REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 501 of 2010

SUKHDEV SINGH LALY……..……..…… PLAINTIFF

VERSUS

GERALD RICHARD KAFEERO……..……1ST DEFENDANT

MARY KAVOSA KAFEERO……..……2ND DEFENDANT

RULING

The application for determination is a Notice of Motion dated 07.12.11 brought by the Defendants under Order 2 Rule 15(1)(a)(b)(c) and (d) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The application is supported by the Affidavit sworn on the same date by the 2nd Defendant in the matter. The application seeks the following substantive prayers:-

1. That the Court does dismiss the Plaintiff's suit for failing to disclose any reasonable cause of action, being scandalous, frivolous and vexatious, and causing delay to fair trial and or for being otherwise an abuse of the court process.

2. That Judgment be entered in favour of the Defendants in terms of the Counterclaim.

The cross-cutting ground for the application is that the issues for determination in the suit have already been dealt with after the determination of two applications filed by the Plaintiff, which were dismissed in rulings delivered on 11th February 2011 and 8th July, 2011. Further that the said applications essentially sought the same prayers as sought in the main suit, and the Plaintiff's suit is therefore not only frivolous, and scandalous, but also vexatious.

The Defendants allege that the Plaintiff has failed to set down the suit for hearing, and instead has resorted to filing unmerited and *res-judicata* applications which have been dismissed with costs to the Defendants. Further, that the Plaintiff's application dated 19.10.10 was dismissed on the 11.02.11 as being unmerited while his application dated 28.02.11 was dismissed on the 08.07.11 as being unmerited and res-judicata. The 2nd Defendant depones that that the prayers made by the Plaintiff in the plaint have either been overtaken by events or spent in the applications .

The Defendants further state that there has been inordinate delay on the part of the Plaintiff, and that it is in the interest of justice that the orders sought be granted since the Plaintiff has lost interest in the matter, the substratum of the suit has been eroded, and there must be an end to litigation. The Defendants contend that the Plaintiff has delayed for more than one year thereby offending Order 17 of the Civil Procedure Rules.

The application is opposed, and the Plaintiff has filed a replying affidavit sworn on 15.02.11 and filed in court on the same date. The Plaintiff depones that the application cannot stand because he has a good case, both in the Plaint and in the Reply to Counterclaim, which pleadings raise triable issues that cannot

be preliminarily dismissed as sought by the Defendants. The Plaintiff states that although the rulings referred to failed to give him the injunctive orders, it was acknowledged in the body of the rulings that the Plaintiff had a valid claim.

The Plaintiff further contends that dismissing the suit would mean that he was not being accorded a fair trial, thereby denying him his constitutional rights. Further, that the Defendants want to take advantage of his goodwill by claiming the title while they have refused and or neglected to oblige to the terms of the sale agreement entered into by the parties. The Plaintiff also states that the Defendants will suffer no prejudice as they are already enjoying the suit premises and have nothing to lose when the case goes for full trial.

Counsel for the parties reiterated the above arguments during the hearing of the application on 19th September 2012. The Defendant's Counsel in addition relied on the authorities of **Joseph Okumu Simiyu vs East Afriican Building Society and Another (2005) eKLR, APA Insurance Ltd vs Theodora Atieno Okal (2012) eKLR ,** and **Raphael Mugwanja Warari vs Olekejuado County Council and 2 Others (2012) eKLR** for his arguments that the Plaint should be struck out. The Plaintiff's Counsel submitted that in the two rulings relied upon by the Defendants were not conclusive, and the court did assert that the Plaintiff's rights were ascertainable. Further, that the basis of the suit herein is the sale agreement between the parties, and that the Court did not rule that there was no balance of the purchase price due under the said sale agreement to warrant the suit being dismissed. The issue of whether there was full payment of the purchase price was therefore still outstanding.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. There are two issues before the court. The first is whether the plaint filed herein should be struck out as being scandalous, frivolous, vexatious or otherwise an abuse of the court, on the basis of findings made in the rulings made on a preliminary applications filed by the Plaintiff. The second issue is whether summary judgment should be entered for the Defendant on the terms of his Counterclaim.

The law on striking out of pleadings is stated in Order 2 Rule 15 of the Civil Procedure Rules and in various judicial decisions aptly summarized by Kimondo J. in Raphael Mugwanja Warari vs Olekejuado County Council and 2 Others (2012) eKLR which was relied upon by the Defendants. The salient principles that apply are that striking out a pleading 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 inD.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."

