



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 585 OF 2011

DUPOTO GROUP LIMITED..... PLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY.....1ST DEFENDANT

THE CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

RULING

This ruling is on two pending applications and a Notice of Preliminary Objection to one of the pending applications. The two applications are firstly, a Notice of Motion dated 27th October 2011 filed by the Plaintiff and seeking orders of injunction against the Defendants. The 1st Defendant then filed a Notice of Preliminary Objection dated 9th November 2011 asking the court to strike out the suit on the grounds that the suit has been filed in contravention of the mandatory provisions of section 33 and 34(a) of the Kenya Airports Authority Act. The 2nd Defendant filed the second application, which is a Notice of Motion dated 10th February 2012 seeking that the Plaintiff's suit filed herein be struck out, and the suit dismissed with costs against the 2nd Defendant.

The 1st Defendant's Preliminary Objection

I will first consider the Preliminary Objection as it raises the point of law of the jurisdiction of this court. The 1st Defendant in submissions filed in court dated 3rd June 2013 has argued that the suit herein is misconceived incompetent and immature, as it was filed in contravention of the provisions of sections 33 and 34 of the Kenya Airports Authority Act (Cap 385 of the Laws of Kenya). Further, that section 33 prohibits any suit for damages against the 1st Defendant, and gives first recourse to arbitration in the event that parties do not agree to compensation, while section 34 (a) requires a litigant to serve one month's notice on the Managing Director or his agent before instituting a suit, which was not done in this suit.

The 2nd Defendant in submissions dated 17th February 2012 supported the objection, and submitted that it was similarly never served with a demand notice as required by Order 3 Rule 2(d) of the Civil Procedure Rules.

The Plaintiff did not respond to the Preliminary Objection or file submissions, despite being given several opportunities to do so. Its Advocate filed a Chamber Summons dated 21st November 2012 to cease acting, which he failed to prosecute, again after having been given several opportunities, and holding up the determination of the pending applications and preliminary objection. This court therefore considered the said Advocate to be still on record, and proceeded to hear and reserve this ruling on the substantive pending applications and the preliminary objection.

I have considered the arguments made with respect to the 1st Defendant's Preliminary Objection and the issues for determination are whether it raises points of law and if so, whether it should be upheld. The 1st Defendant has put forward two grounds, one of jurisdiction of this court and the other of lack of service of the required mandatory notice. It is my finding in this regard that while the issue of jurisdiction is on a point of law, that of failure to serve the required mandatory notice is not, as it requires the facts of such service or the lack thereof to be established. I am guided in this respect by the decision in **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696** that a preliminary objection must be on a pure point of law and cannot be raised if any fact has to be ascertained.

The 1st Defendant submitted that the parcel of land that is the subject of the suit herein falls within the flight path to Jomo Kenyatta International Airport and it has the authority to interfere with it pursuant to sections 12, 14, 15 and 16 of the Kenya Airports Authority Act.

I have perused the Complaint filed herein dated 27th October 2011, and note that the Plaintiffs are seeking damages for trespass to the suit property as against the Defendants. To this extent section 33 of the Kenya Airports Authority Act is applicable. I also agree with the 1st Defendant's submissions that the Plaintiff ought to exhaust the mechanisms provided by statute in dealing with the disputes herein, before proceeding to this Court. Even though this Court has been granted and has exclusive jurisdiction over all matters relating to land and the environment under the Constitution, it is my view that this jurisdiction should not be invoked at the first instance where a law has specifically and expressly prescribed procedures for handling grievances raised by the Plaintiff. This Court is in addition now enjoined to promote alternative dispute resolution methods under Article 159 of the Constitution.

This issue was raised in **Republic v National Environmental Management Authority & 2 others exparte Greenhills Investment Ltd & 2 others, (2006) 1KLR (E&L) 784**, where Ibrahim J. (as he then was) held that section 129 of the Environmental Management and Co-ordination Act requiring filing of appeals to the National Environment Tribunal in the first instance, does not oust the jurisdiction of the High Court of considering applications for judicial review of the decisions of NEMA. However, the Honourable Judge did state that it is an arguable point of law whether the existence of this statutory or alternative remedy in law precludes applicants from coming to the High Court to seek judicial review orders.

The position was later clarified by the Court of Appeal in **Speaker of National Assembly v Njenga Karume [2008] 1 KLR 425**, where it was held that:

“where there is clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

I therefore uphold the preliminary objection by the 1st Defendant as section 33 provides that arbitration proceedings require to be commenced before this court can be moved on the dispute herein. I also note in this regard that under section 6 of the Arbitration Act once arbitration proceedings commence this court is required to stay its proceedings pending the said arbitration. In addition, the Plaintiff will have to address the issue of any preservative orders or possession of the suit property herein in the arbitration proceedings.

