



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 2342 of 2007

DR. PEREZ MALANDE OLINDO.....PLAINTIFF

VERSUS

DR. JOHN KARUNGAI NYAMU1ST DEFENDANT

ELIZABETH WANGUI KAUNGAI.....2ND DEFENDANT

SWARA HOMES LIMITED.....3RD DEFENDANT

PIERRE VILJOEN4TH DEFENDANT

RULING

1. The application before court is the 3rd Defendant's Chamber Summons dated 01/07/2009. The application is brought under Order VI Rule 13(1)(a)(b) and (d) and Rule 16 of the Civil Procedure Rules and all other enabling provisions of the law. The 3rd Defendant seeks an order to strike out the Plaintiff's claim against the 3rd Defendant and also prays that the Plaintiff's suit against the said 3rd Defendant be dismissed. The 3rd Defendant also prays for costs of this suit and of the application from the Plaintiff.
2. The application is premised on the grounds that the Plaintiff's suit does not disclose any reasonable cause of action against the 3rd Defendant for reasons that:-
 - (a) *The parcel of land, L.R. No.7792/36 which has been made a subject matter in this suit belongs to the 3rd Defendant, who is the absolute proprietor of the said property and has an indefeasible and impeachable title over it having purchased the same from the 1st and 2nd Defendant and hence the Orders sought by the Plaintiff in his suit cannot possibly lie as against the 3rd Defendant.*
 - (b) *There was and has never been any privity of contract between the Plaintiff and the 3rd Defendant over LR No. 7792/36.*
 - (c) *That there is no right of relief that the Plaintiff has, if any, as against the 3rd Defendant.*
 - (d) *That accordingly the Plaintiff's claim as against the 3rd Defendant is a non-starter.*
3. The 3rd Defendant also avers that the Plaintiff's suit against the said 3rd Defendant is scandalous, frivolous or vexatious as it has no substantive or any reasonable chance of success given that
 - (a) *The suit emanates from the sale of LR No. 7792/3 by one Diamond Trust Bank (formerly Diamond Trust Bank of Kenya) in exercise of its statutory power of sale, and which power and right the Plaintiff*

unsuccessfully attempted to stop vide his application in HCCC 1230 of 1999.

- (b) The said land was sold and transferred to the 1st and 2nd Defendant as admitted in their pleadings, and later on sub-divided and the portion LR No.7792/36 sold and transferred to the 3rd Defendant.*
- (c) The court having dismissed the Plaintiff's aforesaid application in HCCC No. 1230 of 1999, and there being no appeal or review of the said court decision, any subsequent action over the ownership and possession of LR No.7792/36 has no reasonable chance of success.*
- (d) The very essence of justice requires that this suit be dismissed to prevent the 3rd Defendant from being harassed and put to expense by frivolous, vexatious and hopeless litigation.*

4. It is also the 3rd Defendant's contention that the Plaintiff's suit against the 3rd Defendant is an abuse of the court process and that the said claim is devoid of any merit, is misconceived and has no basis in fact or in law and accordingly that the same should be struck out with costs to the 3rd Defendant.

5. The application is also premised on the sworn affidavit of Ramesh Hirani dated 01/07/2008. The deponent who says he is a Director of Swara Homes Limited gives a synopsis of this case from the filing of the Further Re-Amended Plaint dated 17/04/2008 and filed in court on the same day. In the said Further Re-Amended Plaint, the Plaintiff prays for the following orders:-

- (a) A declaration that the eviction of the Plaintiff by the first and second Defendant on or about 13th May 2006 was wrongful and unlawful and general damages for wrongful and unlawful eviction.*
- (b) An order directing the Defendants jointly and/or severally to deliver possession of and/or reinstate the Plaintiff into possession of LR. No.7792/36 and LR No.7792/37 together with the improvements thereon forthwith.*
- (c) A declaration that the Transfer of LR No. 7792/36 and LR No. 7792/37 is irregular, null and void.*
- (d) An order directing the cancellation of registration of transfer of LR. No. 7792/36 (originally LR No.7792/3/2) and LR No. 7792/37 (original LR No. 7792/3/1).*
- (e) A permanent injunction restraining the Defendants whether by themselves, agents, employees and/or servants from selling, charging, transferring and/or disposing off in any other manner LR No. 7792/36 and LR No.7792/37.*
- (f) Costs of this suit*
- (g) Interest on (e) above at court rates*
- (h) Any other relief deemed apt and fitting.*

