



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI LAW COURTS)**  
**ELECTION PETITION 333 OF 2008**

**KENYA ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**VS.**

**STEPHEN KIRIMA KOGI ..... 1<sup>ST</sup> DEFENDANT**

**ZIPPORAH MBESA WANDERA ..... 2<sup>ND</sup> DEFENDANT**

**MERCY MUTUHI MUGO ..... 3<sup>RD</sup> DEFENDANT**

**EMMANUEL KURIA WA GATHONI ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

The plaintiff herein brought this suit against the defendants jointly and severally alleging several matters among them, breach of the law and terms and conditions of a grant, fraud and bad faith, breach of trust and fiduciary duty. At the centre of the pleadings is a property in Nairobi known as LR. No.209/13539 Grant IR. No.81614. This property is said to have been leased to the 1<sup>st</sup> defendant against all provisions of law and procedure by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants.

In a lengthy plaint filed by the plaintiff which runs to 17 paragraphs, the plaintiff has made the aforesaid allegations against all those defendants but which have been denied. There is now before me an application by way of a chamber summons dated 3<sup>rd</sup> November 2008 by the 4<sup>th</sup> defendant under **Order VI rule 13 (1) (a)** of the **Civil Procedure Rules** and **Section 3, 3A and 63(e)** of the **Civil Procedure Act** for orders that this court strikes out the plaint and the suit be dismissed with costs.

The reasons upon which the said application is founded are that:

- (a) The suit discloses no reasonable cause of action.
- (b) The suit is unconstitutional
- (c) The plaint offends mandatory provision of law
- (d) The plaint is incurably defective for misjoinder

- (e) The suit is time barred
- (f) The suit is an abuse of the process of the court;
- (g) The plaintiff has no *locus standi*

**Order VI rule 13 (1) (a)** reads as follows:

***“13 (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:***

***(a) it discloses no reasonable cause of  
action or defence.”***

Although the submissions on record have addressed the other sub-rules under this particular rule, the application is specific and therefore the sub-rules that have not been cited shall not be addressed in this ruling.

The case against the 1<sup>st</sup> defendant has already been compromised, there is on record a consent letter dated 12<sup>th</sup> November 2008, between the advocates for the plaintiff and the 1<sup>st</sup> defendant who appears in person to the effect that the prayers for injunction, vacant possession, general damages and costs are withdrawn as against the said defendant with no order as to costs.

The foundation of those orders is that, the plea of fraud in the acquisition of LR. NO.209/13539/76 made by the plaintiff against the 1<sup>st</sup> defendant is withdrawn without any conditions. Secondly, there be a declaration issued that, the lease made on 10<sup>th</sup> September 1999 between the City Council of Nairobi and the 1<sup>st</sup> defendant in respect of the same property is invalid, null and void in all intents and purposes for being *ultra-vires* and thus, conferred no interest or right on the 1<sup>st</sup> defendant. There was also a declaration that the registration of the lease instrument of the same date and in respect of the same property was wrongful and illegal.

In the same consent letter, an order would issue directing the Registrar of Titles to cancel and expunge from the register entry No.96 made under presentation book No.1440 of 30<sup>th</sup> September 1999 so as to restore the land comprised in LR. NO.209/13539/76 IR. No.81614 to the grantee/Government of Kenya.

The said consent letter was filed in the High Court central registry on 18<sup>th</sup> November 2008 and on 21<sup>st</sup> November 2008, it was endorsed by the Senior Deputy Registrar as the order of this court.

The application which is subject to this ruling was brought by the 4<sup>th</sup> defendant. The pleadings against all the defendants are intertwined and one would be excused to believe that the 1<sup>st</sup> defendant having compromised his suit with the plaintiff, then the substratum of the suit would have gone. However, a careful look at the pleadings would reveal that the cause of action by the plaintiff against the remaining defendants can still be addressed and thus this application has to be considered on its own merits.

Before I go any further, I must set out the following guidelines in addressing such an application. In the case of **Kenfreight (East Africa) Ltd. vs. Honeyway East Africa Ltd. Mombasa Civil Case No.181 of 1997**, the court observed that striking out the pleading is a draconian remedy. In the case of **Nitin Properties Ltd. vs. Jagjit S. Khalsi & Anor. Civil Appeal No.132 of 1989**, the Court of Appeal stated that this jurisdiction should only be exercised in plain and obvious cases with extreme caution. Additionally, a party's claim should only be struck out where the cause of action does not exist at all or so hopeless and weak that it cannot be sustained even by an amendment. It is also the practice of the courts to sustain a suit rather than striking it out because a party should not be driven out of the seat of judgment before he or she is heard.

With that in mind, I have looked at the pleadings herein. Although **Rule 13(2)** provides that no evidence shall be admissible on an application under **sub-rule 1(a)** the submission by the learned counsel for the 4<sup>th</sup> defendant which has been filed herein contains a lot of evidence which has not been adduced in a full trial. That notwithstanding, it cannot be said from the pleadings herein that the plaintiff has no reasonable cause of action against the applicant or any of the co-defendants. This is because the plaint and the defence of the 4<sup>th</sup> defendant, when considered objectively, are full of steaming triable issues which can only be addressed by calling evidence. Termination of any proceedings of this nature by any summary procedure as sought by the 4<sup>th</sup> defendant will only result in prejudice not only to the parties herein but, also result in miscarriage of justice considering the issues raised in relation to the subject matter.

I have considered the points raised by both parties herein, and I am of the view that to delve any deeper into this issue will prejudice the main trial. In the end, I do not consider the application merited and therefore dismiss the same with costs to the plaintiff.

Orders accordingly.

Dated, signed and delivered at Nairobi this **21<sup>st</sup> day of July, 2009.**

**A. MBOGHOLI MSAGHA**

**JUDGE**

In the presence of:

*Mr. Onindo for the Applicant*

*Mr. Ngaa for Mr. Gikonyo for the Respondent*