



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & TAX DIVISION – MILIMANI

CIVIL CASE NO. 280 OF 2009

KULTAR SINGH
HANSPAL
..... **PLAINTIFF**

VERSUS

ESTHER MUTHONI PASSARIS

.....
DEFENDANT

R U L I N G

The application before the Court is brought by a Notice of Motion dated 16th December, 2010, and made under **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act; Section 52 of the Transfer of Property Act; and Order L Rule 1 of the Civil Procedure Rules**. By the application, the Defendant/Applicant seeks one main order –

“That, pending the hearing and determination of the Defendant’s application dated 30th November, 2010 an order of prohibition do issue preserving the suit property L.R. No. 7741/75 Kitisuru by prohibiting the Plaintiff, whether by himself, his agents, employees, servants, or any firm of Advocates howsoever from selling, transferring, pledging, leasing or in any way alienating the suit property L.R. No. 7741/75 Kitisuru”.

The Applicant also prays for an order that the costs of the application be awarded to the Defendant/Applicant in any event.

The application is supported by the annexed affidavit of Mansur Muathe Issa, the Advocate having the conduct of this matter on behalf of the Defendant, and is based on the following main grounds –

- 1. THAT the Plaintiff is attempting to dispose of the suit property and thereby defeat the Defendant’s claim in this suit. Section 52 of the Transfer of Property Act prohibits any alienation of a property pending suit.***
- 2. THAT the Defendant is in possession with her family, has invested substantially in renovating and improving the suit property pursuant to the option to purchase the suit property.***
- 3. THAT unless the prayers sought are granted, the Defendant’s claim in the suit may be defeated and rendered nugatory and the Court will be aiding the Plaintiff and his wife steal a match on the***

process of the Court.

4. THAT it is in the interests of justice that the prayers sought herein be granted.

Opposing the application, the Plaintiff/Respondent swore and filed a replying affidavit on 24th December, 2010. In that affidavit, the Respondent attests that he is the registered proprietor of the suit premises and that he suffered a stroke and has been in a wheel chair since 2002. Since then, he has incurred medical bills which have rendered him totally broke as a result of which he has been forced to sell the suit property in order to obtain urgent medical attention which requires a colossal sum of money.

In addition to the replying affidavit, the Respondent, through his Advocates, also raised a notice of Preliminary Objection to the effect that at the hearing of the application, the Respondent would contend as a preliminary point of law, to be determined *in limine*, that the Defendant/Applicant's application and suit are hopelessly misconceived, frivolous, totally devoid of merit and mala fides for the reason *inter alia*, that the Defendant/Applicant has no enforceable contract over the suit property as alleged in the defence/counter-claim and has no *locus standi* or *cause of action* to bring, maintain and prosecute the counter-claim and the pending application.

With the leave of the Court, the parties filed written skeleton submissions through their respective Advocates, Mr. Issa for the Applicant and Mr. Apopo for the Respondent. After considering the pleadings and the submissions, I take the following views of the matter. Firstly, it is alleged in the aforesaid notice of Preliminary Objection that the application and suit are hopelessly misconceived, frivolous, and devoid of merit for the reason that the Applicant has no enforceable contract over the suit property as alleged in the defence/counter-claim and has no *locus standi* or cause of action to bring and prosecute the counter-claim and the application.

The invocation of such phrases as “**frivolous pleadings**” or pleadings that disclose “**no reasonable cause of action**” in this notice of preliminary objection brings to mind the provisions of **Order VI Rule 13 (1) of the Civil Procedure Rules**, under which the Court may order such pleadings to be struck out or amended. Before the Court can grant such an order, however, its jurisdiction needs to be properly invoked under **Rule 16**, which prescribes that any applications under **Order VI** be made by summons. They cannot be made by way of Preliminary Objection which is a very restricted procedure. In the case of **MUKISA BISCUIT MANUFACTURING CO. LTD. v. WEST END DISTRIBUTORS LTD.** [1969] E.A. 696, Sir Charles Newbold, P. said at page 701 –

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion ...”