6. Mr. Hirani says that the Plaintiffs Chamber Summons application dated 17/03/2008 filed contemporaneously with the Further Re-Amended plaint seeking orders of injunction to restrain the Defendants, whether by themselves or through servants and employees and/or agents from selling, charging, transferring and or disposing off the suit property was consequently dismissed for reasons that the Plaintiff had not established a prima facie with a probability of success against any of the Defendants. It is the deponent's contention that the Plaintiff's suit as it stands has no probable chance of success on grounds that:-

- (a) the 3rd Defendant is the registered and absolute proprietor of LR No. 7792/36 over which the 3rd Defendant has a Certificate of Title issued to it under the Registration of Titles Act (RTA) for a term of 99 years from 01/01/1950*
- (b)the said parcel of land LR No. 7792/36 was originally part of LR No.7792/3 and was later subdivided and a portion thereof transferred to the 3rd Defendant from the 1st and 2nd Defendant.*

7. It is also the deponent's contention that the Plaintiff's suit has no reasonable chances of succeeding due to historical factors, namely that –

- (a) The Plaintiff had originally charged his land LR No.7792/3 to Diamond Trust Bank (the Bank), on 9/02/1992 as security for a loan of Kshs.4,000,000.00;*

(b) When the Plaintiff defaulted on the loan repayments the Bank exercised its statutory power of sale over the property vide transfer dated 05/12/2005.

(c) A case filed to contest the Bank's exercise of statutory power of sale namely HCCC 1230 of 1999 by which suit and application therein the Plaintiff sought to restrain the Bank from selling the property was dismissed by Onyango J (as he then was) on 10/12/1999

(d) The Plaintiff has preferred no appeal against the ruling of Onyango J (as he then was) dated 10/12/1999 and therefore that the very root of the Plaintiffs present suit has already been heard and determined, and that the Plaintiff lost any right over the suit property as a consequence of the orders made in HCCC No. 1230 of 1999.

8. The deponent further says that the Plaintiff's other suit being HCCC No. 246 of 2006, seeking to have the transfer entered on 04/01/2006 cancelled and revoked was compromised through a consent order entered into between the Plaintiff and the Bank and the party that sold and transferred LR No. 7792/3 in the following terms:-

“(i) By consent the suit between the Plaintiff and the 4th Defendant (the Bank) be and is hereby marked as withdrawn.

(ii) That it is hereby agreed that no fresh or further suit and/or proceedings can be filed against either party on the same subject matter.”

9. Finally, the deponent avers that since the 3rd Defendant was not a party in HCCC No. 498 of 2006 wherein the Plaintiff has alleged that an order was issued stopping the subdivision of LR 7792/3 and transfer thereof and that in any event the alleged order was never served upon the 3rd Defendant so as to bind the said 3rd Defendant, the Plaintiff herein cannot purport to bind the 3rd Defendant by the orders allegedly issued in HCCC No. 498 of 2006.

10. It is clear from the facts above that this dispute involving the Plaintiff has a long history which has resulted in four suits, all bought by the Plaintiff. In their submissions dated 13/08/2009 and filed in court on 14/08/2009, counsel for the 3rd Defendant, M/s Musyimi & Co. Advocates submitted that the Plaintiff's case does not disclose any cause of action against the 3rd Defendant as amplified by the Replying Affidavit of Ramesh Hirani dated 01/07/2009. Learned counsel submitted that in essence the Plaintiff wants to be put back into possession of the suit premises namely LR No. 7792/36 together with all the improvements being thereon. The Plaintiff also wants the court to declare that the original transfer of LR No. 7792/36 is illegal, null and void. Counsel said that the 3rd Defendant has sworn an affidavit in support of the 3rd Defendant's application to support other grounds for striking out and not necessarily one of non-disclosure of a cause of action under Order VI Rule 13(1)(a). See **BTB Insurance Agencies Ltd. –vs- Nitin Shah & Others (HCCC No. 560 of 2001 – Milimani Commercial Courts).**

10. To support the 3rd Defendant's position that the plaint does not disclose a cause of action against the 3rd Defendant, counsel for the 3rd Defendant submitted that the suit property belongs to the 3rd Defendant who has an indefeasible title over the same. To further buttress their arguments, counsel for the 3rd Defendant relied on section 23 of the Registration of Titles Act (the RTA) and said that the only remedy available to the Plaintiff is in damages and not re-possession. Section 23 of the RTA reads:-

“23(1) The Certificate of title issued by the registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions

contained therein or endorsed thereon, and the title of that proprietor shall not be subject to challenge, except on the ground of fraud or misrepresentation to which he is proved to be a party.”

