REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 45 OF 2012

MAWANDO LIMITED.....PLAINTIFF

VERSUS

THOUSAND PALMS BEACH HOTEL LIMITED.....1ST DEFENDANT

REGISTRAR OF TITLES MOMBASA.....2ND DEFENDANT

SBM BANK (K) LIMITED.....3rd DEFENDANT

RULING

1. By a Notice of motion dated 2nd June, 2018 and filed in court on 22nd June 2018, the 1st Defendant/Applicant seeks orders that:

a. Spent

b. All further proceedings in this suit be stayed until the hearing and determination of this Application.

c. This suit be struck out with costs to be paid by Nyameta Mogaka & Magiya Advocates, Zahid Iqubal Dean as well the Plaintiff jointly and severally.

d. The costs of this Application be provided for.

2. The Application is brought under the provisions of Articles 159, 25(c), 50 (1) and 149 (2)(b)(d) and (e) of the Constitution and Sections 1A, 1B, and of the Civil Procedure Act and Order 2 Rule 15 (1) (b)(c) & (d) of the Civil Procedure Rules and is premised on the following grounds:

1. That this suit is a gross abuse of the process of court.

2. This suit is scandalous, frivolous and vexatious.

3. There cannot be a fair hearing or a fair trial of any issue in this suit.

4. The suit is a fraud upon the court and the Defendants.

5. The suit is based on verifiable falsehoods and on forged documents that do not require a full hearing to be found to be forgeries and falsehoods.

6. The 1st Defendant is under no obligation to continue participating in a suit and to incur cost in a suit that is incompetent and which must fail.

7. The court must not encourage the filing and prosecution of suits based on false documents and false evidence as such suits constitute an offence against the administration of justice.

8. The existence of this suit is taking up judicial time and resources that should otherwise be applied to legitimate suits.

9. This court has a duty not to continue facilitating the commission of offences by the Plaintiff, the Plaintiff's directors and shareholders and the Plaintiff's advocates.

10. The Plaintiff's documents prove beyond reasonable doubt that this suit is a fraud, frivolous and vexatious.

11. Had the court read the documents upon which the Plaintiff's suit is based the court would already have struck out the suit with costs.

3. The Application is supported by the affidavit of D. Muyaa Advocate for the Applicant sworn on 21st June, 2018. She referred the court to paragraph 6 of the amended Plaint in which the Plaintiff alleges that the 1st Defendant illegally and fraudulently caused itself to be registered as the proprietor of the suit property in January, 2009, a fact she averred the Plaintiff, its directors and advocates knew to be false. She referred the court to the supporting affidavit sworn by Zahid Iqubal Dean, the Plaintiff's director on 9/2/17 in which he had annexed a copy of the Grant/Title which shows that the suit premises were acquired by Seawake Beach Hotel Ltd on 25/11/1982 and the Grant was registered on 15/12/1982. Entry No.4 in the Grant is the registration of a Certificate of Change of Name of Seawake Beach Hotel Ltd to Thousand Palms Beach Hotel on 18/9/1986. That in paragraph 2 of the said affidavit, it is stated that the Plaintiff, Mawando Limited acquired the suit property after it changed its name from Thousand Palms Beach Ltd to Mawando Ltd. The Applicant avers that the statement is false and ridiculous and referred the court to the Plaintiff's List of Documents dated 20/3/13 in which the first document in that bundle is the Certificate of Incorporation of the Plaintiff Company on 8/9/08. That when a company changes its name it obtains a Certificate of Change of Name but the registration number remains the same.

4. The Applicant argues that having acquired the property under its previous name in 1982, it cannot be alleged to have acquired the same property in 2009 from the Plaintiff, adding that the Plaintiff itself did not exist until 8/9/08 when it was incorporated. That no effort has been taken by the Plaintiff and its advocates to explain how it owned the property from 1982 yet it was incorporated in 2008. The Applicant avers that the Plaintiff has not shown any certificate of change of name of Thousand Palms Ltd to Mawando Limited and that it cannot have or show any such evidence because Mawando Limited is a distinct and separate company incorporated in 2008 as per the certificate of incorporation in the Plaintiff's own list and bundle of documents.

