



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 169 OF 2019

ZAMIN LIMITED.....PLAINTIFF

-VERSUS-

PRINCIPAL SECRETARY, STATE DEPARTMENT OF INFRASTRUCTURE

& 4 OTHERS.....DEFENDANTS

RULING

(Application by the 4th and 5th defendant to be struck out from the suit claiming that there is no cause of action against them; one of the prayers in the plaint being a claim directly as against the 4th and 5th defendant; cannot therefore be said that there is not demonstrated a cause of action; 4th and 5th defendants properly enjoined in the suit; application dismissed.)

1. The notice of motion application before me is one filed on 27 October 2020 by the 4th and 5th defendants. They seek an order to be struck out of the suit on the grounds that the suit does not disclose any cause of action against them. They have further claimed that the plaint does not raise any allegation against them, nor does it raise any complaint on any act, of commission and/or omission, against them. They claim that the plaintiff has acted *mala fides* in bringing the suit against them, and the suit against them is therefore, frivolous, vexatious and an abuse of the court process, and ought to be struck out with costs. The application is opposed by both plaintiff and the Attorney General on behalf of the 1st to 3rd defendants.

2. To put matters into context. This suit was commenced through a plaint filed on 20 September 2019 which plaint was later amended on 19 August 2020. It is the case of the plaintiff that she is the duly registered owner of the plot number Mombasa/MS/Block 1/1677 (suit land) which was the only asset of the plaintiff during a buy-out between the current directors of the plaintiff, and the 4th and 5th defendants who were the original directors of the plaintiff. The plaintiff has pleaded that on 18 June 2019 the 1st defendant (Ministry of Transport) through its agents and on the advice of the 3rd defendant (Attorney General), moved into the suit land and started constructing a fish market for the use and benefit of the 2nd defendant (Ministry of Fisheries) without the plaintiff's authority or involvement. The plaintiff thus contends that she has been unlawfully dispossessed of its property, and has suffered, and continues to suffer damages from the acts of the defendants. There are several prayers in the plaint including a declaration that it is the plaintiff which is the lawful owner of the suit premises. There is also a prayer that if it is proved that the 4th and 5th defendants obtained the suit land unlawfully then they be ordered to compensate the plaintiff at the current market value of the suit land.

3. In opposing the application, the plaintiff filed grounds of opposition and averred that the applicants are necessary parties to the proceedings. It is said that the applicants used the plaintiff to acquire the suit property and later transferred their interest to the current shareholders. It is argued that any question over the initial acquisition and/or allotment of the suit land cannot be adequately discussed and determined without the applicants.

4. The matter came up for *inter partes* hearing on 10 March 2012. Mr. Ngaine, learned counsel for the 4th and 5th defendant submitted that the court only needs to look at the plaint to establish that there is no cause of action against the 4th and 5th defendants. Mr. Ngaine further submitted that the prayer sought in the plaint as against the 4th and 5th defendant is speculative. Counsel submitted that if the plaintiff has a claim against the 4th and 5th defendants as former directors, the action occurred 30 years ago, and limitation of action would be in issue. Mr. Ngaine submitted that the sale was purely a commercial transaction.

5. Ms. Njau holding brief for Ms. Kiti, learned State counsel on record for the 1st -3rd defendants submitted that an application to strike out would be drastic, and some issues alleged will require evidence.

6. The firm of M.K Mulei & Company Advocates, on record for the plaintiff, did not appear at the inter partes hearing and did not make

submissions.

7. It will be seen that what the applicants argue is that there is no cause of action displayed and in fact Mr. Ngaine, learned counsel, submitted that a plain reading of the plaint will reveal that there is no cause of action demonstrated against his clients.

8. I will thus straight away have a look at the plaint. The plaintiff in the plaint has a prayer specifically directed at the 4th and 5th defendants who are the applicants herein. That is prayer (f) in the plaint and it seeks orders inter alia that if it is proved that the 4th and 5th defendants obtained the plot No. Msa/Block 1/1677 unlawfully, then they should be ordered to compensate the plaintiff at the current market value. Now, I do not know why the applicants allege that there is no cause of action, for the cause of action is right there, in black and white, in prayer (f) of the plaint. Of course, the applicants are of the view that this cause of action is “frivolous, vexatious and an abuse of the court process.” The fact that they are of this view does not mean that there is no cause of action. They may feel that the plaintiff stands no chance in succeeding in this prayer, but that, I am afraid, can only be determined after the plaintiff’s case has been heard. It is difficult, if not impossible for this court, without having heard the plaintiff’s case, and without having gone into a careful analysis of the evidence and the law, to find that the case of the plaintiff’s case is frivolous. All the issues that Mr. Ngaine mentioned in his submissions are matters that the applicants will have a chance at ventilating during the hearing of the case.

9. The plaintiff ought to be allowed to have her case heard to its logical conclusion. As I have said, the applicants will have a chance to vent any defences that they may have during trial. They will have a chance to demonstrate, at trial, that the plaintiff has no case against them. No prejudice will therefore be caused to them if the plaintiff is allowed to proceed to trial against them. It will be drastic, if not outrightly unfair to the plaintiff, if this court proceeded to summarily strike out the plaintiff’s case against the applicants without first hearing it.

10. For the above reasons, this application is hereby dismissed with costs.

11. Orders accordingly.

DATED AND DELIVERED THIS 19TH DAY OF MAY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA