



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

Environmental & Land Case 93 of 2010

ALI HUSSEIN MOHAMOD.....PLAINTIFF

VERSUS

**BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND.....
.....DEFENDANT**

RULING

The dispute herein involves a parcel of land known as LR/1585/007 Tassia II, Nairobi. The property standing thereon was sold by the defendant to one Reuben Kipkoech Chepkwony who subsequently agreed to sell it to the plaintiff herein Ali Hussein Mohamod.

The defendant subsequently disowned the transfer of the property from the previous tenant/purchaser to the plaintiff herein. As a result, the plaintiff filed a suit against the defendant claiming among other things a declaration that he is the legal owner of the said property and that the defendant should be compelled by a mandatory injunction to transfer the suit property to him. He also sought a permanent injunction to restrain the defendant, its agents, managers, servants and all employees from in any way from selling, transferring, charging, leasing etc. the suit premises in whatever manner pending the hearing and determination of this suit.

There is now before me an application by way of Chamber Summons under Order VI Rule 13(1)(b) and (d) of the Civil Procedure Rules for orders that the plaint dated 3rd March, 2010 and filed 4th March 2010 be struck out with costs. The application is opposed and the plaintiff has filed a reply thereto. Both parties have filed submissions which I have on record.

The grounds set out by the defendant in support of the application are that;

- (a) The plaintiff’s suit is an enforceable by action since no contract was executed between the plaintiff and the defendant and none exists in relation to the suit property in terms of Section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya. In the premises this suit is unsustainable and ought to be struck out.**
- (b) In the plaint the plaintiff relies heavily on an alleged contract between himself and one Reuben Kipkoech Chepkwony in relation to the suit property as a basis for his clam for relief against the defendant whereas there is no privity of contract/estate between the plaintiff and the said Chepkwony on the one hand and the defendant on the other in relation to the alleged contract.**
- (c) By reason of (a) and (b) above, the suit is frivolous, vexatious and an abuse of the process of court.**

There is in addition to the said grounds, an affidavit sworn by Aggrey Nyandong said to be the assistant Manager, Tenant Purchase Scheme (Department) of the defendant.

I have looked at the material before me. The defendant stated that the original tenant, that is, Mr. Reuben Kipkoech Chepkwony breached the conditioned of the agreement between himself and the defendant. However, the defendant did not rescind the contract between itself and the said Chepkwony. At paragraph 8 of Mr. Nyandong’s affidavit the following statement appears;

“That in or about the month of March, 2006 the said Chepkwony informed the defendant that he had assigned his

interest in the suit property to the plaintiff whom he claimed was a trustee of the alleged NGO.”

The said deponent goes on to say that the defendant accepted the arrangement and the plaintiff proceed to pay a total sum of Ksh. 962,875/- in varying installments. However, there was no formal agreement that was executed between the plaintiff and the defendant. The same deponent continued to say at paragraph 9 of his affidavit that the plaintiff's substitution as the new purchaser was supposed to be on more or less the same terms as those that obtained in the earlier agreement between the defendant and the said Chepkwony.

Thereafter, it is alleged that the plaintiff herein breached the arrangement and therefore the defendant was bound to rescind the agreement. On the other hand, it is the plaintiff's case that he complied with all the arrangements and in fact paid all the money due and payable to the defendant in full satisfaction of the said arrangement.

The order sought by the defendant is a drastic one and the courts have repeatedly held that, the powers conferred upon the court in such applications are to be exercised with great caution and only in the clearest of cases. But once such caution has been exercised and is perfectly clear that no useful purpose will be served on a trial on the merits, the court is perfectly entitled to strike out a pleading. ***See Civil Appeal No.179 of 1997 JP Machira T/A Machira and Co. Advocates – vs – Wangethi Mwangi and Nation Newspapers.***

It is also an accepted principle that however weak a litigant's case may be he should not be driven out of the seat of judgment before a full hearing. I am alive to the provisions of Section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya upon which the defendant heavily relies in this application.

In a letter dated 27th September, 2009 addressed to the plaintiff herein by the Managing Trustee of the defendant, the defendant informed the plaintiff that the transfer of the plot from Reuben Chepkwony to the plaintiff was on the same terms. Going by that letter and also the averments of the affidavit of Mr. Nyandong aforesaid, it is clear to me that the defendant created the impression which was believed by the plaintiff that the sale had been approved, and therefore the absence of a contract notwithstanding, there was an arrangement which may have amounted to an assignment.

The plaintiff also transferred a substantial sum of money from his bank to the defendant which has also been confirmed by the annexures to the affidavit of the plaintiff and also the one by Mr. Nyandong. Clearly therefore, there are triable issues in this matter and until and unless oral evidence is called, the plaintiff should not be driven out of the judgment seat.

I do not wish to delve any deeper into the contentious issues to avoid any prejudice to the parties. I find the application by the defendant lacks merit and must fail. The same is hereby dismissed with cost to the plaintiff.

Orders accordingly.

Dated, signed and delivered at Nairobi this 4th day of October, 2010.

***A. MBOGHOLI MSAGHA
JUDGE***