



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

**Civil Case 595 of 2004**

**ELIAS M. MUSYOKI ..... PLAINTIFF**

**VERSUS**

**HALAI DEVELOPERS LIMITED (Receivership of**

**Deloitte and Touche Accountants) ..... 1<sup>ST</sup> DEFENDANT**

**INVESTMENTS & MORTGAGES BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**MR. KRISHNALAL B. SASODIA ..... 3<sup>RD</sup> DEFENDANT**

**MRS. DHARAMA SASODIA ..... 4<sup>TH</sup> DEFENDANT**

**CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

The 2<sup>nd</sup> defendant/applicant filed the Chamber Summons application dated 11<sup>th</sup> October 2006, and seeks for orders that the suit filed by the plaintiff by way of an amended plaint be struck out on the grounds that the suit is scandalous and does not disclose any cause of action. The suit is otherwise an abuse of the court process. This application is also supported by the affidavit of Paul Kinyanjui Ndungu sworn on 11<sup>th</sup> October 2006.

Briefly stated, the 1<sup>st</sup> defendant was registered proprietor of a parcel of land known as LR 209/10721 herein referred to as the property. The 1<sup>st</sup> defendant borrowed money from the 2<sup>nd</sup> defendant which was secured by that property. The 1<sup>st</sup> defendant secured further monies and executed a further charge on the property. Later on, the loans due to the 2<sup>nd</sup> defendant were secured by an all assets debenture which was registered in favour of the 2<sup>nd</sup> defendant.

Sometimes in 1995, the 1<sup>st</sup> defendant requested for the applicant's permission to sub divide the property in various sub plots. One of the subplots was LR 209/10721/42, the subject matter of this litigation. The applicant was requested to execute a partial discharge of charge because the 1<sup>st</sup> defendant had allegedly found a buyer and was desirous of selling that sub plot. Since the applicant was secured by other charges and an all asset debenture, it executed the partial discharge.

Subsequently the 1<sup>st</sup> defendant entered into a sale agreement with the 3<sup>rd</sup> and 4<sup>th</sup> defendant for the sale of this sub plot. The applicant was not party to the sale agreement and the applicant's interests ended when they executed a discharge of charge and the same was registered. It is the applicant's contention

that they were wrongly sued as a party in these proceedings. The 2<sup>nd</sup> defendant is only referred to in the amended plaint under paragraph 4, and 5.

The only claim against the applicant is that it placed the 1<sup>st</sup> defendant under receivership; nothing else is pleaded against the applicant. Moreover the mere fact that the 2<sup>nd</sup> defendant placed the 2<sup>nd</sup> defendant under receivership does not in any way connect the 2<sup>nd</sup> defendant with a sale agreement and the allegations of fraud against the 1<sup>st</sup> defendant. In any event no particulars of collusion are pleaded against the applicant. The final order that is sought against the 2<sup>nd</sup> defendant is an order of injunction to restrain the 2<sup>nd</sup> defendant from the sale of the property. The 2<sup>nd</sup> defendant has no interests whatsoever in the land and no useful purpose would be served by maintaining the 2<sup>nd</sup> defendant as a party.

There are allegations that through some collusion the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants recorded a consent order in Hccc 734 of 1996, but the 2<sup>nd</sup> defendant was not a party to the consent and was not even aware for the circumstances under which that consent was recorded. Thus the 2<sup>nd</sup> defendant is not a necessary party to these proceedings. Counsel relied on several authorities for the proposition the court has wide powers to strike out a suit which does not disclose reasonable cause of action.

This application was supported by counsel for the 3<sup>rd</sup> and 4<sup>th</sup> defendants who contended that their clients were bona fide purchasers of the property for value without notice. It is well documented in the replying affidavit of the 4<sup>th</sup> defendant that the plaintiff had constructive notice of the 3<sup>rd</sup> and 4<sup>th</sup> defendants' interests in the property. A caveat was registered in the lands office, which was ample notice to all the interested parties who had an interest or wanted to deal with the suit property. The sale agreement was between the plaintiff and the 1<sup>st</sup> defendant was illegal since there no property was capable of being sold.

This application was opposed by counsel for the plaintiff; he relied on the replying affidavit sworn by the plaintiff on 28<sup>th</sup> August 2007. The plaintiff contends that the 2<sup>nd</sup> defendant is the one who financed the development of the suit property as they had even admitted having issued a partial discharge in respect of the property. As a result of the discharge the property was transferred to the plaintiff. The plaintiff later came to learn the same property was sold to the 3<sup>rd</sup> and 4<sup>th</sup> defendant. While the dispute was going on, the 2<sup>nd</sup> defendant placed the 1<sup>st</sup> defendant under receivership as a result of that receivership, the plaintiff could not follow the claim. Moreover the 2<sup>nd</sup> defendant does not disclose the status of management and has not revealed the report by the receiver manager. The plaintiff has also filed an application seeking to further amend the plaint where he is seeking for the refund of the monies paid to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The court cannot ignore the proposed amendment while determining whether the 2<sup>nd</sup> defendant should be struck out of the pleadings because the court will have to determine whether the 2<sup>nd</sup> defendant passed a good title to the plaintiff.

Having set out the summary of the arguments, this application is brought under the provisions of order 6 r 13(1) b, c and d of the Civil Procedure Rules. A suit which does not disclose a reasonable cause of action can be dismissed. It is determinable from the facts that the 2<sup>nd</sup> defendant financed or granted a loan to the 1<sup>st</sup> defendant who was the registered proprietor of the suit premises. Subsequently, the 1<sup>st</sup> defendant applied to sub divide the property into sub plots and the 2<sup>nd</sup> defendant issued a partial discharge which was executed and registered. It is therefore clear that the 2<sup>nd</sup> defendant was not party to the transfer to the plaintiff or to the 3<sup>rd</sup> and 4<sup>th</sup> defendants.

The other point to determine is whether by placing the 1<sup>st</sup> defendant under receivership the 2<sup>nd</sup> defendant colluded in order to defeat the claim by the plaintiff. It is evident that there was a debenture issue dated 2<sup>nd</sup> May 1991 in favour of the 2<sup>nd</sup> defendant over all the assets of the 1<sup>st</sup> defendant. That debenture contains a provision for the appointment of a receiver manager, in the event of any default on the part of the 1<sup>st</sup> defendant. That being so, the allegations of collusion between the 1<sup>st</sup> and 2<sup>nd</sup> defendants is

without basis.

Accordingly, I am persuaded that the amended plaint does not disclose any cause of action against the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant has clearly stated they have no interest in the suit premises; therefore the final order of injunction which is sought against them would be of no effect. I have also looked at the proposed further amended plaint which is pending for hearing and determination. The plaintiff seeks a refund of the purchase price from both the 1<sup>st</sup> and the 2<sup>nd</sup> defendant. However the pleadings show that the money was paid pursuant a sale agreement entered between the plaintiff and the 1<sup>st</sup> defendant. The property was also registered in favour of the 1<sup>st</sup> defendant who was the absolute proprietor. The 2<sup>nd</sup> defendant was not a party to the agreement of sale, they were only chargors. They duly discharged the charge and they had no control over what the 1<sup>st</sup> defendant did with his title upon discharge.

Having so found, the suit against the 2<sup>nd</sup> defendant is hereby struck off with costs.

RULING READ AND SIGNED AT NAIROBI THIS 17<sup>TH</sup> DAY OF JULY 2009.

**M.K. KOOME**

**JUDGE**