strike out the plaint. He therefore urged the court to set a date for ruling on his application. The court willingly obliged as there was nothing on record to indicate reasons by the plaintiff for its non compliance with the court's order of 5th July, 2012 and the non-attendance in court by its counsel.

The application seeks to strike out the plaint on the grounds on the face of the application. It is instructive that no replying affidavit and or grounds in opposition if any have been filed by the plaintiff in response to the application. As it is therefore the application is unopposed. Of course a party seeking to strike out a pleading on the ground that it discloses no reasonable cause of action need not adduce evidence in support thereof by way of supporting affidavit. All that the court considers are the pleadings without recourse to evidence. However, the 2 defendants have also asked me in the alternative to strike out the plaint on the ground that it is scandalous, frivolous, vexatious or otherwise an abuse of the process of court. On this the 2 defendants are perfectly entitled to adduce evidence in support thereof. Indeed

they have done so through an affidavit sworn by the 1st defendant and the annextures thereto.

Of course, I am alive to the fact that striking out a pleading is a drastic remedy and can only be invoked in plain and obvious cases. Indeed such jurisdiction must be exercised with extreme caution. Otherwise the summary procedure of striking out a pleading is only applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the process of the court or that it is unarguable.

The 2 defendants' claim that summons requiring them to enter appearance and perhaps subsequently file their defences if at all have not been served on them. There being no defence on record but only the plaint, I cannot by merely looking at the plaint determine that it is hopeless, disclosing no reasonable cause of action and therefore liable to be struck out. In the case of **D.T Dobie & Company (K) ltd vs Muchina[1982] KLR 1,** the Court of Appeal attempted to define the words;- *"**Reasonable cause of action"*** in terms that it is, ***"an action with some chance of success, when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claimed prayer…"***

In other words *"cause of action"* to my mind means an act on the part of the defendant which gives the plaintiff his cause of complaint. On the face of the plaint as filed and without rebuttal from the 2 defendants since they have yet to file their defence if any, I can confidently say that it disclosures a complaint that requires investigation or interrogation by court. Accordingly, I am an able to say that the plant does not disclose a reasonable cause of action at this juncture.

However, can the plaint be struck out on account of being scandalous, frivolous, vexatious or otherwise an abuse of the process of court? I think so! An exposition of the above terms was rendered by **Ringera, J** (*as he then was*) in the case of **Mpaka Road Development Co. Ltd vs Abdul Giafur** t/a **Anil Kapuri Pan Coffee House** thus:-

> ***"A matter would be scandalous if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned. Such would be the case where an imputation is made on the character of a party when the character is not in issue.***
>
> ***A pleading would be vexatious if it annoys or tends to an*noy. O*bviously it would annoy or tend to annoy if it was not serious or it contained scandalous matter which were irrelevant to the action or defence"***

The 2 defendants have demonstrated by affidavit evidence and the annextures thereto that they are the registered proprietors of the suit premises. They have exhibited a title deed issued on 24th October, 2008 with regard to the suit premises which is in their names. Accompanying the title deed is a certificate of official search dated 31st October, 2008 showing again that the 2nd defendants are the registered proprietors of the suit premises. The 2 defendants too have demonstrated how they acquired the suit premises. This was pursuant to a court decree. The transfer and registration followed court proceedings which terminated in favour of the 2 defendants as against the plaintiff. The court decree has yet to be to be reviewed and or set aside. Accordingly the defendants have demonstrated that they obtained the title to the suit premises lawfully. In the light of the foregoing, this suit can only be vexatious, frivolous and abuse of the process of the court and I so hold. The plaintiff has not demonstrated to my satisfaction its entitlement to the suit premises if at all. The aftermath of so holding is that the suit is un-contestably or hopelessly bad such that it must be struck out. It is struck out and all consequential orders vacated with costs to the 2 defendants. The 2 defendants shall also have costs of this application.

DATED, SIGNED and **DELIVERED** at **MACHAKOS** this **31ST** day of **OCTOBER, 2012.**

ASIKE-MAKHANDIA

JUDGE