An examination of the Amended Plaint dated 3rd April 2012 shows that there is a claim for the balance of the purchase price of Kshs 6,900,000/=, with respect to the sale and transfer by the Plaintiff to the Defendants of the property known as L.R No7741/337 situated at Kitisuru, Nairobi. The Defendants in their Amended Statement of Defence and Counterclaim dated 24th April 2012 claim Kshs 3,240,000/= from the Plaintiff being the money they claim was collected as rent from the suit premises over and above the purchase price.

It is therefore clear from the face of the pleadings that there are at least two triable issues, namely whether there was full payment of the purchase price and whether there was an agreement that the rent collected from the suit premises would go to the payment of the purchase price. It therefore my finding that this is not a clear case for striking out of the pleadings. It is also my finding that the identified triable issues were not conclusively determined in the rulings cited by the Defendants. Indeed in the ruling delivered by Hon J. Okwengu (as she then was) on 11th February 2011 on an application by the Plaintiff for a temporary injunction, the Honourable Judge stated as follows in dismissing the said application:

"…I find that the applicant has not established any *prima facie* case regarding the nullification of the

agreement of sale of the suit property or revocation of the title held by the Respondent. In any case the applicant's loss if any is clearly ascertainable. It is the unpaid balance of the purchase price and the rent due from the suit property. It cannot therefore be said that the applicant is likely to suffer irreparable loss if the orders sought are not granted ..."

In her ruling delivered on 8th July 2011 on an application by the Plaintiff for rent to be paid to him, for the Defendant to deposit security with the court and for an inhibition to issue, the Honourable Judge found all other issues other than that of deposit of security to be *res- judicata*. The Honourable Judge however stated as follows on the issue of security:

"…Should the applicant succeed in its suits, the rent from the suit property and indeed the suit property itself will still be available for attachment. In the circumstances I find that the applicant's plea for the respondents to furnish security for their attendance is not justified…"

It is evident that the Hounourable Judge envisaged that the suit herein would go for full trial, and in any case the objective of an interlocutory application where interim relief is sought is not to conclusively determine a dispute between the parties. To employ interlocutory applications towards this end would not only be an abuse of the process of court, but inimical to justice as it would result in judgement being entered without the court being fully informed on the merits of the case through discovery and oral evidence.

On the second issue for judgment on the terms of the Counterclaim, it is firstly noted that a prayer for summary judgment can only be made under Order 36 of the Civil Procedure Rules, and not under Order 2 Rule 15. However in order to provide substantive justice as this Court is required to do under Article 159 of the Constitution, the said prayer will be considered despite this procedural anomaly.

It must be shown that there is no *bona fide* triable issue before summary judgment can be granted, and an application under Order 36 Rule 1 should be made before the defence to the claim is filed. This was stated by the late Honourable Madan J.A. in **Continental Butchery Ltd. vs. Nthiwa (1989) KLR 573** as follows: -

"With a view to eliminate delays in the administration of justice which would keep litigants out of their just dues or enforcement of their property the court is empowered in an appropriate suit to enter judgment for the claim of the plaintiff under summary procedure provided by Order 35 subject to there being no *bona fide* triable issue which would entitle a defendant leave to defend. If a *bona fide* triable issue is raised the defendant must be given unconditional leave to defend but not so in a case in which the court feels justified in thinking that the defences raised are a sham."

This reasoning also applies to Counterclaims as Order 7 Rule 17 (3) states that where a Counterclaim is pleaded, a defence thereto shall be subject to the rules applicable to defences. It is my finding that the said summary judgment cannot issue as the Plaintiff did file a Reply to Counterclaim on 24th November 2010, therefore the remedy of summary judgment is not available to the Defendants. In addition, there is a triable issue raised in the Counterclaim as to whether the Plaintiff received rent in lieu of payment of the balance of the purchase price

For the foregoing reasons the Defendants application dated 07.12.11 fails, and the Defendants shall meet the costs of the application.

Signed at Nairobi this _____ day of _____, 2012.

P. NYAMWEYA

JUDGE

Dated, signed and delivered in open court at Nairobi this _____23rd____ day of _____October____, 2012.

P. M. MWILU

JUDGE