



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 35 OF 2009

PAOLO SPIGA.....1ST PLAINTIFF

GIANFRANCO MARIA SANTUCCI.....2ND PLAINTIFF

-VERSUS-

DR. JOHN MKHALASINGA KHAMINWA.....DEFENDANT

RULING

The Chamber Summons application dated 05/02/10 is made pursuant to provisions of Order VI Rules 13 (1) (b) and (d), 16, Order V Rule 21, 21A, 23, 26, 3A of the Civil Procedure Act. It seeks that the Defence and Counterclaim herein be struck out and judgement be entered for the Plaintiffs as prayed in the suit. Subsequently the suit be listed for formal proof. In addition and in the alternative, it seeks that the counterclaim be excluded and be tried as a separate suit.

It is premised on grounds that;-

1. The defence is embarrassing and incapable of answering the Plaintiff's claim.
2. The defence is vague and evasive
3. The defence is a sham and a waste of court's time

4. The defence is not maintainable nor is it arguable

5. No leave was sought to include non Kenyan Defendants who are ordinarily resident in Italy, a non Commonwealth Country.

The application is supported by the affidavit sworn by **GIANFRANCO MARIA SANTUCCI**(the 2nd Plaintiff) who states that Plaintiffs are registered proprietors of ESTELLA CO. LTD which constructed and owned **ALHAMBRA RESIDENCE** standing on parcel known as **LR NO.1790(Original No.424/9)** situated at **CASUARINA MALINDI A CR/12** issued by the Registrar of Companies on 24th November 2008 which shows that Plaintiffs are the registered proprietors of shares which they say are representative of **APARTMENT NO. 1 ALHAMBRA RESIDENCE**.

The Defendant filed a counterclaim naming inter alia **ESTELLA CO. LTD, ESTELLA DUMINGA FURULI, ANGELO RICCI, ILARIO BARBIERI, SERGIO BATTISI** as defendants therein. These parties are Italian Citizens ordinarily resident in Italy and have never been served with the counterclaim. For that reason, the Defendants remain unsuited and the counterclaim is a nullity as leave has not been obtained before the suit (i.e counter claim) was filed.

The Plaintiffs/applicant describe themselves as innocent purchasers without any notice of defect in the title of the 4th Defendant, if any, as at the time of purchase nothing was registered against the Title of the 4th Defendant. However 2nd Plaintiff/applicant argues that although there are claims that there is a caveat registered against the Title of the 1st Defendant to the counterclaim, a search by the Registrar of Companies yielded no such caveat. The applicants deny authorizing the Defendant/Respondent to enter and remain in the property. The applicant urges this court to strike out the defence filed herein, and/or in the alternative order that the counterclaim be excluded because its inclusion means the suit will never be prosecuted so long as the defendants to the counterclaim remain unsuited.

In response the respondent filed a replying affidavit stating that Plaintiffs introduced no valid evidence that they are the registered owners of the suit premises and the prayers for striking out are untenable as both defence and counterclaim raises serious triable issues which can only be determined at a trial. He explains that his attempts to serve the Defendants in the counterclaim have not been successful as they reside in Italy and have not returned to the jurisdiction of this Court. The Plaintiff's application is termed as a ploy to introduce into the court record a defective document being annexure marked PEX 1 of the 2nd Plaintiff's supporting affidavit. He opposes the Plaintiff's attempts at having the counter claim struck out.

The Plaintiff's claim is that after purchasing shares from **SERGIO BATTISTI**(the predecessor in title on 18/12/07) they became the duly registered owners, and they came to Kenya for purposes of taking possession of their apartment but were prevented from doing so by the Defendant, his servants and/or agents and this what precipitated filing of this suit.

MR OLE KINA for the applicants submits that they have locus standi to make averments in the suit as the record from Registrar of Companies annexed clearly demonstrates that Plaintiff's hold shares in the company and whether they hold shares as a result of an impugned transaction is another matter. However the fact that applicants are the current share holders of those shares means they have the standing to initiate the proceedings and there are no basis for challenging the applicant's locus standi then pursue them in a counterclaim for alleged conspiracy and damages.

The Defendant challenges the sale agreement saying it does not meet certain parameters which constitute a legal agreement and the capacity of the person who purportedly sold the shares to the purchasers is challenged. The contents of the consent to the sale agreement are also challenged as being contradictory and bearing inconsistent dates and lapses in time all of which demonstrate deceit, misrepresentation and fraud on the Plaintiff's permit.

There is also the matter relating to the Defendant`s possession of the premises. **MR OLE KINA** submits that defendant was put in possession thereof subsequent to a transfer made by the owners in consideration of due professional fees for services rendered by defendant. His argument is that there is no memorandum in writing produced to show the sale or intention thereof and the presumption is that none exists at all.

The defendant who acts in person argues that the issue of his possession of the suit premises is infact a triable one and says even the claim that what he possesses an apartment is contested as he is in occupation of a house which is on its own compound and has its own gate. I think the question as to how the defendant got to be into possession of the suit premises – whether it was payment in kind for professional services rendered, or whether he got it as a result of shares transferred to him or he is purely in illegal occupation with no colour or right is a triable issue. That would routinely tie up with contradictions as to whether the Defendant is a trespasser. I also concur with the Defendant that there are allegations of fraud, deceit and good faith, all which cannot be worked away without interrogating the parties through a trial process. I also make a finding is that the question regarding whether shares were obtained as a result of an impugned transaction, and whether the vendor had capacity to transact any shows with the applicants is a triable issue which cannot be visited by simply reading through the sale agreement and certificate of share holders.

