



CHRISTOPHE HAPPE.....PLAINTIFF

VERSUS

MARINE POWER HOUSE LTD. & 7 OTHERS.....DEFENDANT

RULING

1. The Defendant's application before me is dated 30th June, 2010. It prays for the suit against the 1st to 5th and 7th and 8th Defendants be struck out under Section 1A, 1B 3A Civil Procedure Act and Order VI Rule 13(a) (b) and (d) Civil Procedure Rules. The applicant urges striking out essentially on three grounds.

First, that the suit is vexatious and scandalous, discloses no reasonable cause of action, and is an abuse of the court process.

Secondly, that there is no privity of contract by way of a written or other agreement between the Plaintiff and the Defendants.

Thirdly, the Defendants assert that the Plaintiff has filed another suit HCCC No. 16 of 2010 Christoph BF Happe Vs Altocoff Ltd. and Alessandro Torriani claiming shs. 125,000,000/=, in which similar allegations are made as in the present suit.

2. All those averments are in the Supporting Affidavit of Allesandro Torriani deposed on 30th June, 2010. The Deponent annexed, the Plaint in HCCC 16 of 2010 as Exhibit 'A'. The defendants in that case are not the same as those in this suit. The connecting factor between the suits is Mr. Torriani in respect to his business ventures in Funzi Island and the properties in dispute, and the plaintiff.

3. The application is opposed vide the Replying affidavit of the Plaintiff. He depones that the suit is for a liquidated amount. It is against Mr. Torriani and a company. That Mr. Torriani is a trickster who took advantage of the Plaintiff and he defrauded and swindled him. The present suit is about land bought from the investment funds contributed by the Plaintiff. Finally, that the suit should go for full trial since the issues raised by Plaintiff should be determined on merit.

4. The plaintiff alleges In HCC 16 of 2010, that he invested US \$ 1.5 Million and Shs. 8,270,000/= in a joint venture project known as Altocoff Investment Funzi Island Project. It was to be owned by Altocoff Limited. Some of the Investment funds contributed by Plaintiff were used to purchase machinery, vehicles, equipment and other items. Nineteen parcels of land in Kwale/Funzi on Funzi Island (See Plaintiff paragraphs 7 and 12 were similarly purchased. Subsequently, the Plaintiff discovered that he had been defrauded by Mr. Torriani as all the properties purchased had been transferred to other entities (paragraph 17).

5. Further, in HCCC 16 of 2010, the essential remedies sought by the Plaintiff is a refund of his investment in the amount of the equivalent of Shs. 125,270,000/=, interest thereon, and exemplary damages for breach of trust.

6. In the present suit, the Plaintiff asserts that he discovered that the 1st Defendant's director, Mr. Torriani, had transferred the nineteen parcels of land from Altocoff Ltd to the 3rd to 8th Defendants. This is stated in the Amended Plaint at paragraph 14. Alternatively, that the monies invested by the Plaintiff were used to purchase the nineteen parcels of land which were then registered in the names of the 1st to 8th Defendants. Particulars of fraud are set out at paragraph 23 of the Plaint.

7. In this suit, the Plaintiff essentially seeks a declaration that the Defendants hold the purchased assets on a constructive trust for the Plaintiff, or are liable to account the plaintiff. Secondly, injunctive relief is sought to restrain the Defendants from disposing the assets and properties.

Finally, plaintiff seeks accounts and inquiries to trace and recover the assets.

8. I have considered the parties' submissions and the documents and authorities availed or referred to at the hearing of the application. I will deal with the application following the grounds argued by the applicant.

Abuse of the Court Process

9. It is not disputed that the two suits arise from the same factual circumstances. As a result, there is a substantial interphase and similarity in the assertions made and matters in issue in both suits. However, I do not view the aforesaid similarities to amount to an abuse of the court process in this case. The prayers ultimately sought in each suit are very disparate and distinct.

10. In the present suit the Plaintiff has been candid enough to disclose in paragraph 34 of its amended plaint the existence of HCC 16 of 2010. He says it was filed before he became aware of the other matters subject of the current suit. I think that is perfectly understandable, given that in this suit there are serious allegations of fraud, clearly particularized. In such situation, information often unravels slowly and over time. Whilst it may be true, as argued by the Applicants, that the Plaintiff was aware of the existence of the Defendants, I am prepared to accept the Plaintiff's arguments that it was open to it, as it obtained clearer details of the alleged fraud, to file individual suits against each defendant.

11. In this regard, an abuse of court process is established where the orders sought are similar in two or more different suits – **Commercial Exchange Ltd and Another Vs Bank of Kenya Ltd** (1996) LLR 2194 (CAK). Where there is an allegation of fraud, however, as in this case, no court is entitled to shut its eyes and ears, and a party should be given ample opportunity to ventilate its case – **United Insurance Co. Ltd. Vs Keriaro Marwa Musembi Ndolo & Co. Advocates** [2000] LLR 5657. I am therefore disinclined to strike out on this ground.

Agreement For Purchase of land/Privity of Contract

12. The Applicants argument is that there is no privity of contract with the defendants by written agreement as provided for under Section 3 (3) Law of Contract Act, and this is fatal to its application. This argument strikes me as hollow. The circumstances here pleaded expressly raise the issue of fraud. In any event Section 3(3) of the Law of Contract Act is excepted from application by Section 3(4) where, as in this case, the operation or creation of a resulting, implied or constructive trust is pleaded. Here, the Plaintiff seeks a declaration that the Defendant holds the assets subject of the suit on a constructive trust. On this ground also, I am unpersuaded to strike out.

Cause of Action

13. The Applicant's argument here is that the cause of action in both suits is similar. I think I have dealt with this point already when dealing with the distinctions in the prayers sought. I will therefore not repeat myself, save to say that even if I was inclined to agree with the Applicant on this point, the existence of the claim on fraud would deter my readiness to strike out.

14. Overall, I prefer to abide by the well known principles in **DT Dobie & Co. (K) Ltd. Vs Joseph Uharia Muchira and Leah Wanjiku Mbugua** [1982] IKLR, that the court should aim at sustaining rather than terminating a suit summarily except if it is so weak that it is beyond redemption.

The upshot of all the foregoing is that the application is dismissed with costs to the Plaintiff.

15. However, given the fact that I have observed that both suits emanate from the same sequence of events there is powerful premise for the matters to be consolidated. This will aid full determination of all questions arising between the parties in relation to the Altocoff Project.

I will therefore order that the parties shall appear for a mention within thirty (30) days from the date hereof when further arguments on and directions regarding consolidation of the two suits may be made. The Plaintiff shall serve notice of the mention to the parties in HCCC 16 of 2010.

Orders Accordingly.

Dated, signed and delivered this 31st day of August, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d)