Order VI Rule 13 (1) of the Civil Procedure Rules opens by stating that “**At any stage of the proceedings the Court may order to be struck out or amended any pleading ...**” The phrase “**... may order ...**” in this context denotes that the power to strike out or amend any part of a pleading is not mandatory. It is only permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the pleading sought to be struck out. The Court may or may not grant the order sought. In the words of Sir Charles Newbold therefore, it would be improper to seek the exercise of the Court's judicial discretion by way of a Preliminary Objection.

Furthermore, in the same case, Law, J.A. stated at page 700 -

“I agree that the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a “preliminary objection”, which it was not. So far as I am aware, a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

The preliminary objection raised by the Respondent herein does not raise pure points of law which are *ejusdem generis* with the examples of the points of law given by Law, J.A., nor are they pure points of law as envisaged in the judgment of Sir Charles Newbold since they tend not only to contradict the facts pleaded by the Applicant, but also seek the exercise of judicial discretion.

Referring to the Court's power to strike out proceedings in the case of **WENLOCK v. MALONEY & ORS [1965] 1 WLR 1238** (which was cited with approval and applied in **D.T. DOBIE & CO. (K) LTD. v. MUCHINA [1982] KLR 1**), Sellers, L.J., said at page 1242 –

“This summary jurisdiction of the Court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the Plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power.”

These are strong words. Within our own jurisdiction, in the case of **NITIN PROPERTIES LTD. v. KALSI & ANOR. [1995 -98] 2 EA 257**, the Court of Appeal held that striking out pleadings was a drastic remedy and the procedure for striking out could only be invoked in plain and obvious cases and that such jurisdiction must be exercised with extreme caution as a claim can be struck out only if the claim is incontestably or hopelessly bad. And even then, a proper application for striking out must be filed if such a cause was warranted under **Order VI Rule 13 (1) (a), (b), (c) and (d)** by summons as stated in **Order VI Rule 16** of the **Civil Procedure Rules**. The combined effect of all the above observations militates against the striking out of the Applicant's defence/counter-claim, and I therefore find that the preliminary objection is not meritorious.

Secondly, by an application by Notice of Motion dated 18th September, 2009, the Applicant herein sought orders that, *inter alia*, the Plaintiff be restrained from levying distress or in any way interfering with the Applicant's quiet and peaceful possession of the suit property pending the hearing and determination of this suit. Among the grounds advanced in support of the claim were that the Defendant was in possession under an option to purchase the property, and that she had a counter-claim in the suit. In a ruling delivered on 16th October, 2009, the learned Judge rendered herself thus –

“I am of the view that in this suit the Defendant has a good case with a chance of success. She is in possession and it is proper that she should continue in possession until the suit is determined, but she continue (sic) to pay rent as in the agreement. The balance of convenience tilts in her favour.”

There is nothing on record to show that there was any appeal against this ruling. It stands to reason, therefore, that the Court's finding that the Applicant has a good case with a chance of success remains the current judicial position on this matter. To give any order to the contrary at this stage would be a backdoor accession to reviewing the above Court order, or sitting on appeal on an order of a Court of co-ordinate jurisdiction. Any such appeal would have to lie elsewhere but not to this Court.

Against the background of these observations, **Section 52** of the **Transfer of Property Act**, so far as is relevant to this matter, states as follows –

“During the active prosecution in any Court ... of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.”

Since the right to the suit property in this matter is directly and specifically in question, the above **Section** applies and the suit property may not be transferred to the detriment of any of the parties. The Applicant is therefore, entitled to interim orders for the conservation of the property.

I accordingly direct that pending the hearing and determination of the Defendant's application dated 30th November, 2010, an order of prohibition be and is hereby issued prohibiting the Plaintiff, whether by himself, his agents, employees, servants or any firm of Advocates howsoever, from selling, transferring, pledging, leasing or in any way alienating the suit property L.R. No. 7741/75 Kitisuru as prayed. Costs in the cause.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 13th day of December, 2010.

L. NJAGI
JUDGE