



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

Civil Case 333 of 2006

THE PUBLIC TRUSTEE OF KENYA..... PLAINTIFF

VERSUS

CECILIA MWENGA NTARA..... 1ST DEFENDANT

BARCLAYS BANK OF KENYA.....2ND DEFENDANT

RULING

The 2nd Defendant has by chamber summons dated 22nd June 2007 sought to have the plaint filed herein, together with the suit, struck out with costs. The Application is expressed to be brought under the provisions of Order VI rule 13 (1)(b)(c) and (d) of the Civil Procedure Rules and Section 3A of Civil Procedure Act and all enabling provisions of the Statutes. There are seven grounds cited in support of the application as follows:-

- 1) **THAT the suit is frivolous, vexatious, scandalous and an abuse of the court process.**
- 2) **THAT the property in the above mentioned suit was properly transmitted to the 1st Defendant as administrator of the estate of Johnson Ntara to hold as trustee for all the other beneficiaries.**
- 3) **THAT on the 6th June 1995 charges were taken over the titles of both Meru Town/Block 11/270 and Meru Town/Block/11/18 and on 9th December 1996 in respect of Ntima/Igoki/1119.**
- 4) **THAT on or about 29th June 1999, the 2nd Defendant issued to the 1st Defendant the required statutory notice informing her that if she did not pay her debts the property would be auctioned off to recover the same.**
- 5) **THAT through an application to the court, dated 6th November 2001, the 1st Defendant and Catherine Nkatha Mworira sought orders to have the grant of letters of administration issued to them to be revoked and that the Public Trustee of the Republic of Kenya be appointed the Administrator of the Estate.**
- 6) **THAT the revocation of the above mentioned grant does not affect the rights of a bona fide third party (2nd Defendant) without notice.**
- 7) **THAT it is therefore only fair and in the interest of justice that the orders sought are granted.**

There is also an affidavit sworn in support of the application, by **JOB MWANGI THIGA**, an advocate in the firm acting for the 2nd Defendant. It has several annextures.

The application is opposed. The Respondent filed grounds of opposition challenging the competence of the supporting affidavit and the legality of the application.

The plaint was filed on the 27th June, 2006 by the Public Trustee, seeking two declarations and four orders as follows:

- a) **A declaration that the transfer of the said parcels of land to the 1st Defendant are illegal, null and void in law.**
- b) **A declaration that the charges credited on the said parcels of land in favour of the second Defendant are invalid and of no consequences.**
- c) **An order vesting the said parcels of land to the estate of the deceased JOHNSON NTARA NWITARI.**
- d) **Mesne profits**
- e) **Costs of the suit**
- f) **Any other order this honourable court deems fit and property to make.**

The thrust of the Plaintiff's case was that the Defendant, a co-administratrix of the property of **JOHNSON NTATA MWITARI** (deceased), had fraudulently, illegally, and in breach of trust and fiduciary duties, transferred the deceased properties to her name. The properties are specified in the plaint. It is alleged that the Administratrix used the properties to obtain and or secure loans with the 2nd Defendant, who is the Applicant herein.

The striking out of pleadings is a drastic measure and remedy, and the court exercising that procedure should only invoke it plain and obvious cases. Such jurisdiction must be exercised with extreme caution. See **NITIN PROPERTIES LTD. VS KALSI AND ANOTHER [1995-98] 2 EA 257** and **REPUBLICAN OF PERU GUANO COMPANY 36 CHDW 489**. The test to be applied is whether the claim is incontestably or hopelessly bad. See **NITIN PROPERTIES LTD**, Supra.

The application was argued by Mr. Thiga for the Applicant, and Mr. Opiyo for the Respondent. Mr. Thiga's contention is that the case is frivolous, vexatious, scandalous and otherwise an abuse of the court process. The basis of the contention that the suit is bound to fail, are contained in the averments in the supporting affidavit. These include the fact the 1st Defendant (Administratrix) became possessed of the suit property by way of transmission authorized by the court; two, the fact the charges over the suit property signed in favour of the Applicant were registered; three, the Respondents cannot challenge the validity of the charges by way of a suit as purported by the filing of the suit. In support of the first contention, counsel relies on Section 122 of the RLA. Section 122(1) begins thus:

“Subject to any restriction on his power of disposing of the land, lease or charge contained in his appointment.”

Mr. Opiyo for the Respondent submitted that under paragraph 12 of the Plaint, the Plaintiff's have pleaded that the process through which the 2nd Defendant got the charges were fraudulent and illegal, and particulars of both provided. The very wording of Section 122(1) of the RLA implies that there may be in existence, certain restriction to the power of an Administrator/Administratrix, to dispose of land, lease or charge. That in itself means, Counsel submitted, the application herein cannot invoke the said sections as a protection to justify the striking out of the plaint in an interlocutory application. The section actually works against the Applicant as it stands out as a caution, that the power of an administrator may be restricted in the manner in which he/she exercises his power over the deceased's property.

The second ground, that the charges over the suit property were registered in favour of the Applicant, is

neither here nor there for reason the Plaintiff's claim is that the charges were illegal; and, on the Applicant's part, he has joined issue with the plaintiff therefore making it an issue for determination during trial. The third ground that the charges cannot be challenged in a suit, is in all the circumstances of this suit, an issue for determination during trial.

The Court of Appeal, **TUNOI, LAKHA AND OLE KEIWUA, JJA, IN YAYA TOWERS LIMITED**
vs TRADE BANK LTD (IN LIQUIDATION) CAN 35 OF 2000 stated:

“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant can demonstrate shortly and conclusively that the Plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial.”

The Applicant had duty to demonstrate that the Plaintiff's suit was bound to fail or is otherwise objectionable. It is my considered view that the Applicant has failed in that duty. I am satisfied that triable issues do exist in this case which, must go to trial. The Plaintiffs should therefore be allowed to pursue their claim in court.

Mr. Opiyo for the Plaintiffs has raised issues with the supporting affidavit sworn by the Applicant's Advocate. In view of my ruling on this application, I need not go into details on this point, except to state that indeed the affidavit deponed on contentious issues of fact to which the Advocate had no personal knowledge, not having been involved in the matter during the transactions in issue in the case and so the affidavit was in great part incompetent.

Having come to the conclusion that this case raises triable issues, I dismiss the Applicant's application with costs to the Respondent's.

Dated at Nairobi this 19th day of October 2007.

LESIIT, J.

JUDGE

Read, signed and delivered in presence of:

Thiga for Applicant

Okuta holding brief Opiyo for Respondent

LESIIT, J.

JUDGE