



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL CASE NO. 90 OF 1999**

**SIRERET FARMERS COMPANY LIMITED.....APPLICANT**

**VERSUS**

**WILLIAM AUDI ODODA.....RESPONDENT**

**RULING**

The applicant's M/s Sireret Farmers Company Limited (hereinafter referred to as the Company) have brought an application by way of Chamber Summons under order 6 rule 13(I)(b) of the Civil Procedure Rules and section 3A of the Civil Procedure Act in which it is seeking this court's order to strike off the defence filed in this Court by the respondent William Audi Ododa (hereinafter referred to as William Audi Ododa) on 10th November, 1999.

The Company is further seeking orders that on the striking off of the said defence judgment be entered for the plaintiff in terms of the plaint.

The grounds in which the said application is based is that the defence filed in Court is frivolous and vexatious and constitute an abuse of the process of the court.

Secondly that William Audi Ododa has no right to remain on the said premises which is now registered in the name of the Company and the Company has an absolute occupation usufructuary rights over the same and finally the pleading in the defence are falsehoods.

The said application is further supported by the affidavit of Ngeno and the annexures attached to it.

The application is opposed by William Audi Ododa and the grounds of opposition were filed in Court and a replying affidavit was sworn by his counsel Miss Malik and filed in Court.

Before dealing with the main application two issues which were raised by Mr Otieno David counsel for the applicant (the Company) must be decided first.

Mr Otieno pointed out that the grounds of opposition and the replying affidavit were filed out of time as it was filed one day after the time allowed by the provisions of the Civil Procedure Rules.

His submissions are that as the grounds of opposition and the replying affidavit were filed late then the same were improperly in the court file and hence the application is not opposed and the Court should disregard the papers so filed.

The second issue he raised is that the replying affidavit in the court file which was filed in favour of William Audi Ododa was sworn by Miss Malik, counsel appearing for William Audi Ododa. His submission on the replying affidavit are that the same is defective as there are a number of authorities where it has been held that its not proper for counsel appearing for a party to depone to evidentiary matters of facts in a suit.

In her reply to the two issues raised Miss Malik in responding to the first issue stated that her office was served with the application herein at the time she was on leave and immediately she resumed her work she filed the documents in question in Court. And she was late by one day only. Her submission on this point is that the Court cannot ignore the documents that had been filed. In support of that contention she quoted the case of *Central Bank of Kenya Limited vs Uhuru Highway Development Company Ltd, Nairobi CA No 75 of 1998* (unreported).

In his appeal Bosire JA had this to say at page 14:

“Even assuming the aforesaid rule was applicable the appellant filed his grounds of opposition and affidavit in reply before the application came for orders. Rule 16(B), above, does not say that documents filed out of time must be ignored. The sub rule does not talk about any time frame ..... I am therefore unable to subscribe to the view expressed by Mr Rebello that documents filed out of time in response to an application are necessary invalid and should not be looked at .....To my mind a Court is obliged to consider them unless for a reason other than a mere lateness, it considers it undesirable to do so”.

The explanation given by Miss Malik as to why the documents were filed one day late to me seems to be reasonable and as this Court is bound by the decisions of the Court of Appeal, I am obliged to look at the grounds of opposition filed in Court together with the replying affidavit and the application before me cannot be deemed to be unopposed. That disposes off the first issue.

On the second issue which was raised by Mr Otieno on the validity of a replying affidavit which has been sworn by counsel acting for a party in the suit, he has quoted a number of authorities which show that such an affidavit will be rendered defective if its deponed on matters of evidence by the counsel acting for the party.

In the case of *Kuya/Investments Ltd and another vs Kenya Finance Corportation and others Nairobi HCCC No 3504 of 1993*, Ringera AG J in upholding a preliminary objection that counsel for the applicant should not have sworn an affidavit in disputed matters had this to say:

“The first objection is well founded. The applicant’s counsel has deponed to contested matters of fact and said that the same are true and within his own knowledge and information and belief. It is notcompetent for a party’s advocate to depone to evendentiary facts at any stage of the suit. By deponing to such matters the advocate courts an adversarial invitation to step from his privileged position at the bar into the witness box.

This decision was followed in the case of *Simon Isaac Ngui vs Overseas Courier Services Ltd Nairobi HCCC 1632 of 1997* (unreported) where A Mbogholi Msagha J, where when he dealt with the question of striking out affidavit especially on the ground that the affidavit had been made by counsel for one of the parties, quoted with approval the holding in the case quoted hereabove.