5. The Applicant avers that the suit is incoherent and referred to various affidavits sworn by the Plaintiff's director and numerous paragraphs of the amended plaint. An example is given of an indemnity dated 13/10/08 signed by Zahid Iqubal Dean under oath stating that the suit premises belongs to Thousand Palms Beach Hotel Ltd yet the same person on behalf of the Plaintiff states that Thousand Palms Beach Hotel Ltd acquired the property unlawfully or fraudulently in 2009, which is untenable. That there is no title or grant in the further list of bundle of documents containing any entry showing the Plaintiff as the registered owner of the suit premises. The Applicant further avers that the property never belonged to the estate of Salan Dean, father to Zahid Iqubal Dean, and that the attempt by the latter to transfer the property from the deceased to himself is nothing short of fraud. The Applicant avers that even the transfer of the suit property dated 8/6/09 by Zahid Iqubal Dean to Mawando Ltd is fraudulent and further that the will dated 6/5/94 is a forgery. After analyzing various documents, Ms. Muyaa argues that it is oppressive to permit a suit like this to continue existing in this court or any other court in Kenya. The Applicant also referred to proceedings and order in Mombasa HCCC No.331 of 2008 and concluded that the Plaintiff is using the facilities of this court to harass and intimidate the Defendants.

6. The Application is opposed by the Plaintiff through a replying affidavit sworn by Zahid I Dean on 22nd January 2019. The Plaintiff expressed the view that the grounds relied on by the 1st Defendant are matters of evidence that need to be tested and each party given an opportunity to present their case. If the arguments put forward contained matters of fact which need to be ascertained, the Plaintiff believes that the arguments can only be addressed at a full hearing and not at this preliminary stage. The Plaintiff avers that the defendant in support of the Application contain evidence and misstatement of facts hence the discretion to strike out the suit cannot stand. In this case, the Plaintiff submits that it is in possession and occupation of the suit property as well as the original title and craves for a hearing to demonstrate that the proprietorship of the suit property was changed fraudulently. It was thus asked to dismiss the Application.

7. The Application was canvassed by way of written submissions, which were also orally highlighted by the advocates for the parties, mainly reiterating their opposing positions as outlined above. The Applicant relied on the case of **Bhavasar Anadkumar t/a Sarax Enterprises –v- Beloilco Holdings Ltd & 3 Ohters (2018) eKLR**, in which Olola, J struck out a petition.

8. On its part, the Plaintiff relied in the Court of Appeal case of **Salesio M'aribu –v- Meru County Council, Civil Appeal No.183 of 2002; D.T. Dobie –v- Muchina (1980)KLR 1,** and the case of **G.B.M Kariuki –v- Nation Media Group Limited & 3 Others (2012)eKLR**.

9. Mr. Makuto, learned counsel for the 2nd Defendant supported the Application and relied on Section 20 (3) of the Companies Act, Cap 486 Laws of Kenya (repealed).

10. I have considered all the issues raised in the Application, the affidavit in support and against, the rival submissions and the case law cited by the parties. The principles which guide the court in determining an Application for striking out pleadings are well settled.

11. In the case of **DT Dobie & Company (Kenya) Ltd -v- Muchina (1982) KLR 1**, the Court of Appeal stated 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 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."

12. In **Yaya Towers Limited –v- Trade Bank Limited (In Liquidation) Civil Appeal No.35 of 2000** the Court of Appeal expressed itself thus:

"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… It cannot be doubted that the court has inherent jurisdiction to dismiss that which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved….If the Defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavit…. No suit should 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."