The statement of defence raises triable issues which merit hearing and there can be no justification to strike out the defence. As regards the counter claim it is true as is even admitted by the defendant, that some parties in the counter claim have not been served. Defendant says attempt at service have failed because the other persons in the counter claim live in Italy. Applicant says this will cause delay and result may be never getting to hear the suit and if the same is found to be merited then defendant should be ordered to off load it from this suit and file a separate suit.

MR OLE KINA submits that under the provisions of Order V Rule 26 (1) a Notice of Summons ought to have been served on the Defendants in the counter claim, this was not done. Further, no leave was sought under Order V Rule 21, 21A, 21B, 23, 24, 25, 26, 27 & 28 before or after institution of service in these proceedings which means there were three persons included in this suit without leave having been obtained from this court. **Mr OLE KINA** relies on the decision in **KARACHI GAS CO. LTD V ISAQ 1965 EA 42 AT** page 42 where Newbold Ag VIP while dealing with the question of the Court`s jurisdiction over persons neither domiciled or ordinary resident in Kenya stated as follows;-

“.....the defendant was out of the jurisdiction and was neither domiciled nor ordinarily resident in Kenya. In such a case, the Courts of Kenya will not assume jurisdiction in relation to any matter arising out of a contract unless the circumstances fall within the provision of Order V rule 21 Civil Procedure Rule(Revised Rule 1948). This rule details circumstances in which service of summons or a notice of summons may be allowed out of the jurisdiction in order to give effect to a jurisdiction which courts have assumed. In case of contracts, the court in Kenya will assume jurisdiction, inter alia, if the contract is made in Kenya, or if the proper law of the contract is Kenyan law or if a breach is committed within Kenya. While it is not perfectly clear there this contract was made, I shall assume it was made in Pakistan. If therefore the Kenya Courts are to have jurisdiction in this case, either proper law of contract must be Kenyan or a breach of the contract must have been committed in Kenya”.

The decision was followed by the Court of Appeal in the case of **RAVTHEON AIRCRAFT CREDIT CORP & ANOTHER V AIR AL FARAJ (2005) EA 259** where the court stated;-

“.....The High Court assumes jurisdiction over persons outside Kenya by giving leave on application by a Plaintiff to serve summons or notice of summons, as the case may be, outside the country, under Order V Rule 23 and after such summons are served in accordance with the machinery

stipulated therein.....The USA is not a Commonwealth Country, service if leave was given, could only have been through the diplomatic channel under Order V Rule 27at the time the High Court had not been moved to assume jurisdiction over Raythen Thus, there cannot be any question that Raythen was not amenable to the jurisdiction of the High Court and the objection to jurisdiction should have been allowed on this ground alone”

MR OLE KINA submits that no leave was sought and none was granted at the commencement of this suit and the decision in Raythen should guide this Court and find that it has no jurisdiction over the defendants **DUMINGA FUHIL, ANGELO RICCI and SERGIO BATTISTI** in the counterclaim and the same should be struck out since the Court has no jurisdiction and has no basis for continuing with this matter.

DOCTOR KHAMINWA`s response with regard to the counterclaim is that the test the court ought to use is whether it arises out of the same subject matter and if it is totally foreign then it may be disregarded but if it is related to or arises out of the same subject matter of the action, then unconditional leave to defend ought to be granted and reference is made to the decision by Platt **Ag JA in Dodge Versus Kenya Carries Limited (1983) at page 950.** While that is an important consideration, in this situation I am inclined to agree with **MR OLE KINA** that the first thing to get out of the way is whether this Court has jurisdiction to entertain the counterclaim since the defendants therein have not been served nor was leave obtained as contemplated by Order V Rule 21 and 23. The issue of concern is not whether the counterclaim is frivolous or vexatious, it is whether summons have been effected in the parties in the counter claim who do not reside in Kenya.

Order V Rule 21 addresses the issue of service allowed out of jurisdiction and applies inter alia,

- (a) The whole subject matter is immovable property situate in Kenya (with or without units and profits)
- (b) Any person out of Kenya is a necessary or proper party to a suit property brought against some other person duly served in Kenya such is the situation prevailing here. It has also been conceded by both parties that the individual sued in the counterclaim reside in Italy, which is not a commonwealth country, so Order 21A(1) d is applicable that;-

“(d) where a person on whom.....summons, order or notice is to be served is neither a Commonwealth citizen nor residing within the Commonwealth, a copy....shall be served instead of the original together with an intimation in working that process in the form of the copy has been issued or otherwise launched.”

My finding is that defendant has not complied with the requirements contemplated under order V Rule 21, 21 A and 28.

Does this warrant striking out of the counterclaim or directing that a separate suit be filed. I am most mindful of the views expressed by **Newbold AG V.P in the KARACHI 9AS** case and founded in the Raythen case yet from the counterclaim, if a separate suit were to be filed it would probably end up with a request for consolidation because the matters and issues are so intertwined and so inter relates, that the outcome of the Plaintiff's case would impact on the counterclaim and vice versa. I find it prudent that this counterclaim remain as part of this suit. In so doing I am persuaded justice will be achieved and the overriding objectives in terms of attaining;-

- (a) the just determination of the proceedings.
- (b) Efficient disposal of the business of court.

The way to achieve this is by this Court directing that the Defendant complies with the provisions of Order V rule 21-28 regarding service within the next 30(Thirty) days in default of which the counter claim will stand struck out without further reference to this Court. The Defendant to bear ½ costs of this application.

DELIVERED AND DATED THIS 20TH DAY OF JULY 2011 AT MALINDI

H A OMONDI

JUDGE

Mr Angima holding brief for Mr Ole Kina

Mr Mwadilo holding brief for Khaminwa