



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 1140 OF 2016

RICHARD JUMA OKAYO.....1ST PLAINTIFF

KIAMOKAMA FARMERS CO-OPERATIVE

SOCIETY LIMITED.....2ND PLAINTIFF

VERSUS

PHILIP ONYANDO OKINDO.....1ST DEFENDANT

FLORENCE KWAMBOKA OTIENO.....2ND DEFENDANT

MARY MOKEIRA NYAKONO.....3RD DEFENDANT

LUTAFALI RAJWAN T/A QUASAR LIMITED,

VISHA BROTHERS LIMITED, KISII PETROLEUM

PRODUCTS LIMITED.....4TH DEFENDANT

QUASAR LIMITED.....5TH DEFENDANT

VISHA BROTHERS LIMITED.....6TH DEFENDANT/APPLICANT

PRIME BANK LIMITED.....7TH DEFENDANT/APPLICANT

KISII PETROLEUM PRODUCTS LIMITED.....8TH DEFENDANT

RULING

INTRODUCTION

1. This ruling disposes of the 6th and 7th Defendant's application dated 17th November 2020, which is expressed to be brought under Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules and Section 3 A of the Civil Procedure Act. It is based on the grounds set out in the application and the affidavit of Umeshkumar B. Chandaria and George W. Mathui. The orders sought in the application are for striking out of the Plaintiffs' suit against the 6th and 7th Defendants with costs for the reason that the suit does not disclose a reasonable cause of action against them.

2. The Defendants' case is that the 4th Defendant was the principal party in the case and the suit cannot proceed effectively against them in his absence. They contend before they were enjoined to the suit, the 4th Defendant, who was the alleged architect of the fraud in the suit, had died on 18th February 2016. When the matter came up for hearing on 5th November, 2019 the court directed the Plaintiffs to substitute 4th Defendant but they failed to do so. They argue that the failure to substitute the 4th Defendant renders the suit against them incompetent and a non-starter and thus urge the court to dismiss the suit against them with costs.

3. In response, the 1st Plaintiff, Richard Juma Okayo swore an Affidavit on 29th January 2020 stating that his advocate and the court were only informed of the death of the 4th Defendant on 5th November 2019. He had been advised by his advocate that it was upon the advocate of the deceased party to appoint a legal representative of the deceased party and that the passing on of the 4th Defendant did not amount to the suit having abated.

4. He asserted that a cause of action still existed against the 6th and 7th Defendants and the question of whether the suit against them was dependent on the 3rd and 4th Defendants was an issue that could only be determined during trial. The court was therefore urged to dismiss the application for being premature.

5. The application was canvassed by way of written submissions which I have duly considered.

ISSUES, ANALYSIS AND DETERMINATION

6. The central issue arising for determination from the submissions, the application and the parties' depositions is whether the Plaintiffs' suit against the 6th and 7th Defendants should be struck out for failing to disclose a reasonable cause of action.

7. Order 2 Rule 15 (1) (a) of the Civil Procedure Rules provides that at any stage of proceedings, the court may order that any pleading be struck out if it does not disclose a reasonable cause of action.

8. On the exercise of the court's discretion to strike out pleadings for not disclosing a reasonable cause of action, Madan JA in the case of **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another Civil Appeal 37 of 1978 [1980] eKLR** held:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits 'without discovery, without oral evidence tested by cross-examination in the ordinary way'. (Sellers, L.J. (supra))."

9. As to what constitutes a reasonable cause of action, Madan JA in the above case held:

"No exact paraphrase can be given but I think reasonable cause of action means a cause of action with some chance of success when (as required by paragraph(2) of the rule) only the allegations in the plaint are considered-."

10. In **Crescent Construction Co. Ltd vs Delphis Bank Ltd (2007) eKLR** the Court of Appeal held:

"However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter."

11. The 6th and 7th Defendants have placed before this court a copy of the 4th Defendant's certificate of death to prove that he died on 18th February 2016.

12. The procedure to be undertaken upon the death of one or more Defendants is provided under Order 24 Rule 4 of the Civil Procedure Rules thus:

[Order 24, rule 4.]

(1) Where one of two or more Defendants dies and the cause of action does not survive or continue against the surviving Defendant or Defendants alone, or a sole Defendant or sole surviving Defendant dies and the cause of action survives or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased Defendant to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any Defence appropriate to his character as legal representative of the deceased Defendant.

(3) Where within one year no application is made under sub rule (1), the suit shall abate as against the deceased Defendant.

13. Since the 4th Defendant died, no effort has been made to substitute him with his legal representative as provided in the provisions reproduced above. Consequently, the suit against the 4th Defendant abated on 18th February 2017, one year after his death.

14. The 6th and 7th Defendants contend that since the 4th Defendant was the mastermind of the fraud complained of in the Plaintiffs' suit, not much was left of their case after the suit against the 4th Defendant abated. The Plaintiffs' position is that they are not mandated by law to substitute the 4th Defendant.

