



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

CIVIL CASE NO. 69 OF 2002

JASUMATI DHIRAJLAL SAVANI (PERSONAL

RERESENTATIVE OF DHIRAJLAL)PLAINTIFF

VERSUS

CHUNILAL M. SAVANI 1ST DEFENDANT

RAJAN SAVANI 2ND DEFENDANT

JITU C. SAVANI 3RD DEFENDANT

RULING

The plaint in this case is filed against three Defendants who are named as Chunilal M. Savani, Rajan Savani, and Jitu C. Savani. They are sued in their personal capacities and the judgment sought against them jointly and severally is for vacant possession of the suit property, Damages on mesne profits at the daily rate of KSh.7,000/- from 12th October 2001 until possession is delivered up, costs of the suit and incidental to this suit is also sought. The claim is made on the grounds that at all material times to the suit, these Defendants were the Administratrix's agent in respect of godowns situated on the land comprised in title Numbers Mombasa/Block XV/05, Mombasa Block XV/121 and Mombasa/Block XV/122 which are comprised in the deceased's estate. The Plaintiff is claiming them as the Administratrix of the estate of Dhirajlal Mohanlal Savani and she is suing the defendants as the administratrix's agents.

In a fairly short statement of defence the defendants state that in their capacity as Directors of Samji Kala & Co Ltd., they are aware that the company i.e. Samji Kala & Co. Ltd. was vested with the Management of the subject properties except that one property is now under the Management of Gigi & Co. They also admit that the Plaintiff and deceased estate has been deprived of the use and enjoyment of the property and has suffered loss, and that the premises the subject matter of the suit are situated at Mombasa within the jurisdiction of this court. However, their main defence is that they have been wrongly sued, and they seek the dismissal of the suit.

There was no reply to the defence and so the pleadings were closed at that level. Following the close of the pleadings, the plaintiff has now filed this application by way of Chamber Summons under Order VI Rule 13 (1) (b) (c) and (d) of the Civil Procedure Rules. It is seeking orders that the Defendants' written statement of Defence dated 22nd April 2002 be struck out; that final judgment be entered in favour of the Plaintiff against the Defendant for vacant possession of the property referred to in the plaint; and that interlocutory judgment be entered as aforesaid for mesne profits from 12th October 2001 till possession is delivered to the plaintiff, such mesne profits to be assessed by court on a convenient date and costs of the

suit be awarded to the Plaintiff plus costs of the application. Grounds of the same application are that the Defendants statement of Defence is scandalous, frivolous, and vexatious and that the denials contained in the statement of defence and the contents of paragraph 5 thereof are not made bonafide. There is also a supporting affidavit. In the affidavit, the Deponent who is the first Plaintiff says that Samji Kala & Company Ltd. was not vested with the management of the property and so according to him the Defendants have been rightly sued. He then annexed correspondence emanating from the Defendants to demonstrate that Samji Kala & Company had nothing to do with the suit properties.

The Respondents/Defendants opposed the application and filed Replying Affidavit sworn by the Second Defendant Rajan Chunilal Savani in which the Deponent states that the Defendants did not manage the subject properties in their personal capacity but were doing so as duly authorised agents of Samji Kala & Co. Ltd. They also annexed a bunch of documents in support of their contention.

The main issue in this case between the parties is not as to whether the properties are not being managed properly. Respondents admit as Directors of Samji Kala & Co. that the property is not being managed properly and they clearly do so at paragraph 4 of their statement of Defendant where they admit the contents of paragraph 7 of the plaint/ The main issue is, admitting that the property may be wasted as alleged by the Plaintiffs, who is to be sued. The Plaintiffs say that the Defendants are the right people to be sued in their personal capacity because the alleged company Samji Kala & Company had nothing to do with the management of the houses. They produced correspondences to prove the same. The Respondents maintain that Samji Kala & Co. Ltd was the company managing the property and although they were directors of the same Samji Kala & Co. Ltd., they cannot be sued in their personal capacities – I presume without first removing the corporate veil. They also annex documents to prove their stand.

I will not comment any further on the merits and demerits of each party's case for fear of prejudicing the fair hearing and determination of the suit. However, this application has been made under Order VI rule 13(1) (b) (c) and (d) and so I must in considering it ask myself as I do, the following questions. What is scandalous or frivolous or vexatious in the defence advanced? If the defendants were to be shown to have signed agency agreement in which they undertook to carry out the alleged agencies duties in their capacities as individuals, then I would readily agree that to deny the same later would be scandalous, frivolous and vexatious and such denial may even be an abuse of the court process. Here however, even the documents that are availed before court do not say for certain that one was acting as agent on his personal capacity neither is there anything to show that Samji Kala & Co. Ltd executed any agency agreement to carry out the agency's duties as such a company. Those are matters that can only be ventilated when the entire case is heard and parties are heard in their evidence. They cannot be determined through Affidavit evidence as oral evidence and possibly further documentary evidence will be required to ascertain why some letters were written on the letter heads and signed by the company without revealing the writers e.g. First letter RCS 1 and why some letters were (faxes) without signatures of the witnesses) e.g. First letter of Exh. JDS 1. I also do not see how a defence such as was preferred in this case can prejudice and embarrass or delay the fair trial of the suit. Surely, if the Defendants feel they cannot assume what they felt was responsibility of a company and cannot be held liable as individuals for the company's mistakes, they are at liberty to say so. The truth however will come out at the hearing however long it takes. In fact, in my feeling if the Applicant had fixed this case for hearing immediately after close of the pleadings, it could have been finalised by now instead of the court still hearing application of this nature.

The sum total of all the above is that this is a matter that must go for full hearing. In my mind issues raised in the defence are not scandalous, frivolous and vexatious. Neither would they prejudice and/or delay the fair hearing of the suit. They certainly are not by any stretch of imagination an abuse of the court process. Application dismissed with costs to the Defendant/Respondent. Orders accordingly.

Dated and delivered at Mombasa this 27th Day of March 2003.

J.W. ONYANO OTIENO

JUDGE

