



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1185 OF 2015(O.S)

JADVA BHIMJI SANGHANI

SHASHIKANT JADVA SANGHANI.....PLAINTIFFS

VERSUS

MIDDLE EAST BANK KENYA

(as receivers of Manji Villas Limited).....DEFENDANT

RULING

This suit was instituted on 18th November, 2015 by way of Originating Summons and plaint both dated 4th November, 2015. The Originating Summons and the plaint were received at the court registry and stamped. However, according to the court receipt dated 19th November, 2015 the court fees was assessed and paid only in respect of the plaint in the sum of Kshs.70,095/=. I have not seen the receipt for the court fees if any that was paid for the Originating Summons. In the Originating Summons the plaintiff sought the determination of the following questions:

- (a) Whether the defendant could legally refuse to sign a transfer in favour of the plaintiffs in respect of House No. 2 on L.R No. 209/13439/10 (hereinafter referred to as “the suit property”) acceptable for registration by the Registrar of Titles;
- (b) Whether the defendant was entitled to additional advocate’s costs.

In the plaint, the plaintiffs sought among others the following reliefs:

- (i) A declaration that the plaintiffs were the registered owners of the suit property as they had been in adverse possession thereof for over 12 years.
- (ii) An order that the defendant does execute the instrument of transfer and/or lease in favour of the plaintiffs in respect of the suit property.

In the plaint and the Originating Summons, the plaintiffs averred that they purchased the suit property from Manji Villas Limited through an agreement for sale dated 23rd September, 1998 at a consideration of Kshs.5,000,000/=. The plaintiffs averred that before the completion of the said agreement for sale, Manji Villas Limited was placed under receivership by the defendant, Middle East Bank Limited who had a charge over L.R No. 209/13439/10 on which the suit property is erected. The Plaintiff averred that they entered into a new agreement for sale on 26th May, 1999 with the defendant’s appointed receiver who sold the suit property to them again at Kshs.11,700,000/= which they paid in full and took possession of the suit property. The plaintiffs averred that despite having fulfilled their part of the bargain, the defendant had refused to transfer the suit property to them.

From the record, there is no evidence that the plaintiffs took out summons for service upon the defendant. The defendant was however served with the Originating Summons and the attached plaint. The defendant entered appearance under protest on 18th December, 2015 and filled an application by way of Notice of Motion date 17th December, 2015 seeking an order to strike out the proceedings herein with costs to the defendant. The application was brought on the following grounds:

- (i) The proceedings herein are an abuse of the process of the court;
- (ii) There is no provision in the Civil Procedure Rules which permits the commencement of proceedings by simultaneously filing an Originating Summons and a plaint;

- (iii) The proceedings are embarrassing and vexatious;
- (iv) The proceedings will delay the fair trial of the issues in question; and
- (v) The plaintiffs do not have a conceivable cause of action against the defendant and the entire process is solely meant to prejudice and embarrass the defendant.

The application was supported by the affidavit of the defendants managing director, Dhirendra Rana sworn on 17th December, 2015. The defendant averred that having been served with an Originating Summons and a plaint, it was at a loss as to which one to respond to. The defendant averred that it was not a receiver of Manji Villas Limited (hereinafter referred to as "the company"). The defendant averred that it is and was at all material times the chargee of the parcels of land known as L.R No. 209/12138 and L.R No. 209/12139 (hereinafter jointly referred to as "the properties") owned by the company. The defendant averred that following the default by the company in the repayment of the loan that was advanced to it by the defendant, the defendant appointed Shamin Salim Damji (hereinafter referred to as "the receiver") as a receiver of the properties. The defendant averred that the agreement for sale dated 26th May, 1999 which the plaintiffs have relied on was entered into between the plaintiffs and the company and was executed by the receiver on behalf of the company. The defendant averred that the plaintiffs took possession of the suit property pursuant to the said agreement and as such they are not in adverse possession of the property. The defendant averred that the said agreement for sale expressly excluded personal liability of the receiver however arising. The defendant averred that the plaintiffs and other persons who had an interest in the properties had appointed the firm of Messrs Simani & Company Advocates to act for them in the matter with a view to resolving the issues of subdivision and issuance of separate titles for the houses that were built on the properties including the suit property. The defendant averred that it agreed with the plaintiffs and the other persons who had interest in the properties that Messrs Simani & Company Advocates would undertake the process of subdivision of the properties and the processing of the titles for the houses thereon including the suit property provided that the defendant was released from all liability. The defendant averred that on 1st July, 2008, the plaintiffs signed a release and discharge in favour of the defendant releasing and discharging it from all liability in relation to the agreement for sale dated 26th May, 1999. The defendant averred that in consideration this release and discharge, it released to the plaintiffs' advocates Messrs Simani & Company Advocates all the documents that were necessary for processing titles in favour of the plaintiffs and others who were interested in the properties. The defendant averred that it was not a party to the agreement for sale dated 26th May, 1999 and if it had any liability thereunder, the same was waived by the plaintiffs.