15. At this point, it is necessary to consider the facts set out in the Plaintiff, being careful not to express opinions that would be prejudicial if this court finds that the suit raises a reasonable cause of action.

16. The 1st Plaintiff who is the Chairman of the Management Committee of the 2nd Plaintiff and the 2nd Plaintiff which is a Co-operative Society, sued the 1st to 4th Defendants claiming that they had conspired to defraud the members of the 2nd Plaintiff of Land Parcel No. L.R. No. Kisii Town/Block II/23 (hereinafter "the Plot"). The Plaintiff claimed that the 1st, 2nd and 3rd Defendants sold the 2nd Plaintiff's plot and building situated on the Plot to the 4th Defendant without the lawful authority of the members who constituted the 2nd Plaintiff.

17. Subsequently, the Plaintiffs applied for the joinder of 6th and 7th Defendants to the suit. They filed an application dated 22nd December 2015, seeking to amend the Plaintiff to include the 6th Defendant for the reason that the Plot had changed hands from the 5th Defendant to the 6th Defendant. The Plaintiffs also filed an application dated 6th April 2018 to further amend their Plaintiff to include the 7th Defendant on the basis that the property had since been charged to the 7th Defendant.

18. The application to amend the Plaintiff to enjoin the 6th Defendant was unopposed. It was allowed by Mutungi J. on 8th March 2016. Mutungi J. also considered the application to amend the Plaintiff to enjoin the 7th Defendant and allowed it on 25th June 2018. The Learned Judge, observed that the orders sought in the Plaintiff, if granted, would affect the interest of the 7th Defendant as a chargee and it would therefore be necessary for the 7th Defendant to be enjoined to the suit.

19. Following those amendments, the orders sought in the Amended Plaintiff were:

a. A declaration that the sale of land parcel Kisii Town/ Block II/23 by the 1st, 2nd, 3rd Defendants to the 4th Defendant and subsequently registered in the name of the 5th Defendant and subsequently the 6th Defendant is null and void and should be cancelled and that the land parcel Kisii Town/ Block II/23 reverts to the 2nd Plaintiff herein.

b. A declaration that the encumbrances on the title Kisii Town/ Block II/23 placed by the 6th Defendant to the 7th Defendant for a loan facility amounting to Kshs. 15,000,000/= be declared null and void and the same be ordered to be serviced by the Applicant (6th Defendant) of the charge/encumbrances.

c. An order of permanent injunction restraining the 6th Defendant by himself or through his servants, agents, or employees from entering, occupying, selling, offering for sale to any third party, leasing, charging, interfering with land parcel Kisii Town/ Block II/23, evicting the Plaintiff from or in any other way interfering with the 2nd plaintiff's occupation and enjoyment of the suit property.

d. An order of eviction of the 6th defendant, his agents, servants and/all workers from land parcel Kisii Town/ Block II/23.

e. Costs of the suit.

f. Any other relief that this Honorable Court may deem fit to grant.

20. The 6th and 7th Defendants contend that without showing any wrongdoing on the part of the 4th Defendant, it would be impossible to prosecute the prayers sought in the Plaintiff. I disagree with this position for the reason that firstly, making such an assumption would be pre-empting the Plaintiffs' case without hearing their case.

21. Secondly, the Plaintiffs accused the 1st, 2nd and 3rd Defendants alongside the 4th Defendant of conspiring to defraud the 2nd Plaintiff of its Plot. Order 24 Rule 4 (3) above provides that the suit against the deceased Defendant abates within one year after his death if an application is not made to substitute him. This means that the suit against the 4th Defendant abated but the suit against the rest of the Defendants still subsists.

22. There is nothing in the Plaintiff to suggest that the Plaintiffs claimed that the 4th Defendant was the mastermind of the fraud claimed in the suit. Even if that were the case, the 1st, 2nd and 3rd Defendants have also been accused of participating in illegalities that led to the 2nd Plaintiff's loss of its plot in their individual capacities.

23. It is trite that the transferor of goods cannot pass a better title than he himself possesses. The question of whether the 6th Defendant obtained good title to the plot and whether it could charge the plot to the 7th Defendant are questions that can only be determined after a full hearing of the matter. I reiterate the observation by Mutungi J. that the prayers sought in the Plaintiff would affect the 6th and 7th Defendants if granted and their participation in the suit is therefore necessary.

24. Consequently, I find and hold that the Defendants will not suffer any prejudice that cannot be compensated in costs if the suit is dealt with to its logical conclusion. The application dated 17th November 2020 is therefore found to be lacking in merit and it is dismissed with costs to the Plaintiffs.

DATED, SIGNED AND DELIVERED AT KISII THIS 13TH DAY OF APRIL, 2021.

J.M. ONYANGO

JUDGE