



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 43 OF 2017

(Formerly Machakos ELC 148 of 2010)

BENJAMIN LEMASEI TUMPES.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK1ST DEFENDANT

JANE N. MWANGI.....2ND DEFENDANT

RULING

What is before Court for determination is the 1st Defendant's Notice of Motion application dated 6th July, 2018 brought pursuant to Order 2 Rule 15(1) (a); Order 1 Rule 15 -22 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicant seeks for orders that the Plaintiff's suit against the 1st Defendant be struck out with costs.

It is premised on the ground that the suit discloses no reasonable cause of action against the 1st Defendant and the Plaintiff is not seeking any relief against it.

It is supported by the affidavit of TOM OGOLA who is its Legal Manager where he confirms that the Plaintiff obtained a loan facility of Kshs. 500,000 with the 1st Defendant and secured it with a Charge dated the 5th November, 1986 on property LR No. Kajiado/ Olchoro/ Onyore/ 1171, which he failed to pay culminating in the said property being sold, vide public auction on 18th May, 1992. He confirms that the 1st Defendant transferred the suit land to Mwangi Karogo on 9th July, 1992 and ceased to have an interest over it. He explains that the Plaintiff had initially filed a suit Nairobi HCCC No. 148 of 2010 against the 1st Defendant claiming the sale of land to Mwangi Karogo was fraudulent but he withdrew it. He contends that the Plaintiff filed the instant suit seeking orders of adverse possession against the 2nd Defendant and has not disclosed any reasonable cause of action against it.

The Plaintiff opposed the application and filed a replying affidavit sworn by BENJAMIN LEMASEI TUMPES where he confirmed charging his land to the 1st Defendant vide a legal charge dated 5th November, 1986. He insists he repaid the mortgage loan in full but his records got destroyed when his house burnt down on 24th September, 2000. He avers that in 1992 the 1st Defendant purported to sell the suit land by public auction and transferred the said land to Mwangi Karogo despite the fact that he had repaid the loan in full. He reiterates that the 1st Defendant has been uncooperative to provide justification for the sale of his land and is hence a necessary party to the suit herein.

The 1st Defendant and the Plaintiff filed their submissions which I have considered.

Analysis and Determination

Upon perusal of the Notice of Motion application dated 6th July, 2018 including the parties affidavits and submissions, the only issue for determination is whether the Plaintiff's suit as against the 1st Defendant should be struck out with costs.

The 1st Defendant submits that it is not a necessary party to the suit herein since the Applicant has not sought any reliefs against it. Further, that it exercised its statutory powers of Sale and ceased to have an interest in the property. It has relied on the cases of **Augustine Kimenteria Nthiga V David Ndubi Stower (2008) eKLR** and **David Ngugi Ngaari V Kenya Commercial Bank Limited (2015) eKLR** to support these arguments.

The Plaintiff submitted that it has established a reasonable cause of action against the 1st Defendant as one of the triable issues raised is whether the 1st Defendant's statutory power of Sale had been extinguished at the time of the public auction. It insists the 1st Defendant has

been put in the centre of the dispute between the Plaintiff and 2nd Defendant. He relied on the case of **Nyeri HCCC No. 15 of 2016 Humphrey Mbaka Nandi T/a Nyati Distillers Limited V Equity Bank (K) Ltd & 2 others; HCCC 286 of 2013 UBA Kenya Bank Limited V Transport and Technical Services Limited & 5 others** to oppose the application.

Order 2 rule 15 of the Civil Procedure Rules provides as follows: **‘(1) 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.’**

In the Court of Appeal in the case of **RAMJI MEGJI GUDKA LTD –Vs- ALFRED MORFAT OMUNDI MICHIRA & 2 OTHERS [2005] eKLR** held as follows:

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said:-

“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 LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham.”

In the current scenario, I note the Plaintiff is seeking various prayers including adverse possession; injunctive reliefs; cancellation of resultant subdivisions of the suit land as well as rectification of title, which is currently registered in the name of the 2nd Defendant. From a perusal of the supporting affidavit to the Amended Originating Summons, he raises issues in respect of having paid the mortgage over the suit land in full. He disputes the auction undertaken in 1992 and insists the 1st Defendant’s statutory power of sale was extinguished since he had repaid the loan in full. From the averments in the supporting affidavit to the Amended Originating Summons, I opine that the 1st Defendant is hence a necessary party to this suit. I am further of the view that the issues raised in the Amended Originating Summons are triable hence the matter should proceed to full trial for adjudication and not dispensed with at an interlocutory stage.

In relying on the two Court of Appeal decisions cited above as well as the facts as presented, I find that it would be pertinent if the suit was set down for hearing on its merits to enable the court make a final determination of the dispute at hand.

In the circumstances, I will disallow the 1st Defendant’s Application dated the 6th July, 2018 to strike out the Plaintiff’s suit against it and direct that all the parties do comply with Order 11 and set the suit down for hearing.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 2nd day of October, 2019

CHRISTINE OCHIENG

JUDGE