On 22nd February, 2017, the plaintiffs changed advocate from Pramod Patel Advocates to Mohamed Madhani & Company Advocates. On 5th May, 2017, the plaintiffs' new advocates filed a notice of withdrawal of the Originating Summons dated 4th November, 2015 and filed an amended plaint dated 26th April, 2017.

The plaintiffs opposed the defendant's application through a replying affidavit sworn by the 1st plaintiff on 10th July, 2017. In the affidavit, the plaintiffs admitted that it was irregular to file an Originating Summons and a plaint simultaneously in this suit. They attributed the error to their previous advocate, Pramod Patel. The plaintiffs averred that this irregularity was brought to their attention by their current advocates who also advised them to withdraw the Originating Summons. They averred that on the strength of that advice, they filed a notice of withdrawal of the Originating Summons on 5th May, 2017 and also amended the plaint. The plaintiffs averred that the mistakes of their former advocate should not be visited upon them. The plaintiffs averred that the amended plaint raises triable issues which should proceed to trial. The plaintiffs averred that the purchase price for the suit property was received by the defendant. The plaintiffs averred that the defendant who sold the suit property to them as a chargee had an obligation to ensure that they obtained good title to the suit property. The plaintiffs averred that the receiver who was appointed by the defendant who was the defendant's employee had abrogated her duties and her whereabouts was unknown. The plaintiffs averred that it was the entry in the mother title of the property on which the suit property is situated of the appointment of Shamin Salim Damji as a receiver that has frustrated the plaintiffs in their attempts to obtain a title for the suit property and that the defendant has refused to discharge that entry.

While the defendant's application was pending hearing, the plaintiffs filed an application by way of Notice of Motion dated 18th July, 2017 seeking enlargement of time within which to apply for summons to enter appearance. The application is pending.

The defendant's application was heard by way of written submissions. The defendant filed its submissions on 12th September, 2017 while the plaintiffs filed their submissions in response on 8th November, 2017. I have considered the application together with the supporting affidavit. I have also considered the affidavit filed by the plaintiffs in opposition to the application. Finally, I have considered the submissions of counsel and the authorities that were cited in support thereof. The law on striking out of pleadings is now settled. The defendant's application was brought under Order 2 rule 15 (1) (b), (c) and (d) of the Civil Procedure Rules. Under that rule, the court has power to strike out a pleading on the grounds that it discloses no reasonable cause of action or defence or that it is scandalous, frivolous or vexatious or that it may prejudice, embarrass or delay the fair trial of the action or that it is otherwise an abuse of the process of the court.

The defendant sought the striking out of the Originating Summons and the plaint that were filed herein by the plaintiffs on the grounds that; the same amounted to an abuse of the process of the court; were embarrassing and vexatious and would delay the fair trial of the suit. The defendant also contended that the Originating Summons and the plaint disclosed no cause of action against it. In view of the draconian nature of the remedy of striking out pleadings, it has been held that the court's power to strike out pleadings should be exercised with great caution and only in clearest of cases. See the case of, Chattev National Bank of Kenya Ltd. Civil Appeal No. 50 of 1996. See also the case of, D.T.Dobie & Company (K) Ltd. v Muchina [1982] KLR 1 where Madan J.A stated as follows regarding the exercise of this power to strike out pleadings;

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment."