Again the case of *Scholastica M Sheghu vs Kenya Power & Lighting Co Ltd Kisumu HCCC 215 of 1992* where ICC Wambilyangah J in following the decision made in *Kisya Investment Ltd* case and other cases stated:-

“In doing so the judge held that a party’s advocate was not competent to swear the supporting affidavit on disputed facts. For these reasons I hold that Mr John Olago Aluoch was not competent to swear an affidavit in this case.”

It is therefore very clear that an advocate acting for a party should not make a sworn affidavit on disputed

matters. Miss Malik has argued that her affidavit is not on disputed matters but relates to most of the documents exhibited by Mr Thomas Ngeno.

I have gone through the replying affidavit of Miss Malik and in my view the same does not rest on contested facts and the same was validly sworn and filed hence will be considered in dealing with the application before me.

Turning on the main application itself in which the Company would like to have the defence filed in this Court to be struck off, it is alleged that the said defence is frivolous, vexatious and constitute an abuse to the process of the court.

Secondly that the Company now owns the said parcels of land and it has the absolute occupational and usufructuary rights over the same.

Thirdly, that the defence is based on falsehoods.

From the supporting affidavit Thomas Ngeno parcels number LR 6030 (IR No 67092) and No Kericho/Chilchila Kuniyak Block 2(Kinda) 201 were advertised for sale on 4/7/98 and the sale was to take place on 10/8/ 98. This contention is contained in his annexure to his affidavit marked as SFCL1.

Further that the sale took place on the said 10th August 1998 and the property was purchased for Shs 7,920,000/= for the second property and Shs 750, 000/= for the first property by the Company and was issued with receipts marked SFCL 4(a)(b)(c) and (d). The Company was also issued with two certificates of sale marked SFCL2 and 3.

The reason why these properties were sold were as a result of court order in Kisumu HCCC No 66 of 1998 wherein on 14.7.1997 the Court gave an order that parcels number LR 67091, 67091, 50536 and Kericho Chilchila/ Kuniyak/Block 2 (Kinda) 201 were ordered to be sold by public auction in execution of the Court's decree therein. See exhibit SFCL5.

William Audi Ododa made several applications in Court to stop the sale of the said property but finally the attempts were not fruitful so in the meanwhile he and his co-administrators to the estate, applied for the subdivision of Kericho/Chilchila/Kuniyak/Block 2 (Kianda) 2001 into two portions namely Kericho/Chilchila/Kuniyak/Block 2 (Kinda) 203 and 204. This is evidenced by annexure SFCL7 and 8 attached to the affidavit of Thomas Ngeno which shows that the partition was effected on 9/6/98.

On 30th October 1998 the Court in case No Kisumu HCCC 66 of 1978 issued a confirmation sale order in which the two plots number Kericho/ Chilchila/Kuniyak/Block 2 (Kinda) 203 and 204 were confirmed to the Company amongst other lands. This is borne by annexure SFCL9 and by another order dated 1st December 1998 made in the same file, the District Land Registrar Kericho was ordered to register the transfer in favour of the Company. This also is shown by annexure SFCL 10 attached to the affidavit of Thomas Ngeno ..... SFCL 13 and 14.

Mr Otieno arguing for the Company has urged me that William Audi Ododa in his defence is challenging all the court orders that were made in Kisumu HCCC No 66 of 1978. That the averments in the defence ought to have been raised in that suit and not in the present case as that will be tantamount to having this Court sitting on appeal on the orders made by a Court of equal and competent jurisdiction.

He has further submitted that after the said William Audi Ododa made various applications in the other case and even after he had filed all application in the Chief Magistrate' s Court as per annexure SFCL II which was eventually dismissed with costs he is estopped from questioning the validity of the court orders made in the Court towards the sale of the property in question. Furthermore he has argued that after the balance of the sale proceed were deposited in Court William Audi Ododa withdrew the same balance amounting to Shs 1,988,486/= as evidenced by annexure SFCL17 and by so doing he confirmed the validity of the sale of the said property.

Mr Otieno further submitted that if William Audi Ododa wanted to challenge the validity of the sale he should have done so under the provision of order 21 rule 79 of the Civil Procedure Rules but no do so in this case.

In his submissions he says that the gist of the defence is basically the challenge of the orders in HCCC 66 of 1978 and that amounts to an abuse of the court's process.

