



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 524 OF 2008**

**KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF**

**VERSUS**

**IRENE MUTHONI.....1<sup>ST</sup> DEFENDANT**

**JOHN FAUSTIN KINYUA.....2<sup>ND</sup> DEFENDANT**

**RULING**

The following are the prayers in the Plaintiff's application to this Court by way of a Notice of Motion dated 12<sup>th</sup> March 2012:

- a. The 1<sup>st</sup> Defendant's statement of Defence dated 5<sup>th</sup> July, 2010 be struck out.
- b. The 2<sup>nd</sup> Defendant's Statement of Defence dated 29<sup>th</sup> November 2011 be struck out.
- c. Judgment be entered for the Plaintiff against the Defendants jointly and severally as prayed for in the plaint.
- d. The 1<sup>st</sup> Defendant do vacate L.R No. 209/10611/173 (hereinafter "the suit property") forthwith.
- e. The suit does proceed for formal proof on the claim for mesne profits.

The main grounds for the Plaintiff's application are that the said Defences do not raise any triable issues, as the suit property was sold to the 1<sup>st</sup> Defendant by the Kenya Reinsurance Corporation purportedly in consideration of payment of Kshs.3,000,000/=, which was paid by way of a cheque No. 000188 of Kshs.3,422,586.50. However, that no consideration whatsoever was paid for the suit property as the said cheque was drawn by Trident Insurance Company Limited in settlement of its debt to Kenya Re-Insurance Corporation. Further, that the transfer of the suit property to the 1<sup>st</sup> Defendant was fraudulent as against the Corporation, which fraud was perpetrated by the Defendants jointly and severally.

The Plaintiff in a supporting affidavit sworn on 12<sup>th</sup> March 2012 by John Lolkoloi, its investigator, gave a detailed chronology of the events leading to the said transfer of the suit property. He attached various correspondence between Kenya Reinsurance Corporation and Trident Insurance Company Ltd with respect of cash call credits due to the Corporation, and between the 1<sup>st</sup> Defendant and Kenya Reinsurance Corporation on the purchase of the suit property. The Plaintiff's arguments were reiterated in submissions filed by its counsel dated 2<sup>nd</sup> July 2013 in which the counsel relied on the ruling given in similar circumstances involving the 2<sup>nd</sup> Defendant in **KACC vs John F. Kinyua and Another, ELC 322 of 2008**.

The 1<sup>st</sup> Defendant and 2<sup>nd</sup> Defendants opposed the Plaintiff's Notice of Motion in Replying Affidavits

sworn on 18<sup>th</sup> June 2012 and 3<sup>rd</sup> July 2012 respectively. The 1<sup>st</sup> Defendant in summary averred that that Kenya Re-insurance Corporation, through Mr. John Faustin Kinyua, its then Financial Controller, approached her while she was working at Trident Insurance Company Limited for assistance in recovery of the outstanding cash call credits due to the Corporation from her employer. Further that it was agreed that she would be entitled to 20% of the amount recovered as her whistle blower benefits amounting to Kshs.4,221,850/=.

It is the 1<sup>st</sup> Defendant's case that Kenya Re-insurance Corporation Limited allocated the suit property to her, in part payment of the whistle blower benefits that were due to her for the assistance she gave to the Corporation. Further, that all dealings with the suit property were lawful, and that the Corporation has not demanded recovery of any sum or made any complaint against her. She attached various documents including a statement made by the 2<sup>nd</sup> Defendant, and a duly executed sale agreement and transfer with respect to the suit property.

The 1<sup>st</sup> Defendant's counsel in submissions dated 22<sup>nd</sup> July 2013 relied on various judicial decisions including that of **D.T Dobie vs Muchina (1982) KLR 1**, for the position that striking out of pleadings is draconian step which ought to be employed in the clearest of cases. He submitted that the 1<sup>st</sup> Defendant's Defence raises triable issues that should proceed to full hearing, and the correspondence between the 1<sup>st</sup> Defendant and Kenya Re-Insurance Corporation should be subjected to cross-examination.