11. Counsel for the 3rd Defendant submitted that in the absence of proof of fraud or misrepresentation involving the 3rd Defendant the 3rd Defendant’s title to the suit property remains absolute and indefeasible. Learned counsel also relied on the case of **Vinette Daphine Okola –vs- Akich Okola & 3 Others [2005] e KLR** and submitted that the Plaintiff’s remedy in this case, as was in the **Vinnete case**, lies in damages only, and that even if such damages were to be paid to the Plaintiff, the same can only be paid by Diamond Trust Bank who sold the suit property in exercise of their statutory power of sale and not by the 3rd Defendant who was not privy to the contract between the Plaintiff and the said Diamond Trust Bank.
12. Counsel for the 3rd Defendant also submitted that the Plaintiff’s suit against the 3rd Defendant is scandalous, frivolous and vexatious on grounds that:-
 - (a) *Following the sale of LR No. 7702/3 by Diamond Trust Bank, all the efforts made by the Plaintiff to stop and/or question the sale have been unsuccessful and in particular the ruling by Onyango Otieno J (as he then was) in HCCC No. 1230 of 2009 by which the Plaintiff’s application seeking to stop the sale by Diamond Trust Bank was dismissed.*
 - (b) *The order purporting to stop the subdivision of the suit property was (i) never served upon the 3rd Defendant and (ii) was overtaken by events the same having been issued on 22/08/2007 while the subdivision took place on 10/07/2007.*
13. Counsel for the 3rd Defendant relied on **Abubakar Zain Ahmed vs Premier Savings & Finance Ltd. [2007] e KLR** in saying that the Plaintiff’s suit is scandalous, frivolous and vexatious. In that case, the Plaintiff filed suit seeking an injunction to restrain the Respondents from advertising for sale, alienating or interfering with Latifa’s share in certain properties situate in Mombasa; declarations that the Power of Attorney in favour of the 2nd Respondent was null and void, and thus incapable of effecting any interest in the land registered under the RTA; that the borrowing and the charges related thereto were ultra vires the powers and authority donated in the Power of Attorney; that the 5th Respondents action in allowing the charges to be registered was unlawful.
14. The 1st, 2nd, 3rd and 4th Respondents in the **Zain case** (above) filed their respective applications under Order 6 Rules 13 and 16 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The four applications which were consolidated and heard together sought to have the Plaintiff’s amended plaint struck out and to have the suit dismissed on grounds that the plaint was scandalous, frivolous or vexatious and an abuse of the process of the court. The four Respondents contended that the Plaintiff’s action was time barred under the provisions of the Limitations of Actions Act.
15. The trial Judge found and held that the Plaintiff’s suit was so weak that it was beyond redemption and curable by amendment. The learned Judge also found and held that the claim was statute barred and that no enlargement of time had been asked for and/or granted. The trial Judge struck out the Plaintiff’s suit against the 1st, 3rd, 4th and 5th Defendants.
16. On appeal, the learned Judges of Appeal stated in part at page 7 of the judgment thus:-

“It is trite law that the power to strike out any pleading or any part of a pleading under Order 6 Rule 13 is not mandatory, but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all circumstances relating to the offending pleading. See the speech of Madan JA

(as he then was) in DT DOBIE & CO. (K) LTD. V MUCHINA [1982] KLR at page 1 quoting from Sellers L.J. in WENLOCK –VS- HALONEY & OTHERS [1965] 1 WLR 1238 at page 1242. And as per Halisbury’s Laws of England 4th Edn Vol 37 para 430, the discretion will be exercised by applying two fundamental, although complementary principles. The first principle is that the parties will not lightly be driven from the seat of judgment, and for this reason the court will exercise its discretionary power with the greatest care and circumspection, and only in the clearest cases. The second principle is that a stay or even dismissal of proceedings may “often be required by the very essence of justice to be done, so as to prevent the parties being harassed and put to expense by frivolous, vexatious or hopeless litigation.”