He further submitted that as the Company is now registered owner of the property in question it had every right to enjoy the rights given to it under section 27 and 28 of the Registered Land Act and to buttress his argument he has quoted the case of *Caneland Ltd vs C M Osir and others* Kisumu HCCC 219 of 1996.

Miss Malik counsel for William Audi Ododa has forcefully opposed the application to strike off the defence. She opened her remarks on this part of the application by stating that looking at the extensive nature of Thomas Ngeno's affidavit and submissions in Court it is clear in her own mind that the defence cannot be struck off without taking into account a minute detailed examination of facts and documents. She submitted that the application is not such that it can be granted.

To support that contention she quoted the case of *DT Dobie Company Ltd v Joseph Mbaru Muchina and another* Nairobi Civil Appeal No 37 of 1978 (unreported).

She has further argued that the contention that William Audi Ododa made an application to partition No 201 into two portions in order to defeat the court order is not supported by any evidence and this can only be established after cross-examining the witness. Further she argued further that no prohibitory order, caution or inhibition was placed against the original title which could have prevented William Audi Ododa from dealing with the property.

She went ahead and criticized the making of the order on 1.12.1998 that the same was made on a date when the case had been listed for mention only. This agreement is also contained in paragraph 13 of her affidavit which contains annexure Nm 10 which is a court order dated 1.12.1998 in HCCC No 66 of 1978.

She quoted the case of *Central Bank of Kenya Ltd v Uhuru Highway Development Ltd* - Nairobi Civil Appeal No 75 of 1998: where it was held that an order given on a date of the mention of the case was defective.

Miss Malik further submitted that there is an issue of intermeddling with free property of the estate of the deceased as defined in section 3 of the Law of Succession Act.

The other issue she raised in her argument is the doctrine of caveat emptor. That had the Company carried out a search it would have discovered that the property it was purchasing was no more and section 145 of the Registered Land Act allows the Court to issue an order of rectification in case of registration done fraudulently that is an issue which ought to go for a hearing.

She then distinguished the decision in the *Caneland Ltd (supra)* case that the claimant in that case was a stranger whereas in this case William Audi Ododa is not a stranger to the suit.

In concluding her submission Miss Malik submitted that in dismissing the defence herein the Court will be compelled to look at the merits of the case and that is not permissible in law as borne out by the decision in the case of *DT Dobie Co (Kenya)Ltd (supra)* or in the case of *Trivedi and Trivedi vs Njeri Ngiru and another* Nairobi Civil Appeal No 129 of 1984 (unreported) where it was held that pleadings can be struck out in clear cases and where there are no triable issues. That this is not a plain case and the Court should exercise its discretion with extreme caution. She referred the Court to Supreme Civil Practice 1997 at page 329 paragraph 18.

In an application to strike out the pleadings on the ground that the pleading is frivolous, vexatious and is otherwise an abuse of the process of the court, the power to do so must only be exercised in plain and

obvious cases.

Madan, JA as he then was held in the case of *DT Dobie Company (Kenya) Limited (supra)*, gone through a series of cases as how when and why a pleading can be struck out and has summed up the decisions therein and held that:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so so weak as to be beyond redemption and incurable by amendment.”

The core of the plaintiff’s application is that it purchased the suit premises after the Court had granted specific orders that the same be sold by public auction and after purchasing the same obtained further court orders to perfect the titles and confirm the same and thereafter had the suit premises registered in its name.

The Company then found resistance in the person of William Audi Ododa who refused to hand over vacant possession of the property to the Company and has further refused to move out of the property.

A suit was then filed against him to obtain the orders of possession and for the said William Audi Ododa to be compelled to move out.

He William Audi Ododa has refused to do so and has filed a defence challenging the validity of the sale of the property to the Company as the subject consideration had ceased presumably on the partition of the original title Number Kericho/Chilchila/Kunyak Block 2 (Kinda) 201 into two resultant portions now known as Plot 203 and 204.

Secondly that at the time of sale the two properties were subject to protection of section 45 of the Law of Succession Act.

On behalf of William Audi Ododa it has been submitted that the net estate of the late Fredrick Ododa Odundo was protected by the provisions of section 45 of the Law of Succession Act.

That section provides as follows:

“(1) Except so far as expressly authorized by this Act, or by any other written law, or by a grant of representation under this Act no person shall for purpose of, or otherwise intermeddle with any free property of a deceased person”.