13. In the case **of DT Dobie –v- Muchina (supra)** the Court of Appeal expressed itself inter alia as follows:

"A pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The court must see that the Plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments and must not dismiss an action merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved…..It is not the practice in civil administration of the courts to have preliminary hearing as in crime. If it involves parties in the trial of the action by affidavits it is not plain and obvious case on its face…. The summary jurisdiction is not intended to be exercised by minute and a protracted examination of the documents and the facts of the case in order to see whether the Plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way--- A Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal…. "

14. The overriding principle therefore to be considered in an Application for striking out a pleading is whether it raises any triable issues. It has been stated that the power to strike out pleadings must be sparingly exercised and can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless or fanciful or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as a legitimate use of the process, the court will not allow its process, to be used as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources while taking into account the need to allot resources to other cases.

15. Whereas the court retains the jurisdiction to strike out pleadings in deserving cases, each case must be viewed on its own peculiar facts and circumstances. The law is that a statement of claim should not be struck out and the Plaintiff driven from the judgment seat unless the case is unarguable, and where the hearing involves the parties in a trial of the affidavits and examination of documents, it is not plain and obvious case on its face.

16. In this case, the court is urged to find that the Plaintiff's suit is based on falsehoods, fraudulent acts and forged documents. The Applicant has referred the court to numerous documents and urged the court to make findings on them. To do so, I am afraid, would amount to making a determination of this case based on affidavit evidence. I would have to make a finding that the Plaintiff's action is based on forged and false documents. It must be noted that the Plaintiff has not admitted the facts as presented by the Applicant.

17. Taking all the circumstances of this case into consideration, I am not satisfied that the justice of the case will be attained by terminating this suit at this stage. The 1st Defendant's version is yet to be tested as against the Plaintiff's evidence before the court can arrive at a just determination. Under Article 50 (1) of the Constitution, every person has the right to have any dispute that can be resolved by the Application of the law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. Under Article 25 that right cannot be limited. Whereas I agree that the form of a hearing does not necessarily connote adducing oral evidence and that in appropriate cases hearing may take the form of affidavit, to determine a suit by way of affidavit evidence ought to be resorted to only in clear and plain cases. I am not satisfied that the present case ben be termed as clear and plain case.

18. Furthermore, under the overriding objective in Sections 1A and 1B of the Civil Procedure Act as well as Section 3 of the Environment and Land Court Act, this court is enjoined to ensure that there is just determination of the proceedings in a timely and efficient manner at a cost affordable to the respective parties. Under the said objective, it has been held that the challenge to the courts is to use the overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory Applications and instead to adjudicate on the principal issues in a full hearing if possible. See **Stephen Boro Gitiha –v- Family Finance Building Society & 3 Others Civil Application No.263 of 2009 and Lucy Bosire –v- Kehancha Div. Land Disputes Tribunal & 2 Others (2013) eKLR.**

19. It is also of great significant to note that in this case, the affidavit in support of the Application herein has been sworn by D. Muyaa, an advocate of this court appearing for the Applicant. The law governing affidavits is order 19 of the Civil Procedure Rules. Subrule 3(1) thereof stipulates that affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove. Further, under Rule 9 of the Advocates Practice Rules, Advocates are not permitted to swear affidavits in contentious matters. The issue of advocates swearing affidavits in contentious matters has been decided in several court cases.

20. In **Republic –v- Nairobi City County Government & 6 Others Ex Parte Mike Sonko Mbuvi, (2015)eKLR,** Odunga, J stated:

"Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate

subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted."

21. The affidavit in support of the Application contains dispositions that are contentious in this matter. The advocate appearing for the 1st Defendant/Applicant being on record and resulting to swearing the supporting affidavit on behalf of the client has created a legal muddle and as such the issues raised in this matter cannot be resolved by the advocate purporting to be the advocate and the litigant at the same time. In my view, the appropriate party to swear the affidavit should have been a director of the Applicant.

22. The upshot is that the 1st Defendant/Applicant's Application dated 2nd June, 2018 is without merit and is dismissed with costs to the Plaintiff.

DATED, SIGNED and DELIVERED at MOMBASA this 8th day of July 2019.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Muyaa for the 1st Defendant

Magiya for the Plaintiff

Mwandeje for AG for the 2nd Defendant

No appearance for the 3rd Defendant.

Yumna Court Assistant

C.K. YANO

JUDGE