See also **NITIN PROPERTIES V JAGIR SINGH KALSI Nairobi Civil Appeal No. 132 of 1989 (unreported)** and **SAMUEL KANYI GITONGA V PETER MUGWERU, Nairobi HCCC No. 3356 of 1989** (also unreported) where the courts held that striking out of a pleading in “*a draconian measure*” which must be taken only in the clearest of cases.

17. After considering all the facts in the **Zain case**, the learned Judges of Appeal concluded that the Plaintiff’s claim “*was hopelessly time barred and that it would be an exercise in futility if left to go on trial*” and that “*no useful purpose would be served in trying to sustain the suit by further amendment*”.
18. The question that this court has to grapple with in this case is whether on the facts before it, the Plaintiff’s claim against the 3rd Defendant is so hopeless that no useful purpose would be served by allowing it to go to trial. I shall return to this question later in this judgment.
19. The 3rd Defendant also took issue with the Plaintiff’s Replying Affidavit and submitted that the same does not contain any substantive response to the 3rd Defendant’s application. The 3rd Defendant contends that though the Plaintiff alludes to fraud at paragraph 2 of the affidavit, the truth of the matter is that the Plaintiff’s pleadings do not contain any details of fraud. The 3rd Defendant also contended that the Plaintiff has not revealed to the court that he (Plaintiff) has already conceded the fact that the 1st and 2nd Defendants obtained the suit property from Diamond Trust Bank, the mortgagee and that the Plaintiff unsuccessfully tried to stop the sale vide his claim in Nairobi HCCC Nos. 246 of 2006 and 1230 of 1999.
20. For the reasons given above by the 3rd Defendant, the 3rd Defendant prays that its application be allowed as prayed so as to stop the 3rd Defendant from being harassed and put into unnecessary expense by the Plaintiff.
21. The Plaintiff made brief submissions dated 22/10/2009. The thrust of the Plaintiff’s submissions is that the 3rd Defendant’s title is not cast in stone and that the same is subject to challenge on grounds of fraud. Relying on Section 23 of the RTA (above) Section 69B of the Indian Transfer of Property Act (the ITPA) and **ELGANT FREIGHTERS –VS- ORIENTAL COMMERCIAL BANK – Nairobi HCCC No. 66 of 2005**, counsel for the Plaintiff submitted that the sale of the suit property by the Bank to the 1st and 2nd Defendant was tainted with fraud and can therefore be challenged.
22. Counsel for the Plaintiff also submitted that the Plaintiff is far from being a vexatious litigant. He submitted that the suit property was transferred during the pendency of HCCC No. 498 of 2006 which suit had to be withdrawn to pave way for this suit. Counsel also argued that the issue of legality of the mortgagee’s power of sale is still pending for determination in HCCC No. 498 of 2008. The Plaintiff wants the court to dismiss the 3rd Defendant’s application so that he (Plaintiff) can proceed to prosecute his claim against all the Defendants at a

full trial.

23. The 3rd Defendant filed a rebuttal dated 5/11/2009 to the Plaintiff's submissions. It was reiterated that the Plaintiff has not pleaded any fraud against the 3rd Defendant.
24. Regarding the provisions of section 23 of the RTA and section 69B of the ITPA, counsel for the 3rd Defendant submitted that the Plaintiff has neither pleaded nor in any way suggested that the 3rd Defendant was a party to any alleged fraud during the process of transferring the suit premises to the 3rd Defendant. Counsel also submitted that there is no indication that the Plaintiff intends to amend his plaint, and that in any event, even if the plaint were to be amended, such amendment would only be an effort on the part of the Plaintiff to steal a march on the 3rd Defendant. See **Elegant Freighters** case (above).
25. On the provisions of section 69B of the ITPA, any person who may feel aggrieved by a mortgagee's exercise of statutory power of sale can only have a claim in damages, as against the person who exercised such a power, and in this case, it is the Bank. Counsel for the 3rd Defendant argued that from whichever angle they are looked at the provisions of section 23 of the RTA and section 69B of the ITPA apply in favour of the 3rd Defendant.
26. Finally, counsel for the 3rd Defendant submitted that the 3rd Defendant is not aware of HCCC No. 498/2008, and that if the reference is to HCCC No. 498/2006, the suit was withdrawn by the Plaintiff and accordingly has no bearing on these proceedings.
27. The Plaintiff relied on the **ELEGANT FREIGHTER's case** (above) an authority that was also cited by the 3rd Defendant. Quoting from the ruling of Nyamu J (as he then was) in **ZE YU YANG V NOVA INDUSTRIAL PRODUCTS LTD. [2003] EA 362** at page 364, the court said,

