



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
LAND AND ENVIRONMENTAL DIVISION
ELC CIVIL SUIT NO. 98 OF 2010

SIMON KIHOSHIA NDIRITU & 100 OTHERS.....PLAINTIFFS

VERSUS

ABDI SHEIKH AHMED.....1ST DEFENDANT

AKIBA (DEVELOPMENTS) LIMITED2ND DEFENDANT

TARAGURI LALITCHANDRA PANDIT3RD DEFENDANT

DHRUV LALITCHADRA PANDIT4TH DEFENDANT

ABRAHAM MURIUKI MUNENE5TH DEFENDANT

RULING

The application by way of Notice of Motion before the court is dated 15th July 2011 and is brought by the 3rd, 4th and 5th Defendants/Applicants. The Applicants are seeking orders that this Court strikes out with costs the suit against the 3rd, 4th and 5th Defendant; and/or in the alternative, the name of the 3rd and 4th and 5th Defendants be struck from the suit herein with costs. The Application is supported by an Affidavit and Supplementary Affidavit sworn by the 5th Defendant on 5th July 2011 and 2nd November 2011 respectively, and written submissions by the Applicant's Counsel dated on 9th November 2011.

The said suit was filed on 29th March 2010 by the Plaintiffs by way of an Amended Plaint dated 26th March 2010. The Plaintiffs who are residents of Akiba Estate in Nairobi, claim that the Applicants contracted to sell to them houses in the said estate, and it was agreed that a portion of the land known as LR No. 13324/92 (hereinafter referred to as the suit property) would be used to construct a nursery school for the estate. The Plaintiffs further claim that the Applicants, in breach of the said agreement, failed to build the said nursery school and sold the suit property to the 1st Defendant.

The Applicants' case is that the Plaintiffs claims against the 3rd, 4th and 5th Defendants is scandalous, frivolous and vexatious and otherwise and abuse of court process, and the 3rd, 4th and 5th Defendants have been wrongly and illegally enjoined as parties in this suit. The Applicants state that the Plaintiff

purports to sue the 3rd, 4th and 5th Defendants on the notion that they were the Directors of the 2nd Defendants Company prior to its dissolution, contrary to and in total disregard to the laws and procedures set out in the Companies Act (Cap 486). Further that the 2nd Defendant herein was dissolved under Section 339 of the Companies Act, on 5th of August 2009, and that there has been no order for reinstatement of the company under Section 339 (6), or Section 338 of the Companies Act.

The Applicants also aver that the 3rd, 4th and 5th Defendants herein have been sued in their personal capacities, and no fraud is pleaded or alleged against the 3rd, 4th and 5th Defendants or grounds disclosed to warrant the lifting of the 2nd Defendant's corporate veil. It is also averred by the Applicants that the 3rd, 4th and 5th Defendants were not directors of the 2nd Defendant between 1986 and 1987 and could not, therefore, have sold houses and contracted or covenanted with the Plaintiffs in their capacity as directors of the 2nd Defendant as alleged.

According to the Applicants the suit property herein was wholly owned by the 2nd Defendant to the exclusion of the Plaintiffs, who are yet to produce evidence of their proprietary rights over the suit property or of a contract in writing for the transfer of interest in the said land. In the premises, the Applicant's case is that the decision by the 2nd Defendant to sell and to transfer the same was well within the 2nd Defendant's rights, and that the transfer of the suit property to the 1st Defendant happened on the 1st April 2009 well before the dissolution of the 2nd Defendant.

Finally, the Applicants allege that the matter herein is *res judicata* having been raised and determined by a court of competent jurisdiction in High Court Civil Case No. 298 of 1997, from which no appeal has been preferred. The Applicants state that the 2nd Defendant (now dissolved) sought in the said suit to restrain the residents from obstructing it from building a nursery school on the suit property. The application was heard and a ruling given on 25th November 1998 by Githinji J. (as he then was), ordering that the said residents be restrained from interfering with the 2nd Defendant's enjoyment of the suit property. A subsequent application for review of the aforesaid ruling filed by the Plaintiffs was accordingly dismissed with costs.

The Plaintiffs' Counsel in response filed Grounds of Opposition dated 23rd September 2011, and submissions dated 15th November 2011. The Plaintiffs opposed the application on the grounds that the 3rd – 5th Defendants (then acting as directors and/or agents of the 2nd Defendant) colluded with the 1st Defendants to fraudulently transfer the suit property on 3rd September, 2009 long after the 2nd Defendant had been wound up. Further that the transfer lodged at the Lands Registry depicts the suit property as having been sold by the 3rd – 5th Defendants to the 1st Defendant for Kshs.500,000/=, while the 1st Defendant claims in his affidavit filed in court that he bought the said property for Kshs.3,000,000/= from a beneficial owner at an auction. The Plaintiffs state that the suit property has never been charged, and it is necessary for the 3rd – 5th Defendants to inform the court how the property came to be sold under public auction. These arguments were also reiterated in written submissions by the Plaintiffs' Counsel dated 15th November 2011.

The 1st Defendant in a supplementary affidavit sworn on 9th November 2011 states that he is an innocent purchaser for value, having bought the suit premises from the beneficial owner after advertisement of the sale by public auction. The 1st Defendant also states that the Plaintiffs have no interest in the property in law. Further that the cause of action over the suit property is an alleged breach of contract between the Plaintiffs and the 2nd, 3rd, 4th and 5th Defendants, to which he was not privy. The 1st Defendant also filed written submissions on 11th November 2011 wherein he submitted that he holds an indefeasible title over the suit property under section 23 of the Registration of Titles Act, and also made additional submissions on the protection of his rights under the Companies Act, on the Plaintiffs' violation of the said Act, and on the issue of *res judicata*.

Counsel for Plaintiffs and Applicants reiterated their arguments at the hearing of the application on 28th

November 2011, and I have read and carefully considered the pleadings, evidence and submissions made by the respective parties to this application. The power of the Court to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, and hence this power to strike out pleadings should be used sparingly and cautiously. In **D.T. Dobiie & Company (Kenya) Ltd. v. Muchina**[1982] KLR 1 at p. 9 Madan, J.A. said:-

“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 Applicant’s Counsel in the written submissions dated 9th November 2012 has clearly identified the issues arising from the suit filed by the Plaintiff. He discusses the issue whether directors of a company can be sued in their personal capacity after a company has been dissolved, whether the sale and transfer of the suit property to the 1st Defendant was legal and raises the defence of estoppel against the Plaintiff. The Applicant’s Counsel also cites various authorities in support of his arguments. What clearly emerges from all the pleadings and submissions is that there are legal issues that need further consideration, and the main trial is the proper forum to canvass these issues. I cannot at this stage without the benefit of further evidence and argument purport to make a final determination on the issues raised. This is therefore was not a proper case for striking out the pleadings against the Applicants, and it is clearly not a frivolous or vexatious suit. It should be left to the Plaintiffs to prove their case by way of evidence, and for the Applicants to argue their defence at the trial.

On the Applicants prayer that the name of the 3rd and 4th and 5th Defendants be struck from the suit herein, I find that they are proper parties, as there is a cause of action alleged to exist against them for breach of contract in the Amended Plaint dated 26th March 2010. It is up to to the Applicants to disprove this cause of action at the trial, and the 3rd, 4th and 5th Defendants’ proper remedy in the event of misjoinder would be in an award for costs.

For these reasons the Applicant’s application dated 15th July 2011 is hereby dismissed. The Applicants shall bear the costs of the application.

Dated, signed and delivered in open court at Nairobi this ____8th____ day of ____February____, 2012.

P. NYAMWEYA
JUDGE