



REPUBLIC OF KENYA

IN THE HIGH COURT

AT ELDORET

Civil Case 114 of 2005

SALIM MOHAMED NAKASHA:.....PLAINTIFF

VERSUS

JAMES NJOROGE MBATIA

T/A JOYLAND AUCTIONEERS:.....1ST DEFENANT

SAVINGS & LOAN KENYA LTD:.....2ND DEFENANT

SARAH WANJIKU MACHARIA:.....3RD DEFENDANT

RULING

The Third Defendant herein SARAH WANJIKU MACHARIA brings an application under Order VI Rule 13(b) (c) and (d) of the Civil Procedure Rules and section 3A of the Civil Procedure Act and prays that the Plaintiff's Amended plaint dated 27th March 2006 be struck out and the suit herein be dismissed with costs to the Applicant. There is also a prayer for the costs of the application to be awarded to the Plaintiff. The application is based on the grounds that the suit is frivolous, vexatious and embarrassing and the applicant is the registered owner of the suit land herein. That the withdrawal of the application for temporary injunction by the Plaintiff rendered the suit bare and there was filed another suit being CM.CC.NO.104/2006 subsequent to the said withdrawal and that latter suit was dismissed with cost and bringing this present suit is an abuse of the court process and it is brought by *mala fides*. The third Defendant applicant has sworn a supporting affidavit to the application.

The Application is opposed and a Replying Affidavit sworn by the Plaintiff is filed. He states that the application is vexatious and frivolous and an abuse of the court process and states that the application for injunction was withdrawn once it was discovered that the 3rd Defendant had obtained title to the suit land and that necessitated the amendment to the plaint to include a prayer for the cancellation and/or nullification of the certificate of lease to the suit land. He swears that the application is made in bad faith and it is meant to defeat the cause of justice and it should be dismissed.

The hearing was conducted before the Hon. Mr. Justice Ibrahim who had to later disqualify himself from delivering the ruling because of advances made to him by a friend of a party herein. The matter was then transferred to the other judge in the station who happened to be this judge. Both counsel adopted their submissions before Hon. Mr. Justice Ibrahim and this court delivers the ruling on the basis of those submissions. Counsel appearing for the 3rd Defendant/Applicant Mr. J.N. Njuguna was supported in his application by Mr. C.K. Njuguna appearing for the 1st Defendant that there are no reliefs which can be granted to the Plaintiff as the application was overtaken by events.

Learned counsel for the Plaintiff submitting that striking out is draconian urged that the application be dismissed as the Plaintiff had not been indolent and had been a tenant for 20 years in the suit premises and was the successful bidder in the auction but the property was sold by private treaty.

I have taken into consideration the application and all the submissions by the three counsel appearing. I have also looked at the Amended sought to be struck out. The reliefs sought in that Plaintiff are orders for a permanent injunction against the Defendants jointly and severally restraining them, their servants and agents from selling, transferring, alienating or in any way evicting the Plaintiff from the said property and for a declaration that the Plaintiff was the highest bidder in the Public Auction. There is a prayer for costs and interest and any other relief deemed fit to grant. It has been admitted by the Plaintiff that as soon as he discovered that title over the suit land has been issued to the third Defendant herein, the Plaintiff went ahead to withdraw his application for an injunction. The Amended plaintiff as it stands now seeks those same reliefs. The title over the suit property has passed and so the application for an injunction to restrain a sale, transfer and alienation is spent. No purpose is shown to be served by the continued existence of the Amended plaintiff. Striking out is indeed draconian, but it is draconian where there exists a case which must be heard on its merits and where there are issues for determination. In a plain case such as the present one striking out is the only available remedy. The Plaintiff being a tenant for whatever period is not an issue relevant to the determination of the application under consideration. In this case I find that the Amended plaintiff is bare and raises no issues between the parties fit to take for trial. Accordingly the application dated 23RD April 2007 succeeds and the Amended plaintiff dated 27th March 2006 is hereby struck out with costs.

Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF NOVEMBER 2009.

P.M.MWILU

JUDGE

IN THE PRESENCE OF:

Mr. Njuguna J.N.for Defendant/Applicant

Mr. Omboto for Plaintiff/Respondent

Court clerk – Paul Ekitela