



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CORAM: F. AZANGALALA J**

**CIVIL SUIT NO. 82 OF 2009**

**BETWEEN**

**FRANCIS OZIOVA**

**RANOGWA.....PLAINTIFF**

**KEFA KADENGE (suing on behalf of SHANGILIA CHILDRENS**

**HOME)**

**AND**

**SYMBIOS MICRO COMMUNITY**

**KAIBEIYO.....DEFENDANT**

**RULING**

The applicant **Symbios Micro Community – Kaibeiy**, the defendant herein, seeks one main order that the plaint herein be struck out and the plaintiff’s suit be dismissed for the reason that it may prejudice, embarrass or delay the fair trial of the defendant’s counter-claim. The application is expressed to be brought under the provisions of Order VI Rule 13 (1) (c), Order XII Rule 6, Order VIII Rule 12 of the Civil Procedure rules and Sections 3, 3A and 63 (e) of the Civil Procedure Act. Sections 3, 3A and 63 (e) in my view have inappropriately been invoked given the relevant provisions covering the defendant’s application.

The application is made on three main grounds: that prior to the institution of the suit, the plaintiffs had executed several documents conveying the suit property to the defendant; that the plaintiffs, in their pleadings, expressly admit that the suit property forms part of the estate of the late **Kipyego Chepsiror Kolil**, and the said estate devolves upon the widows of the deceased and that the specific widow has confirmed that her share belongs to the defendant and that the plaintiffs are stopped in law from denying the existence or validity of the memorandum of understanding and memorandum of discharge in respect

of the suit property.

The application is supported by an affidavit sworn by one **Margret Chebet Matui**, the defendants' manager. In the affidavit, it is deponed, *inter alia*, that on 5<sup>th</sup> July, 2005, the plaintiffs voluntarily executed a memorandum of understanding by which they acknowledged that the suit land was purchased with funds from the defendant and sealed all their rights over the same; that the plaintiffs acknowledge that the suit land forms part of the estate of the late **Kipyogo Chepsiror Kolil** which estate devolves to his widows and the specific widow has irrevocably confirmed that her share belongs to the defendant, and that the plaintiffs are stopped from denying the existence, effect or validity of the documents they executed when conveying the suit property to the defendant.

The application is opposed and there is a replying affidavit sworn by **Kefa Kadenge**, one of the board members of Shangilia Children's home. (the beneficiary of the suit). It is deponed in the affidavit, *inter alia*, that the suit was filed on the strength of a ruling of **Ibrahim J.** dated 23<sup>rd</sup> November, 2007 in a succession cause which ruling acknowledged a bona fide dispute between the parties; that the plaintiff, counter claim and defence to counter claim raise several issues of law and fact which should go to trial and that the defendant's application is without merit and should be dismissed with costs.

The application was canvassed before me on 23<sup>rd</sup> March, 2011 by **Mr. Ngala**, learned counsel for the defendant and **Mr. Nabasenge**, learned counsel for the plaintiffs. In his oral submissions in court, counsel for the defendant emphasized that the plaintiff had voluntarily executed documents acknowledging the defendant's interest in the suit property and a trial would only delay finalization of this matter. Counsel further submitted that two of defendant's directors are based in Canada and it would be unnecessarily expensive and inconvenient to have to call them for a trial.

Counsel for the plaintiffs on his part submitted that **Ibrahim J.**, in the succession cause appreciated the seriousness of the dispute between the parties herein and directed settlement of the same in separate proceedings. According to counsel, the defendant has agreed that there are 13 issues for determination and cannot now claim that there is nothing to go to trial. In the premises, counsel concluded that this was not a plain and obvious case for striking out.

I have considered the application, the affidavits filed and the submissions of counsel. I have also given due consideration to the authorities cited. Having done so, I take the following view of the matter. The defendant has invoked Order VI Rule 13 (1) (c) of the Civil Procedure Rules. Under that sub rule, the court may order to be struck out any pleading on the ground that **“it may prejudice, embarrass or delay the fair trial of the action...”**

So, I ask myself whether the plaintiff may prejudice, embarrass or delay the fair trial of this action. I have perused the plaintiff. It seeks one main order namely, a declaration that the plaintiff society is the owner of the suit property together with all the developments thereon. The claim is predicated on several documents allegedly executed in their favour. The suit property was and still is registered in the name of the late Kipyogo Chepsiror Kolil and the plaintiffs accordingly put forward a claim for the suit land in the succession cause. The defendant also laid a claim to the same land and both were advised to settle their disputes in separate proceedings-hence the suit.

The defendant has counter-claimed for the same land. In its counter-claim, it seeks a declaration that the same land belongs to it and the plaintiff be stopped from laying a claim thereto. Its claim is predicated on the allegation that it furnished the funds which purchased the suit land and developed the same and that the plaintiffs presided over the institution on the suit land in trust for it and on its behalf. In acknowledgment of its interest so the defendants contend, the plaintiffs executed documents in its favour.

In its reply and defence to counter-claim, the plaintiffs have denied the defendant's claim. They allege that at the time the suit land was purchased, the defendant was not in existence and had no capacity to enter into any agreement as alleged in the counter-claim. In the alternative, the plaintiffs aver that the purported agreements and memoranda were obtained by fraud, duress, coercion and misrepresentation particulars of which are given. In the further alternative, the plaintiffs aver that the purported memoranda are illegal and void *abi initio* on various grounds among them the ground that they were executed

without the sanction of the plaintiffs and with an entity without capacity to deal with the defendant.

I am unable to find anything embarrassing in the plaint as drawn or anything that may prejudice the fair trial of the action. The pleadings disclose various issues such as the capacities of both the plaintiffs and the defendants to enter into binding contracts in respect of the suit land; the validity of the documents relied upon by both parties; the legal status of the defendant at the time of the transactions; the relationship between each of the parties with the estate of the late Kipyego Chepsiror Kolil.

The above are, but, a few of the issues easily identifiable from the pleadings. They are, in my view, bonafide triable issues. In the premises, I do not find that the case against the defendant is embarrassing or may prejudice and delay the fair trial of the action. To strike out a pleading is a draconian remedy. The pleading must be incontestably bad and beyond the curative remedy of a suitable amendment. (See **D.T. Dobie & Company (Kenya) Ltd –vrs- Muchina [1952] KLR 1.**) The plaint herein is not in that category.

For the same reasons, the defendant is not entitled to the alternative order for judgment on admission. The documents relied upon to establish the admission are challenged on bona fide grounds and a determination of the challenge is not possible on the affidavit evidence placed before me. I should say no more lest I put the trial judge in bind in respect of those documents.

In the end, the application is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 11<sup>TH</sup> DAY OF MAY 2011.**

**F. AZANGALALA**

**JUDGE**

**Read in the presence of:-**

- (i) **Kwambai** holding brief for **Ngala** Advocate for the Defendant and
- (ii) **Mbeja** holding brief for **Nabasenge** advocate for the plaintiff

**F. AZANGALALA**

**JUDGE**