The section must be read with the definitions given in section 3 of the Law of Succession Act.

“Free property” in that section is defined as “In relation to a deceased person, means the property of which that person was legally competent freely to dispose during his lifetime and in respect of whether his interest has not been terminated by his death”.

The protection therefore envisaged by section 45 of the Law of Succession Act is not absolute as it has been urged. The deceased free property is such property as he could have been legally competent to dispose off during his life time and that interest therein has survived his death.

Further interpretation in section 3 of the Law of Succession Act, are contained in the definition of ‘Net Estate’ which are interpreted to mean the net estate after payment of certain things including debts. A judgment debt which is claimable. A decree had been entered against the deceased and his property ordered to be sold to satisfy the decree.

Under order 23 rule 11 the applications of rule 3, 4 and 8 of the order had been excluded in proceedings in execution of decrees or orders.

Its therefore plain and obvious that for William Audi Ododa to call in his defence the provisions of section 45 of the Law of Succession Act, is not tenable as the sale of the property in execution of the court's decree could have, as it did, gone on to satisfy the decree.

Parcel number 201 was partitioned into two parcels No 203 and 204. This was done when William Audi Ododa knew that the original property was now the subject of a decree of the court as shown by the numerous applications he made in Court: if the partition was intended to change the identity of the suit premises, that was inconsequential as by the provisions of section 104 of the Registered Land Act, an application for a partition of land being owned in common can be presented to the Registrar by any of the interested parties who will effect the partition when partition would be completed by closing the register of the parcel partitioned, and opening register in respect of new parcels created. The section does not say the character of the land in question has completely changed as it is still possible to trace the origins of the new title to the old title and be able to effect the orders that were attached to it.

Its therefore not available to the said William Audi Ododa to claim that the suit premises had changed its characteristics and hence is an issue which should be canvassed in the trial.

In any event while William Audi Ododa came in as one of the administrators of the estate of the deceased, he is obliged under section 122 of the Registered Land Act to hold the land subject to any liabilities, rights or interests which are unregistered, but are nevertheless enforceable and subject to which the deceased's held the same.

Having disposed off those two points, the next question to be asked is whether the defence as it stands contains issues which merit to be heard.

The Company is now the registered owner of the property. Section 27 of the Registered Land Act vests on the registered owner absolute rights over the land and section 28 of the said Act states that the rights of the registered owner shall not be liable to be defeated except as provided by the Act. This position was succinctly stated in the *Caneland Ltd* case (*supra*) which was approved by the Court of Appeal as stating the proper position in law.

As stated in the *DT Dobie case and Trivedi and Trivedi case* that a Court should strike out a pleading only in clear cases, and as also pointed out in the Supreme Court Practice 1997:-

At paragraph 18 that "Its only on plain and clear cases that recourse should be had to the summary procedure, I have to decide whether this is a plain and obvious case in which the defence, ought to be struck out.

The whole exercise started with the execution proceedings in HCCC No 66 of 1978 in which the suit premises were decreed to be sold. Infact then property was sold and eventually the same were registered in the name of the Company. This was in consonant with the provisions of order 21 of the Civil Procedure Rules.

Under order 21 rule 86 of the Civil Procedure Rules it was open to the Company to make an application to the Court complaining of the resistance to its taking possession of the property to the Court and the Court after investigation could put it into possession as provided for by rule 87. This was a simple but inexpensive way the matter could have been resolved.

However there is nothing which states therein that the purchaser cannot put-in his complaint through other means including filing a suit.

As the Company has chosen this method and William Audi Ododa has filed a defence can it be said in all the circumstances of the case that he has an arguable defence.

In my opinion this is a plain and obvious case where the defence filed in Court is frivolous, vexatious and is otherwise an abuse of the process of the court.

When the balance of Shs 1,988,486/= which was the balance from sale proceeds after the decreeholder had been paid was made available William Audi Ododa did not hesitate in taking the balance of the said proceedings yet he still wants to challenge the validity of the sale through the court process emanating from the court orders.

I would therefore for the reasons cited here above allow the application and strike out the defence and the amended defence filed in this Court and enter judgment for the plaintiff as prayed in the plaint.

**Dated and Delivered at Kisumu this 15th day of February 2000.**

**P.K.K ARAP BIRECH**

**COMMISSIONER OF ASSIZE**