The 2<sup>nd</sup> Defendant on his part stated that he was a Financial Controller in Kenya Re-Insurance Corporation until 2007, and was tasked with recovery of outstanding debts of the said corporation. Other than confirming that the Corporation did recover Kshs 23,359,250/= owed to it by Trident Insurance Company Ltd, he denied knowledge of the other allegations made by the Plaintiff of his participation in the sale and transfer of the suit property to the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant's counsel filed submissions dated 16<sup>th</sup> July 2013 in which he reiterated the legal arguments made by the 1<sup>st</sup> Defendant's counsel.

I have carefully considered the pleadings filed herein, together with the evidence and submissions made by the Plaintiff and Defendants. There are three issues for determination. The first issue for determination is whether the Defences filed herein by the Defendants should be struck out for reasons that they disclose no triable issues. The second issue for determination is whether judgment can issue against the Defendants herein. Lastly, is whether the 1<sup>st</sup> Defendant can be ordered to vacate the suit property.

On the striking out of the Defences, the applicable law is Order 2 Rule 15 (1) of the Civil Procedure Rules which 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. The Plaintiff in the Plaint dated 28<sup>th</sup> October 2008 is seeking a declaration that the transfer of the suit property between the 1<sup>st</sup> Defendant and Kenya Re-Insurance Corporation was illegal, fraudulent and null and void; a cancellation of the said transfer; and a mandatory injunction directing the 1<sup>st</sup> Defendant to vacate the suit property, among other orders.

The 1<sup>st</sup> Defendant in her Defence dated 5<sup>th</sup> July 2013 denies the Plaintiff's averments and states that the dealings she had with Kenya Re-Insurance Corporation with respect to the suit property were lawful. The 2<sup>nd</sup> Defendant on his part in his Defence dated 29<sup>th</sup> November 2011 denied the allegations of fraud and illegality, and put the Plaintiff to strict proof thereof. I find that in light of these denials the burden is on the Plaintiff to prove the fraud that is alleged and which must be discharged.

The 1<sup>st</sup> Defendant has also given an explanation for the sale and transfer of the suit property to her, that must be controverted by the Plaintiff. This can only be by bringing evidence from the relevant witnesses to show that there was no whistle-blowing arrangement as alleged by the 1<sup>st</sup> Defendant. I must also add that it is important in this regard to determine the extent and nature of the participation and involvement of Kenya Re-Insurance Corporation, if any, in the sale and transfer of the suit property.

It is thus my finding that there are triable issues raised by the Defendants in their Defences and pleadings, and the said Defences are not amenable to striking out. For the same reasons summary judgment cannot therefore issue against the Defendants as their Defences are still on record and must be considered by this court.

I respectively differ with the ruling in Kenya Anti-Corruption Commission vs John F. Kinyua and Another, ELC 322 of 2008 in this regard. Okwengu J. (as she then was) in the said ruling found in similar circumstances that there was no consideration paid, and struck out the Defences filed by the Defendants therein and entered judgment for the Plaintiff. It is my humble view that the issue of whether there was any valuable consideration given by the 1<sup>st</sup> Defendant herein, is in itself a triable issue, that can

only be determined after examination of all the evidence at full trial. The cited case is also distinguished as the Defendants therein had been tried and convicted of criminal charges arising from the sale of the property belonging to Kenya Re-Insurance Corporation, unlike in the present case where the Defendants were discharged.

I accordingly decline to grant prayers (a), (b), (c) and (e) of the Plaintiff's Notice of Motion for the foregoing reasons.

Lastly on the issue whether the 1<sup>st</sup> Defendant can be ordered to vacate the suit property, the Court of Appeal held in **Kenya Breweries Ltd and another v Washington Okeyo (2002) 1 E.A. 109**, that there must be special circumstances over and above the establishment of a *prima facie* case for a mandatory injunction to issue, and even then only in clear cases where the court thinks that the matter ought to be decided at once. This is not such a clear case, as there are outstanding issues that still need to be clarified to the court as elucidated in the foregoing. Prayer (d) of the Plaintiff's Notice of Motion is therefore also denied.

The Plaintiff's Notice of Motion dated 12<sup>th</sup> March 2012 accordingly fails, and the costs of the said Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 29<sup>th</sup> day of October , 2013.

**P. NYAMWEYA**

**JUDGE**