



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO 27 OF 2020

KEPHA MARITA OKEMWA *suing as the personal representative of the estate of*

JOHNSOM OKEMWA NYAKUNDI.....PLAINTIFF/RESPONDENT

VERSUS

MEGA CHOICE LIMITED.....1ST DEFENDANT

I&M BANK LTD.....2ND DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. By a Notice of Motion dated 13th October 2020, the 2nd Defendant/Applicant filed an application seeking to have its name struck out from the suit.
2. In support of the application, Olga Otani the Branch Manager of the 2nd Defendant/Applicant averred that the 1st Defendant caused to be registered a legal charge on land parcel known as KISII MUNICIPALITY/BLOCK/11/16 (hereinafter referred to as the 'Suit Property') in favor of the 2nd Defendant as security for a loan of Kshs 9,000,000/= advanced to the 1st Defendant.
3. She further averred that the said loan has been cleared fully though the 2nd Defendant is still holding the title to the suit property as the obligation to discharge the suit property rests with the 1st Defendant.
4. It was her averment that since the 2nd Defendant has no interest in the suit property; it should be struck out from the suit.
5. In response to the application, the Plaintiff/Respondent filed a Replying Affidavit on 12th January, 2021. In the said Affidavit, and in relation to the application, the Respondent averred that he was not privy to the dealings between the Applicant and 1st Defendant. He averred that the legal charge registered against the suit property was still in force and had not been discharged. He also averred that the Applicant had an obligation to conduct due diligence to uncover any illegality before charging the property and its failure to conduct due diligence has exposed them to these proceedings which they ought to be held to account by the law.
6. He further averred that the Applicant's application is aimed at avoiding liability. It was the Respondents deposition that striking out pleadings or parties to the suit should be done in the clearest of cases and this is not one such case.
7. The Respondent deponed that his claim against the Defendants was one of collusion to which they are both jointly and severally liable to answer and that as a matter of fact, the Applicant had filed a statement of defence on 4th September, 2020 thus it was only prudent that the entire case against the Defendants proceeds on merit.
8. It was his final contention that there was no prejudice that would be suffered by the Applicant should the case proceed to full trial and in fact if at all it blames the 1st Defendant, then it ought to lodge a Counter claim against the Applicant so that his liability is determined at the end of the trial.
9. The court directed the parties to dispose of the application by way of written submissions. The Applicant filed its written submissions on 18th March, 2021 while the Respondent/Applicant filed his on 14th March, 2021 which submission I have considered.

ISSUES FOR DETERMINATION

10. Having considered the pleadings, Notice of Motion and the submissions of the parties, the sole issue for determination is whether the 2nd Defendant/Applicant should be struck out as party in this suit for being wrongfully enjoined in the suit.

ANALYSIS AND DETERMINATION

11. The 2nd Defendant in this suit has invited me to strike it out of the suit for having been wrongfully enjoined to this suit. With regard to joinder of parties, Order 1 rule 9 of the Civil Procedure Rules states that no suit shall be defeated for misjoinder or non-joinder of parties and requires that the court deals with the matter in controversy, so far as regards the rights and interests of the parties actually before it. On the other hand, Order 1 Rule 10 (2) of the Civil Procedure Rules also provides that: -

“The court may at any stage of the proceedings, either upon or without the application of either part, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendants, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

12. From the passage above, it is clear that the court may on its own motion or on application of any party to the proceedings order the striking out of a party, who the court finds was improperly joined. In the exercise of that discretion, the court must as a matter of cause, act according to reason and fairness and not according to its whims and caprice.

13. The question that falls for determination therefore is whether the 2nd Defendant is a necessary party to this suit and if so, whether any cause of action is disclosed against it.

14. The power to strike out a party from a suit should be approached with caution. This court has to assess whether or not there is a prima face case against the 2nd Defendant.

15. I am of the considered view that whether or not the 2nd Defendant did utmost due diligence as per the law before charging the property registered in the name of the 1st Defendant and whether it colluded with the 1st Defendant to defraud the Plaintiff, is a question that cannot be determined at this juncture. I think that to ascertain this at this stage the court would be required to go into the rigorous exercise of trying to determine whether the Plaintiff has a proper case against the 2nd Defendant by assessing the evidence in place. This in my view is premature as evidence can only be tendered at the trial. I am of the view that the merits and demerits of the claims against the 2nd Defendant cannot be summarily decided through this application.

16. In so holding, I am guided by the wise words of **Madan. J.A** in the case of **DT Dobie and Company (K) Ltd vs Joseph Mbaria Muchina & Another (1982) KLR 1** wherein he stated 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 opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”

17. Further, I am of the opinion that whether or not the 2nd Defendant is liable for the purported actions that it is being accused of, that it colluded with the 1st Defendant to grant a loan of Kshs. 9,000,000 to complete the unlawful alienation of the suit property from the deceased, should essentially be controverted by way of a Defence, which Defence the 2nd Defendant has already filed. For this reason, I decline the 2nd Defendant's prayer to strike them out the suit.

18. The upshot is that the application lacks merit and it is dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT KISII THIS 21ST DAY OF JULY, 2021.

J.M ONYANGO

JUDGE