



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
(Milimani Commercial Courts Commercial and Tax Division)
CIVIL CASE 499 OF 2009**

**LAVENDER OBMIMA
(SUING AS THE LEGAL REPRESENTATIVE OF
THE ESTATE OF NELSON MUCHILWA OMBIMA PLAINTIFF
VERSUS
MEIR INTERNAITONAL LIMTIED1ST DEFENDANT
SAMSON MSASAA MUNIKA T/A
MUNIKA & COMPANY ADVOCATES 2ND DEFENDANT
DEVELOPMENT BANK OF KENYA LIMITED 3RD DEFENDANT
ROBERT KINYANJUI KAMAU4TH DEFENDANT**

RULING

- 1.** On 13th November 2009, the plaintiff's application for injunction to restrain the defendant from dealing with the suit property known as **LR NO.330/79** was dismissed. The 4th defendant filed a chamber summons under **Order VI rule 13 (1) (a) and 16 of the Civil Procedure Rules**. The 4th defendant is seeking for an order that the suit against him be struck out with costs. The application is premised on the grounds that the plaintiff has no **locus standi** to institute this suit in her capacity as the administrator of the estate of the late **Nelson Muchilwa Ombima**. Therefore this court has no jurisdiction to entertain the suit as the suit premises which was sold to the 4th defendant was owned by the 1st defendant a Limited Liability Company and was sold by way of an auction to the 4th defendant.
- 2.** Secondly, the plaintiff has no claim against the 4th defendant who was a purchaser of the property at an auction for value without notice. According to the provisions of section 69 (B) of the transfer of the Property Act, the plaintiff's remedy if any can only be by way of damages as against the 3rd defendant. Lastly, the plaintiff has not pleaded any reasonable cause of action against the 4th defendant. There are also no particulars implicating the 4th defendant in any wrong doing therefore the suit against the 4th defendant should be dismissed.
- 3.** The plaintiff filed grounds of objection on 30th September 2009 in opposition to this application. It is contended that the plaintiff has made allegations against the 4th defendant as pleaded under

paragraph 12, 13 and 14 of the Plaintiff. There are allegations of fraud against the 4th defendant and other issues which are triable. However, counsel for the plaintiff did not attend court during the hearing. The third defendant supported the application. The issue for determination is whether the plaintiff's has **locus standi** and whether the suit raises any triable issue against the 4th defendant.

This application is brought under the provisions of **Order 6 r13 (1)**, it is provided as follows:-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the grounds that:

(a) it discloses no reasonable cause of action or defence; or

(b) . . .

(c) . . .

(d) It is otherwise an abuse of the process of court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

4. What the above provision of the law portends is that the court is empowered to strike out pleadings which do not disclose a reasonable cause of action. What constitutes a reasonable cause of action was explained by the Court of Appeal in the case of **DT Dobbie & Co. Ltd. versus Muchina 1982 KLR** in that case the Court of Appeal held as per **Madan JA**:

“The 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.”

5. The property that is in dispute herein was registered in the name of the 1st defendant which is a limited liability company. The applicant is suing as the legal representative of the estate of Nelson Muchilwa Ombima who was a share holder in the 1st defendant the registered proprietor of the suit premises before it was sold 2nd defendant. This suit premises by is governed by the provisions of the Indian Transfer of Property Act. Under the provisions of **Section 69 (B) of the ITPA** part of it provides as follows;

“and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power to otherwise properly and regularly exercised; but any person indemnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.”

6. Apart from the fact that the plaintiff lacks locus standi to pursue a claim against the 4th defendant, I also find the suit as drawn does not disclose any reasonable cause of action against 4th defendant who was not a party to the contract between the 1st, 2ND and 3rd defendants. In any event the plaintiff's claim if any should lie in damages against the 1st, 2nd and 3rd defendants. Accordingly I allow the chamber summons and strike off the 4th defendant from the suit. The 4th

defendant will also have the costs of this application.

RULING READ AND SIGNED ON 2ND JULY 2010 AT NAIROBI.

M.K. KOOME
JUDGE