"I therefore find that :-
 - (a) *the existence of a valid sale agreement as exhibited extinguished the equity of redemption and the Applicant has no remedies touching on the property both as against the former mortgagee and as against the purchaser nor the Respondent/Plaintiff. Its remedy if any is in damages only as against the person exercising the power, namely the third party. Section 60 of the Transfer of Property Act as amended by Act No. 19 of 1995 puts this beyond any doubt. A valid contract of sale extinguishes the equity of redemption.*
 - (b) *The title issued to the Plaintiff/Purchaser cannot be impeached whatsoever as per an unambiguous wording of section 69B set out above and clauses (a) (b) and (c) are in my opinion wide enough to cover nearly all the situations one can imagine including all possible sins by the mortgagee except fraud."*
28. The above is indeed the correct legal position and I entirely agree with it. The issue that arises for determination, as indicated earlier in this ruling is whether the Plaintiff's claim against the 3rd Defendant is so hopeless that there is no point in sustaining the claim.
29. After carefully considering the facts and the circumstances of this case, the submissions and the law, I concur with the summary made by the 3rd Defendant, namely (a) the Plaintiff had originally charged his land LR No. 7792/3 to Diamond Trust Bank as security for a 4,000,000/= advance; (b) the Plaintiff defaulted in his loan repayments as a result of which Diamond Trust Bank sold the Plaintiff's property under the Bank's statutory power of sale (c) the Plaintiff filed HCCC No. 1230 of 1999 to restrain the Bank from selling but the Plaintiff's application for injunction was dismissed on 10/02/1999 and no appeal was ever preferred against the said ruling.
30. Taking the above scenario into account and considering the relevant statutory provisions and the views of the

courts on matters of this nature, I find and hold that the Plaintiff's claim against the 3rd Defendant cannot stand. The 3rd Defendant has a good title to the suit property which title can only be impeached and/or challenged on grounds of fraud to which the 3rd Defendant is proved to be a party. In the instant case, there is no pleading of any fraud against the 3rd Defendant by the Plaintiff. Unlike the position in the **ELEGANT FREIGHTERS case**, the Plaintiff in this case has not indicated that he intends to amend his plaint so as to plead fraud.

31. In any event, the law is clear that if the Plaintiff feels aggrieved by the public auction which eventually led to the transfer of part of the Plaintiff's original land to the 3rd Defendant, his claim lies in damages and such damages are claimable from Diamond Trust Bank and not anyone else.
32. In the premises, as no fraud is alleged and as there is no indication that such allegations are going to be made against the 3rd Defendant, there is no possibility that the Plaintiff's suit against the 3rd Defendant can be sustained.
33. I would also agree with counsel for the 3rd Defendant that the Plaintiff has become a vexatious litigant. He has filed more than two cases on the same subject matter. As soon as he withdrew HCCC No. 498 of 2006, he schemed another way of bringing this suit and has brought this suit with the full knowledge that his quest to challenge the sale of the suit property by Diamond Trust Bank has been a subject of litigation which has been dismissed.
34. In conclusion, I allow the 3rd Defendant's Chamber Summons Application dated 01/07/2009 in terms of prayers 1 and 2 thereof.
35. The costs of this application and of the suit as against the 3rd Defendant shall be borne by the Plaintiff.
36. Orders accordingly.

Dated and delivered at Nairobi this 3rd day of May, 2010.

R.N. SITATI

JUDGE

Read and delivered in the presence of:-

M/s Ashimosi (absent) For Plaintiff/Respondent

No appearance For 1st Defendant

No appearance For 2nd Defendant

Mr. Githaiga for Mahero For 3rd Defendant/Applicant

Weche - court clerk