



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 123 of 2017

EZEKIEL MWAKA MUSAU 1ST PLAINTIFF

EUNICE KOKI MUSAU 2ND PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD DEFENDANT

RULING

1. By a plaint dated 17th July 2017 and filed on 18th July 2017, the Plaintiffs sought the following reliefs against the Defendant;

a. A declaration bestowing the Plaintiffs as the bonafide and legal owners of land parcel numbers Evurore/Katheka/127 and Evurore/Kathera 131.

b. An order directing the Defendant to surrender original title deeds, executed transfers, Land Board Control consent and all other necessary documents capable of effecting registration and transfer in relation to land parcel numbers Evurore/Kathera/127 and Evurore/Kathera/131 in favour of the Plaintiffs.

c. An order directing the Defendant to discharge any and all encumbrances registered against land parcel numbers Evurore/Kathera/127 and Evurore/Katheka/131.

d. In default of the Defendant complying with prayers (2) and (3) above within (3) days of issuance of the decree herein the Land Registrar Embu does proceed to remove any encumbrances registered by the Defendant on land parcel numbers Evurore/Kathera/127 and Evurore/Kathera/131 and have the Plaintiffs registered as proprietors/owners and to issue the Plaintiffs with title deeds thereto.

e. Costs.

f. Such other further reliefs the honourable court shall deem fit to grant.

2. The basis for seeking the said reliefs was that the Plaintiffs had purchased *Title Nos. Evurore/Kathera/127 and Evurore/Kathera/131* (hereinafter described as the suit properties) in a public auction conducted at the instance of the Defendant pursuant to the latter's statutory power of sale. It was pleaded by the Plaintiffs that despite demand and an exchange of correspondence between the parties, the Defendant had failed, refused or neglected to transfer the suit properties to them.

3. The Defendant entered an appearance on 14th August 2017 and filed a statement of defence on 1st September 2017. Save for the description of the parties and the jurisdiction of the court, the Defendant simply denied all the allegations in the plaint. It was pleaded in the alternative that if the Plaintiffs ever purchased the suit properties then they never satisfied the conditions antecedent to their being registered as proprietors. The Defendant did not specify those conditions and the manner in which they were not fulfilled.

4. The Plaintiffs were not amused by the Defendant's said defence. They consequently filed a notice of motion dated 12th September 2017 under the provisions of **sections 1(A), 1(B), 3(A) of the Civil Procedure Act (Cap 21), Order 2 Rule 15(b) (c) and (d) of the Civil Procedure Rules** and **all enabling provisions of the law** seeking to have the Defendant's said defence struck out and for judgement to be entered against the Defendant as prayed in the plaint.

5. The said motion was based upon the several grounds shown on the face thereof and supported by an affidavit sworn by the 1st Plaintiff on 12th September 2017. In a nutshell, it was contended that the Defendant's defence on record was a sham, evasive and a general denial. It was also contended that it was frivolous and intended to delay a fair and just determination of the suit.

6. In his supporting affidavit, the 1st Plaintiff stated that he and the 2nd Plaintiff truly bought the suit properties at a public auction conducted in 1993 by Marchet Auctioneers (K) Ltd on the instructions of the Defendant. He annexed a copy of the certificate of sale from the said auctioneer and copies of various letters which the parties herein exchanged between 1993 and 2004. He also annexed a copy of a demand letter to the Defendant dated 11th November 2015.

7. In view of the annexed exhibits, the Plaintiffs asserted that the Plaintiffs' claim was clearly admitted hence there was no need to waste the court's time and resources on a full hearing.

8. The Defendant filed a replying affidavit sworn on 28th November 2017 in opposition to the Plaintiffs' said application. The affidavit was not sworn by any of the officers of the Defendant but by an advocate practicing in the firm of J.K. Kibicho and Co Advocates which is on record for the Defendant.

9. It was stated in the replying affidavit that there were no admissions on the face of the defence to warrant entry of judgement against the Defendant. It was also contended that it had not been proved that the Defendant had failed in its obligation to transfer the suit properties to the Plaintiff and that such proof can only be established upon a full hearing. Finally, it was contended that striking out a pleading was a draconian measure hence the Defendant should be allowed to defend the suit. The only document annexed to the replying affidavit was a copy of the statement of defence dated 28th August 2017.

10. It was agreed by the parties that the said application be canvassed through written submissions. Consequently, the Plaintiffs filed their written submissions on 10th January 2018 whereas the Defendant filed its submissions on 4th April 2018.

11. In their written submissions, the Plaintiffs objected to the replying affidavit sworn by the Defendant's advocate on record. It was submitted that an advocate cannot depose to contested matters of fact in a suit where he is acting for a party. They urged the court to strike out the replying affidavit on the authority of the case of **Agip (Kenya) Limited Vs Highlands Tyres Ltd [2001] KLR 630**.

12. The Plaintiffs also submitted that the defence on record was a mere denial and a sham which was merely intended to delay a fair conclusion of the suit. It was their submission that the defence did not raise any triable issues worth going for trial. Consequently, they urged the court to allow the application.

13. On its part, the Defendant submitted that the Plaintiff's claim had not been admitted in any way. It was submitted that the documents and correspondence exhibited by the Plaintiffs had not been subjected to verification. It was submitted that their authenticity and authorship could only be verified at a trial. It was further submitted that striking out a pleading was a draconian measure which should be applied as a last resort. The Defendant also submitted that since the Plaintiffs had not filed a reply to defence, they had not joined issue with the allegations contained therein.

14. The court has considered the pleadings herein, the Plaintiffs' said application, the Defendant's replying affidavit and the written submissions of the parties. The court is of the view that the following four (4) issues arise for determination;

- a. Whether the replying affidavit sworn by the Defendant's advocate should be struck out.
- b. Whether the Defendant's defence is liable to be struck out under **Order 2 Rule 15 of the Civil Procedure Rules**.
- c. If the answer to (b) above is in the affirmative, whether final judgement should be entered against the Defendant.
- d. Who shall bear costs of the application.

15. On the 1st issue, it is evident that the replying affidavit herein was sworn by one of the advocates practicing in the firm on record for the Defendant. The court has considered the authority of **Agip (Kenya) Ltd Vs Highlands Tyres Ltd** (supra) cited by the Plaintiffs. It is true that the court deprecated the practice of advocates swearing to contested matters of fact in judicial proceedings.

16. It was held in the said case that it was unseemly for an advocate to discharge his duty to the court and his client if he descended into the arena of controversy. The court did not, however, strike out the replying affidavit which was sworn by the advocate. The court simply refused to give any credence to the averments in the said affidavit. The court sees no compelling reason to strike out the replying affidavit in the instant suit even though it may not have any probative value.

17. The 2nd issue is on striking out the statement of defence. The court has considered the general principles of law relating to the striking out of a pleading under **Order 2 Rule 15 of the Civil Procedure Rules**. The court is aware that striking out is a drastic and draconian measure which should only be invoked in the clearest of cases. In the case of **D.T. Dobie & Co (Kenya) Ltd Vs Joseph Muchina & Another [1982] KLR 1**. It was held, *inter alia*, 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 is incurable by amendment.”

18. The Plaintiffs' allegations in this suit are so clear and straightforward. They claimed to have participated in a public auction where the suit properties were put up for sale pursuant to the Defendant's exercise of its statutory power of sale. They claimed to have been declared the highest bidders and to have been issued with a certificate of sale by the auctioneer. They made a demand for transfer of the suit properties and exchanged correspondence with the Defendant. In its correspondence, the Defendant appeared to ask its advocates Ms Mereka & Co to do the needful.

19. So, what was the Defendant's defence to that narration? It was denial, denial and more denials. They denied the existence of the auction and everything else. In the alternative, it was pleaded that if there was such a sale, then the Plaintiffs had failed to fulfill certain preconditions for the transfer of the suit properties to them. No particulars of such conditions were given whatsoever. The denials in the defence are a clear contradiction of the Defendant's own communication in its various letters which were annexed to the 1st Plaintiff's supporting affidavit.

20. The Defendant did not contend that the said correspondence was a complete forgery and a fanciful creation of the Plaintiffs. It was, however, suggested in the Defendant's submissions that the authenticity of such correspondence could only be established at the trial of the suit. One may wonder why such correspondence would require verification when it was not alleged on oath that they were forgeries. And what would prevent the Defendant from establishing from its records and files whether such correspondence was genuine or made up before the hearing?

21. The court finds that the Defendant has no genuine defence to the action. In the case of **Trust Bank Ltd Vs Amin & Company Ltd & Another [2000] KLR 164**, the court held, quoting from **Bullen & Leake and Jacobs Precedents of Pleadings** (12th edition) that a pleading is scandalous, frivolous or vexatious if it amounted to a denial of what the Defendant had clearly admitted earlier on. It was further held that a pleading is frivolous when it was without substance or groundless and fanciful. It was vexatious when it lacked *bona fides* and was hopeless. A pleading was held to be an abuse of the process of court if it was meant to misuse the machinery or process of the court.

22. The court is satisfied that from the material on record that the Defendant's defence meets the descriptions contained in paragraph 21 hereof. The court shall accordingly grant the prayer for striking out the Defendant's defence.

23. The 3rd issue is whether or not the court is empowered to enter judgement or final judgement against the Defendant upon striking out the defence. The court has carefully considered the nature of the suit and the reliefs sought herein. This is not a liquidated claim in respect whereof judgement may be entered in summary manner. The application before court is to be distinguished from an application for summary judgement under **Order 36 of the Civil Procedure Rules**. Whereas final judgement may be entered under **Order 36 of the Civil Procedure Rules**, I do not think a similar judgement can be entered under **Order 2 Rule 15** when the claim before court is not liquidated.

24. The court's view is that the appropriate order to make upon striking out the defence is for the suit to proceed as undefended. The court, therefore, declines to enter judgement against the Defendant as prayed by the Plaintiffs.

25. The final issue relates to costs. The general rule on costs is enunciated in **section 27 of the Civil Procedure Act (Cap 21)**. Costs of any action shall follow the event unless, for good reason, the court directs otherwise. There is no good reason why the Plaintiffs should not have costs of the application. The Plaintiffs are accordingly awarded costs of the notice of motion dated 12th September 2017.

26. The upshot of the foregoing is that the Defendant's statement of defence dated 28th August 2017 is hereby struck out with costs to the Plaintiffs. The court declines to enter judgement against the Defendant and directs that the Plaintiffs shall be at liberty to fix the suit for hearing as undefended.

27. It is so ordered.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 5TH day of JULY, 2018.

In the presence of Mr Siro holding brief for Mr Orege for the Plaintiffs and in the absence of the Defendants.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

05.07.18