REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 127 of 2011

EQUATOR FLOWERS KENYA LTD.....PLAINTIFF

VERSUS

ANGELINA JEPKEMBOI JEPTOO
ADAMS KEMBOI KIPLIMO
GEORGE KIPKOSGEI KIPLIMO ….....DEFENDANT

RULING:

The Applicant has filed a Notice of Motion dated the 23rd April, 2012. The Application is brought under the provisions of Order 2 Rule 15 (b) (c) and (d) of the Civil Procedure Rules. The Applicant relies on the grounds on the face of the Application and on the Supporting Affidavit of Nehemiah Kangogo, its Managing Director.

The Applicant is seeking for prayers that the Defence filed herein be struck out and judgment be entered against the Defendant/Respondents.

The Applicant avers that the Statement of Defence does not disclose any reasonable Defence. The Applicant states that it is the registered owner of the suit land, known as **SERGOIT/KOIWAPTAOI BLOCK 8/32** having purchased the suit land from **LAWRENCE KIPLIMO MURGOR** who happens to be the husband to the 1st Defendant and the father of the 2nd & 3rd Defendants.

Annexed to the Application is an affidavit sworn by the said **LAWRENCE KIPLIMO MURGOR** In which he confirms that he has no issues with the Applicant and that he voluntarily effected transfer of the suit land to the Applicant.

The Applicant states that it brings the application in good faith and in accordance with the provisions of the law and urges the court to allow the application and also prays for costs.

The Application was opposed and the Respondents relied on the filed Grounds of opposition dated the 13th June, 2012.

Counsel for the Respondent submitted that the Applicant omitted to annex the Statement Defence it sought to strike out, which omission Counsel submitted was fatal.

Counsel also submitted that in such applications no evidence ought to be allowed or adduced and the grounds set out in the Application should suffice.

Counsel argued that the subject matter related to a dispute over land. That there were in existence interim injunctive orders and the application was still pending in court, to be listed for hearing and to be

heard interparties.

Counsel further submitted that the Respondents had filed an application to amend the Defence and the same was still pending.

The provisions of Article 159 (a) & (d) of the Constitution 2010 were also invoked by Counsel, that the court must administer justice without favour.

Counsel submitted that the Respondents had a good claim against the Plaintiff. The Respondents relied on the case of **PARKLANDS PROPERTIES LTD -VS- PATEL HCC NO. 2/1970** where it was held that;

".....that it is not necessary to strike out a defence which has failed to comply with the rules of pleadings but on the face of it answers the claim of the Plaintiff....."

Counsel urged the court to dismiss the application and to allow the matter to proceed to trial and be determined on merits.

After hearing the submissions and arguments of both Counsel for the Applicant and the Respondent the issues for determination are:

1) whether the defence is scandalous, frivolous, vexatious, a gross abuse of court process.

2) Striking out of the Defence.

3) Costs.

On the first issue, the Applicants states in the grounds it seeking to rely on in its application that the Statement of Defence is bare, contains mere denials, does not disclose any reasonable defence in law and that it is scandalous, frivolous, vexatious and a gross abuse of the court process.

The Blacks Law Dictionary describes a scandalous pleading as;

a matter that is both grossly disgraceful (or defamatory) and irrelevant to the action or defense.

A vexatious pleading as; ***One without reasonable or probable cause or excuse; harassing; annoying.***

A frivolous pleading as; ***lacking a legal basis or legal merit; not serious; not reasonably purposeful.***

It is incumbent upon the Applicant to show the court that the Statement of Defence fits the three descriptions referred to above which are Applicant has failed to do.

In the case of **D.T DOBIE -VS- MUCHINA (1982) KLR 1** Madam JA held;

".....That a court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out....."

Upon perusal of the court record, this court notes that there is a pending application to amend the Statement of Defence. The intended amendment raises issues of fraud, these are triable issues of fact and law as stated in the above cited case it may inject some life to the suit.

This court has also taken cognizance of the Affidavit made by **LAWRENCE KIPLIMO MURGOR,** and notes that he is not a party to the suit and therefore there is need for oral evidence to be taken.

The case of **D.T DOBIE SUPRA** is revisited and it was held;

“.....a court must exercise extreme caution and should refrain from making final findings that should be reserved for a trial court.....”

This court is of the opinion that no proper and fair decision can be made before hearing both sides.

Injustice will also be caused if the Respondents together with their witnesses are not heard.

The Respondents should be allowed to canvass the application to amend the defence. This court finds that the said intended defence is not hopeless or frivolous and raises triable issues, that need to be determined at a full hearing.

CONCLUSION:

For the reasons stated above, this court finds that the Application has no merit and the same is dismissed with costs to the Respondents.

It is so ordered.

DATED and DELIVERED at Eldoret this 17th day of December 2012.

A.MSHILA
JUDGE