



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 223 OF 2018

MARY MOKEIRA MATWETWE.....PLAINTIFF

VERSUS

STEPHEN MACHOKA NYARIBO.....DEFENDANT

RULING

1. By his Notice of Motion application dated and filed herein on 11th October 2019 Stephen Machoka Nyaribo (the Defendant/Applicant) urges the Court to be pleased to strike out the entire suit as filed by Mary Mokeira Matwetwe (the Plaintiff/Respondent) on 6th December 2018.

2. The application which is supported by an affidavit sworn by the Defendant is premised on the grounds that: -

- i. The agreement which is the foundation and/or genesis of the suit is unenforceable in law, being a forged document;**
- ii. The Plaintiff never executed the agreement with the Applicant;**
- iii. Vincent Mogaka who signed the agreement and verifying affidavit is not the Plaintiff or a holder of a Power of Attorney from the Plaintiff.**
- iv. The Advocate alleged to have attested the agreement has confirmed that he never signed the same; and**
- v. The Plaintiff has never been in the Country at the time of execution and filing of this suit and therefore the suit is an abuse of the Court process.**

3. The application is opposed. In her Replying Affidavit sworn on 10th October 2019 as filed herein on 20th January 2020, the Plaintiff asserts that the agreement is enforceable as it meets all the requirements of a valid contract and was duly signed by the Defendant whose signature was witnessed by an Advocate.

4. The Plaintiff further avers that she partly paid the purchase price through her brother Vincent Mogaka Nyaboga and that she travelled from the United States to Kenya for purposes of execution of the agreement. She further asserts that she signed the pleadings filed herein at a time when she was in the Country and denies that the verifying affidavit was executed by her said brother on her behalf.

5. The Plaintiff avers that the suit as filed is meritorious and it is only just that she be granted her day in Court as the Defendant/Applicant has not denied the fact that he received the sum of Kshs 300,000/- pursuant to the contract.

6. I have perused and considered the application by the Defendant and the response thereto by the Plaintiff. I have also taken into consideration the rival submissions placed before me by the Learned Advocates appearing for the two parties.

7. The single issue for determination herein is whether or not this Court should strike out the suit for being based on an agreement which according to the Defendant, the Plaintiff did not execute. While the Defendant does not rely on the provision, the power to strike out pleadings is granted to the Court under Order 2 Rule 15 of the Civil Procedure Rules which provides as follows: -

“At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that-

a. It discloses no reasonable cause of action or defence in law, or

b. It is scandalous, frivolous or vexatious; or

c. It may prejudice, embarrass or delay the fair trial of the action; or

d. It is otherwise an abuse of the process of the Court; and may order the suit to be stayed or dismissed or Judgment to be entered accordingly, as the case may be.”

8. According to the Defendant, the Plaintiff who apparently resides in the United States of America was not in the Country at the time of execution of the agreement and filing of this suit and hence the claim as filed amounts to an abuse of the Court process. The Defendant does not however explain how he got to know that the Plaintiff was not in the Country.

9. It is settled law that the Court’s power to strike out pleadings is to be exercised sparingly and cautiously because the Court exercises the power without being fully informed of the merits of the case through discovery and oral evidence. In *D.T. Dobie & Company (Kenya) Ltd – vs- Muchina (1982) KLR1*, the Court **affirmed this position as follows: -**

“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 weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it.”

10. That being the case, the overriding principle to be considered in an application for striking out a pleading therefore is, whether triable issues have been raised. In her Complaint dated 6th August 2018 as filed herein on 6th December 2018, the Plaintiff prays for a declaration that the Defendant is in breach of a contract dated 2nd February 2012 and urges this Court to compel the Defendant to honour his part of the bargain or to refund the Plaintiff the contract sum of Kshs 300,000/- or to give the Plaintiff an alternative parcel of land of a similar value.

11. The Defendant denies executing the contract of sale with the Plaintiff and asserts that the Plaintiff did not travel to the Country to execute the sale agreement and/or the verifying affidavit. The Defendant has attached a copy of the Sale Agreement said to have been executed between himself and the Plaintiff for the sale of a parcel of land described therein as Gongoni Settlement Scheme/907.

12. It is instructive to note that the Defendant does not deny executing the Agreement and/or receiving the sum of Kshs 300,000/- being the consideration for the sale. Instead, the Defendant avers at paragraph 5 and 6 of the Supporting Affidavit as follows: -

“5. That I aver that I am apprehensive that Vincent Mogaka who signed the agreement herein on behalf of the Plaintiff had no power of attorney.

6. That I aver that I have further confirmed he also signed the verifying affidavit in this suit without (a) power of attorney.”

13. A perusal of the agreement annexed to the Defendant’s application does not however support the Defendant’s position. It instead shows that the agreement was signed by the Plaintiff and that Vincent M. Nyaboga signed the document as a witness. Similarly, a perusal of the Verifying Affidavit shows that it is in the name of the Plaintiff and was not in any way signed on her behalf. Even more strange is the fact that the Defendant has attached to his supporting affidavit herein an undertaking made by himself on 30th October 2012 in which he clearly refers to the Plaintiff as the purchaser of the suit property from himself. That undertaking is again witnessed by the said Vincent.

14. The Plaintiff has of course answered back stating that she was in the Country and attaching copies of her passport entry and exit visas to demonstrate that she executed those documents. In my view however, whether or not the Plaintiff executed the sale agreement and/or the verifying affidavit is a triable issue that cannot be determined in the manner sought herein by the Defendant. Those are issues that can only be determined at the trial through production of evidence.

15. The upshot is that I find the Defendant’s application to be totally misconceived and to be without merit. It is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 28TH DAY OF MAY, 2021

J.O. OLOLA

JUDGE