



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 847 OF 2017

PATRICK GITONGA MUGUKU.....PLAINTIFF

VERSUS

GILBERT MAINA NGEI.....1ST DEFENDANT

ESTATE OF PATRICK NJUGUNA NJOROGE.....2ND DEFENDANT

ESTATE OF ISAIAH KIBINGE MUGUKU.....3RD DEFENDANT

USERNAME INVESTMENT LIMITED.....4TH DEFENDANT

(NGONG CRESCENT LIMITED)

RULING

The application for determination is the 4th Defendant's Notice of Motion dated the 25th May, 2018 and filed in court on 4th June, 2018. The 4th Defendant seeks the following orders:

1. That the Honourable Court be pleased to strike out the Plaintiff's suit against the 4th Defendant with costs to the 4th Defendant.
2. The costs of the application be borne by the Plaintiff.

The application is premised on the grounds that:

- i. The Plaintiff's suit against the 4th Defendant discloses no reasonable cause of action against it.
- ii. The Plaintiff's suit against the 4th Defendant is scandalous, frivolous and vexatious and therefore an abuse of the court process.
- iii. The Honourable Court in its ruling issued on 25th January, 2018 found that the Plaintiff's action lies against the 1st, 2nd and 3rd Respondents for refund of purchase price as well as damages.

The Plaintiff opposed the application and filed Grounds of Opposition dated the 23rd July, 2018 where he stated that:

1. The Applicant will not suffer prejudice if the matter goes for full hearing.
2. The Applicant would recover their costs if the court finds no fault in the claim on final judgement.
3. The balance of convenience tilts in favour of the Defendants not in granting an order for striking out.
4. The Applicant has continued to further deal with the suit property thereby prejudicing the Respondent's rights to have the property properly restored.
5. The Applicant claim can be adequately compensated in damages if at all it eventually succeeds in its claim against the Defendants.

The Application was canvassed by way of written submissions which I note it is only the 4th Defendant who filed.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 25th May, 2018, Grounds of Opposition and written Submissions, the following are the issues for determination:

- Whether the Plaintiff's suit against the 4th Defendant should be struck out.
- Who should bear the costs of the 4th Defendant.

The 4th Defendant in its submissions reiterated its claim and referred to the Ruling of this Court dated the 25th January, 2018. It relied on the case of **Crescent Construction Co. Ltd Vs Delphis Bank Ltd (2007) eKLR** to buttress its averments.

The legal provisions governing striking out of pleadings is contained in Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010 which provides as follows:-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

(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 an abuse of the process of the court.”

In the case of **Delphis Bank Limited v Caneland Limited [2014] eKLR**, the Court of Appeal while dealing with the issue of striking out pleadings held that: 'The leading local case on interpretation of Rule 13 of Order VI of the Civil Procedure Rules on which the application striking the defences was based is perhaps **D.T. Dobie & company (Kenya) Ltd vs Muchina which counsel for the appellant referred to us. In the case, Madan JA, as he then was, opined in an obiter dictum that; “The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case.”**

See also the case of **Crescent Construction Co. Ltd Vs Delphis Bank Ltd (2007) eKLR**

In the Plaintiff, the Plaintiff claims to be a purchaser for value of land parcel number LR. NGONG/ NTASHART/5033 (hereinafter referred to as the suit land) having bought the same from the 1st, 2nd and 3rd Defendants. He explained that the suit land was carved out of LR. NGONG/ NTASHART/755 as he only purchased a portion of 28.33 hectares from the said parcel. Further, that the 1st, 2nd and 3rd Defendants have failed to honour the agreement for sale and have since sold the entire parcel of land to the 4th Defendant.

The 1st, 2nd and 3rd Defendants insists they rescinded the Sale Agreement dated 19th December, 2011 with the Plaintiff vide a letter dated the 25th November, 2014. They confirm having sold land parcel number NGONG/ NTASHART/ 5033 to the 4th Defendant.

The 4th Defendant in its Defence confirms he purchased land parcel number KAJIADO/ NTASHART/ 5033 from the 1st to 3rd Defendants and paid a total of Kshs. 48, 650,000 being the purchase price with the final instalment being paid on 31st July, 2017. It confirms that the suit land was registered in its favour on 12th September, 2017 and it hence acquired a good title as an innocent purchaser for value. It reaffirms that it is the absolute and indefeasible owner thereof whose title to the suit land can only be challenged by fraud or misrepresentation which the Plaintiff has not pleaded. It states that it has already subdivided the said land to 484 plots and is currently in the process of transferring the title deeds of the resultant subdivisions to third party purchasers.

Based on the pleadings herein which I have highlighted and noting that the Plaintiff had not been registered as owner of KAJIADO/ NTASHART/ 5033 at the time the 4th Defendant was purchasing it. Further, at paragraphs 7 and 8 of the Amended Plaintiff, it is clear the Plaintiff did not purchase the suit land but a portion of NGONG/ NTASHART/ 755 which was yet to be subdivided. I further note that in the Amended Plaintiff, the Plaintiff has sought an alternative prayer to compel the 1st to 3rd Defendants to pay back the purchase price he had paid with interest at commercial rates. In relying on the legal provisions cited above while associating myself with the decisions quoted and applying them to the circumstances at hand, I find that the Plaintiff has failed to disclose a reasonable cause of action as against the 4th Defendant. I reiterate that the Plaintiff should pursue the 1st to 3rd Defendants who took his purchase price but failed to effect the transfer of a portion of NGONG/ NTASHART/ 755 which he had purchased to him.

As to who should bear the costs of the 4th Defendant.

I wish to make reference to the case of **Supermarine Handling Services Ltd vs. Kenya Revenue Authority Civil Appeal No. 85 of 2006** where the Court of Appeal while dealing with the issue of costs observed as follows:

“Costs of any action or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order. It is well established that when the decision of such a matter as the right of a successful litigant to recover his costs is left to the discretion of the Judge who tried his case, that discretion is a judicial discretion, and if it be so its exercise must be based on facts. If, however, there be, in fact, some grounds to support the exercise by the trial Judge of the discretion he purports to exercise, the question of sufficiency of those grounds for this purpose is entirely a matter for the Judge himself to decide, and the Court of Appeal will not interfere with his discretion in that instance...Thus, where a trial court has exercised its discretion on costs, an appellate court should not interfere unless the discretion has been exercised unjudicially or on wrong principles. Where it gives no reason for its decision the Appellate Court will interfere if it is satisfied that the order is wrong. It will also interfere where the reasons are given if it considers that those reasons do not constitute “good reason” within the meaning of the rule...In the instant case the learned Judge gave no reasons whatsoever for his decision to deprive the successful plaintiff of its costs and yet it was not shown that the defendant had been guilty of some misconduct which led to litigation. In the court’s view the learned Judge’s order was wrong and for the foregoing reasons, the plaintiff’s appeal succeeds as to the award of interest and costs on the principal sum awarded”.

In this instance, I note it is actually the 1st to 3rd Defendants responsible for the dispute herein having admitted entering into a Sale Agreement with the Plaintiff and obtained most of the purchase price from him. Further, having admitted they sold the suit land to the 4th Defendant. It is my considered view that they should be made to pay for the inconvenience caused to the 4th Defendant and will proceed to direct that they jointly bear the costs of the 4th Defendant.

In the circumstance, I find the instant application merited and will proceed to strike out the 4th Defendant from this suit with its costs to be borne by 1st to 3rd Defendants.

Dated, Signed and Delivered Virtually in Kajiado this 12th day of May, 2021.

CHRISTINE OCHIENG

JUDGE