In the case of, Murri v Murri and another [1999] 1 E.A 212 (CAK), the court of appeal held that summary remedy of striking out pleadings is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the court process or is

unarguable. In the case of, J.P.Machira v Wangethi Mwangi [1998] eKLR, Omolo J.A, stated as follows on the issue of striking pleadings;

“I do not think the unfettered power in the courts to allow amendments at any stage is to be used to enable the parties to create all sorts of fanciful defences in the course of litigation. Nor do I understand the decision of this court, particularly that of Madan J.A in the case of D.T.Dobie & Company(Kenya) Ltd. vs. Joseph Mbaria Muchina & another, Civil Appeal, No. 37 of 1978(unreported) to mean that no pleading could ever be struck out even where it is patently clear that no useful purpose could ever be served by a trial on merits.....I agree that these powers are drastic and as the court said.....the powers are to be exercised with great caution and only in clearest of cases. But once such caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on the merits, the court is perfectly entitled to strike out a pleading for as I have said, there is no magic in holding a trial on the merits particularly where it is obvious to everyone that no useful purpose would be served by it.”

In the book, Pleadings: Principles and Practice by Sir Jack Jacob and Iain S. Goldrein, a pleading or an action is said to be frivolous when it is without substance or unarguable. Examples of pleadings which are frivolous are given as those which are put forward to waste the court’s time and those which cannot possibly succeed. On the other hand, a vexatious pleading or action is defined in the said book as a pleading or action which lacks bona fides, is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Borrowing still from the same book, a pleading or action is said to be tending to prejudice, embarrass or delay fair trial when; it is ambiguous or unintelligible, when it states immaterial matter and in the process raises irrelevant issues, when it contains unnecessary or irrelevant allegations and when it involves a claim or defence which a party is not entitled to make use of. Lastly, an action which is an abuse of the process of the court is defined in the said book as one which is pretenceless or absolutely groundless.

It is on the foregoing principles that the defendant’s application falls for consideration. I am in agreement with the defendant that the manner in which this suit was originally brought was irregular which made it a candidate for striking out. As I have mentioned earlier in this ruling, the irregularity was corrected by the plaintiffs when they filed a notice of withdrawal of the Originating Summons on 5th May, 2017. With the withdrawal of the Originating Summons, what was left is the amended plaint. The question that I need to answer is whether the amended plaint dated 26th April, 2017 is frivolous, vexatious and amounts to an abuse of the process of the court and whether it discloses a reasonable cause of action against the defendant.

From the material before me I am satisfied that the plaintiffs have a genuine complaint against Middle East Bank Kenya Ltd. who sold to them the suit property through a receiver in exercise of its powers under the charge that they held over the properties. It is not disputed that Middle East Bank Kenya Ltd. (“MEB”) through its receiver had an obligation to transfer the suit property to the plaintiffs having received the full purchase price. It is also not in dispute that the plaintiffs have to date not received their title for the suit property for which they paid Kshs.11,700,000/=. What is contentious is whether MEB can be sued as the receiver of the company who owned the properties and whether it is MEB, the receiver or the company who is liable to transfer the suit property to the plaintiff. The other contentious issue is whether the plaintiffs waived their rights against MEB including the right to have the suit property transferred to them. It is also not clear whether MEB having appointed its own employee as a receiver can be deemed to have been the receiver of the properties. Having perused the deed of appointment of the said receiver, the other issue that arises is whether the said receiver was a receiver of the properties or of the company and whether she had power to sell the suit property.

I am of the view that the plaintiffs’ suit is not frivolous or vexatious. It raises so many issues which can only be determined at the trial. Even if I am wrong in that conclusion, I am of the view that any defect in the amended plaint can be cured through further amendment. The plaintiffs can further amend the plaint to sue Shamin Salim Damji as receiver of Manji Villas Limited and MEB separately in its own right.

Due to the foregoing, it is my finding that the Notice of Motion dated 17th December, 2015 has no merit. The application is dismissed with costs to be in the cause.

Delivered and Dated at Nairobi this 5th Day of July 2018

S. OKONG’O

JUDGE

Ruling read in open court in the presence of:

N/A for the Plaintiff

Mr. Karanja for the Defendant

Catherine Court Assistant