This is for the reason that even though the court can grant interim orders pending arbitration under section 7 of the Arbitration Act, in this particular dispute there are specific laws and regulations that apply in this regard such as the Civil Aviation Act and regulations, that will be better considered in the context of the arbitration.

I however find that the suit herein and Plaintiff's Notice of Motion dated 27th October 2011 are not amenable to striking out as this court still has residual jurisdiction. I therefore uphold the 1st Defendant's preliminary objection and order that the proceedings of the suit herein and Plaintiff's Notice of Motion dated 27th October 2011 be stayed pending the arbitration between the Plaintiff and 1st Defendant. The costs of the 1st Defendant's Preliminary Objection dated 9th November 2011 shall be in the cause.

The 2nd Defendant's Notice of Motion

I am of the view that the findings and orders given hereinabove do not preclude the consideration of the 2nd Defendant's Notices of Motion, for the reasons that the said orders will not be interfered with whatever the outcome of the Notice of Motion.

The 2nd Defendant's in the said Notice of Motion is seeking to strike out the suit against it on the ground that the Plaintiff filed herein does not disclose a reasonable cause of action. The reasons given by the 2nd Defendant are that the Plaintiff does not disclose any action against the Defendant, and that the Plaintiff is not the registered owner of the suit property herein being LR NO 209/12016. These facts are deposed to in a supporting Affidavit sworn on 10th February 2012 by Karisa Iha, the 2nd Defendant's Deputy Director of Legal Affairs, in which he *inter alia* states that the copy of the title relied upon by the Plaintiff is a forgery.

The 2nd Defendant in its submissions dated 17th February 2012 reiterated the above arguments and gave a detailed analysis of the allegations made against it in the Plaintiff filed herein, and of the procedures of allocation of land by the 2nd Defendant, and cited various judicial authorities in support. The 1st Defendant in its submissions dated 3rd June 2013 associated itself with the 2nd Defendant's submissions, save to state that it had no interest over the ownership of the suit property and had no reason to doubt the authenticity of the Plaintiff's title to the land.

The Plaintiff did not respond to the 2nd Defendant's Notice of Motion.

The issue to be decided in the 2nd Defendant's Notice of Motion is whether the Plaintiff and suit herein should be struck out as against the 2nd Defendant in the circumstances presented in the said application. The law on striking out of pleadings is stated in Order 2 Rule 15 of the Civil Procedure Rules and in various judicial decisions. Order 2 Rule 15 (1) and (2) provide that:

(1) 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.”

(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.

The salient principles that apply to striking out of pleadings are that this is a draconian measure to be employed sparingly, and the grounds for striking out must be plain on the face of the pleadings and from the facts alleged by the parties. This was stated by the Court of Appeal in **D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1** as follows at page 9:-

“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.”

It is my view that the overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. This is because a pleading that raises triable issues confirms the existence of a reasonable cause of action, and it cannot consequently be said that the said pleading is scandalous, frivolous or vexatious.

An examination of the Plaintiff filed herein dated 27th October 2011 shows that the claim against 2nd Defendant is in paragraphs 15 and 16, which is that the 2nd Defendant has fraudulently started allocating portions of the suit property to third parties, and that on 23/10/2011 some of its officials invaded the suit land, demolished structures thereat and evicted members of the Plaintiff therefrom. The Plaintiff then proceeds to give the particulars of the fraud and collusion on the part of the Defendants. The reliefs sought in the Plaintiff of a permanent injunction, damages and a mandatory injunction are also sought against both Defendants.

It is therefore evident from the Plaintiff that there is a claim being made against the 2nd Defendant. The 2nd Defendant in his submissions tried to show that the claim cannot stand, however Order 15 Rule 2 of the Civil Procedure Rules cited hereinabove is clear that no evidence can be brought when one is seeking to strike out a suit on the basis that it discloses no reasonable cause of action, as this fact should be evident from the pleadings filed. In addition the very fact of the 2nd Defendant seeking to discount the said paragraphs 15 and 16 of the Plaintiff shows that there are triable issues raised by the Plaintiff, that can only be effectively decided after full trial.

It is therefore my finding that this is not a clear case for striking out of the Plaintiff, and the 2nd Defendant application dated 10th February 2012 fails. The costs of the said Notice of Motion shall be in the cause

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____14th____ day of ____November____, 2013.

P. NYAMWEYA

JUDGE