



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCC NO. 10 OF 2019

URBAN SOLUTIONS REAL ESTATE LIMITED.....1ST PLAINTIFF

CARLING WOOD INVESTMENTS COMPANY LIMITED....2ND PLAINTIFF

VERSUS

HALAL MEAT PRODUCTS LIMITED.....1ST DEFENDANT

ZAMZAMA ABIB T/A

ABIB & ASSOCIATES ADVOCATES.....2ND DEFENDANT

RULING

1. This ruling is with respect to two applications; the 2nd defendant's application dated 10th September 2020 and the plaintiff's application dated 12th March 2021. Directions were issued to have both applications be canvassed by way of written submissions.

Application dated 10th September 2020

2. The application dated 10th September 2020 seeks orders to strike out the 2nd defendant from the suit. The 2nd defendant also seeks the costs of the application.

3. The application is supported by the 2nd defendant's affidavit and is premised on the grounds that: -

1) The suit has been instituted with some ulterior motive to gain some collateral advantage which the law does not recognize as legitimate use of the court process.

2) No proper cause of action is disclosed against the 2nd defendant in so far as a claim is maintained against the 2nd defendant for the sum of Kshs 104,883,500

3) The 2nd defendant was an agent of the 1st and 2nd plaintiff and could not occur or assume any personal liability for a contract between the plaintiffs and the 1st defendant

4) The plaintiffs claim offends the principal of law that where a principal is known an agent shall not be sued

5) The presence of the 2nd defendant in the suit is ultimately superfluous, unnecessary and will delay the fast resolution of the central dispute herein between the plaintiffs and the 1st defendant

6) The 2nd defendant was brought into the suit as an afterthought in a misguided attempt to coerce a settlement

7) It is in the interest of justice that the present application be allowed as prayed.

4. The plaintiffs opposed the application through the replying affidavit sworn by **Fathulin Ali Mohammed** who states that the contractual relationship between the plaintiffs and the 2nd defendant is separate and distinct from the Joint Venture Agreement.

5. The plaintiffs submitted that the application is incompetent as it does not state any concise reason for striking out the 2nd defendant from the suit. The plaintiffs' case is that the 2nd defendant has been properly sued in these proceedings for breach of contract for retainer thus explaining her liability for the claim made in the suit.

6. The 2nd defendant, on the other hand, submitted that she merely acted as an advocate for the parties in the Joint Venture Agreement between the 2nd plaintiff and the 1st defendant in which case she assumes no rights or obligations under the said Agreement. It was submitted that the claim against the 2nd defendant offends the principle that a claim cannot be sustained against an agent of a disclosed principal.

7. On its part, the 1st defendant submitted that the 2nd defendant acted as the disclosed agent for both the plaintiff and 1st defendant in the Joint Venture Agreement that collapsed when the land that is the subject of the agreement was compulsorily acquired by the National Land Commission for the construction of the Standard Gauge Railway. The 1st defendant denied the allegation that the 2nd defendant was required to register the transfer of interest in the said land to the 1st defendants.

8. I have considered the rival arguments presented by the parties herein and I find that the main issue for determination is whether the 2nd defendant should be struck out from this suit.

9. The plaintiffs' claim is in respect to the Joint Venture Agreement dated 2nd September 2015 between them plaintiff and the 1st defendant. The 2nd defendant is the lawyer prepared a deed of assignment with respect to the said agreement. The plaintiffs' claim is that the 2nd defendant informed them that a transfer was registered and title issued in the 1st plaintiffs name and that they had retained a copy of the Original title. The plaintiff faulted the 2nd defendant for lodging a claim for compensation with the National Land Commission on the basis that the 1st defendant was the owner of LR. NO. Ngong/Ngong/2221.

10. The 2nd defendant, on the other hand, submitted that the only role she played in the transaction was to draft the Joint Venture Agreement between the parties. She added that there is no cause of action against her since she was not privy to the Agreement as she was an agent of a disclosed principal.

11. Order 1 Rule 10 (2) of the Civil Procedure Rules provides as follows: -

“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. It is trite that the power to strike out a party should be approached with caution. The question which arises therefore is whether the plaintiff has a cause of action against the 2nd the defendant. What amounts to a cause of action was discussed in **V.K. Construction Company Ltd vs. Mpata Investments Ltd Nairobi HCC 257/2003** as follows: -

“a reasonable cause of action is such a factual situation as would entitle a person to obtain a remedy against another person and which has some chance of success when only the averments in the plaint are considered. In other words, the test for the reasonableness of the cause of action is the possibility of the success thereof when only the plaint is considered.”

13. In the case of **D.T Dobie & Company (k) Ltd vs. Muchera [1980] eKLR** the Court of Appeal held that: -

“The words reasonable cause of action in Order vi rule 13(1) means an action with some chances of success when the allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer.”

14. I have considered the pleadings filed herein and I note that the plaintiffs' suit is premised on certain representations that the 2nd defendant made to them in her capacity as the lawyer who acted for the parties in the Joint Venture Agreement. I find that the 2nd defendant is at the center of the plaintiffs' such that her role can only be debunked at the hearing of the dispute. I further find that striking out the 2nd defendant from the suit as this stage will be equivalent to determining the merits of the case at this preliminary stage. The role played by the 2nd defendant can only be ascertained during the trial. I therefore find that the application is not merited and I dismiss it with order that costs shall be in the cause.

Application dated 12th March 2020

15. The applicant seeks the striking out of paragraph 17 of the further affidavit of ZAMZAM A. ABIB sworn on 8th February 2021 together with the annexure marked as “ZA5”. The application is supported by the affidavit of STEPHEN OWINO and based on the grounds that; -

1) The deponent of the further affidavit has not disclosed the sources of information and the document marked as “ZA5”

2) The document in question is not admissible under Section 35 of the Evidence Act

3) The document has been obtained in breach of the law

4) *The document has not been certified as required by the law*

5) *To allow the document in question to remain on record would be unfair and detrimental to the administration of justice*

6) *The applicant cannot rely on information obtained under unclear circumstances.*

16. The 1st defendant opposed the application through the replying affidavit sworn of **Mohamed Ali Motha** who states that the file at the National Land commission holds all documents for the twin claims for both the Plaintiffs and the 1st defendant. He states that the existence of the document in question is not contested as the 1st defendant was also able to access it from the time the same was placed in the file at the National Land commission.

17. The 2nd defendant opposed the application vides Grounds of opposition dated 24th March 2021 which provide as follows; -

a. The application is an afterthought and an abuse of the Court Process.

b. The document in issue had already been produced by the 1st defendants in the replying affidavit dated 8th December 2020. It has been on record without any objection.

c. There is no legal basis to exclude the document.

18. The application was also canvassed by way of written submissions which I have considered. The issue that arises is whether the court should strike out paragraph 17 of the further affidavit of **Zamzam A. Abib** sworn on 8th February 2021 together with the annexure marked as "ZA5".

19. The applicant contends that the averments contained in Paragraph 17 are not admissible in court as the deponent of the said affidavit did not disclose the source of information and documents. The said paragraph is worded as follows: -

"The 1st Plaintiff further confirmed the above claim to NLC long after the 2nd defendant ceased acting for them in the letter dated 14th May 2019 by the Plaintiffs Counsel in this Matter S. O. Owino advocates

(a true copy of the letter dated 14th May 2019 is annexed herewith and marked as "ZA5")

20. The plaintiff pleaded that the impugned paragraph offends the provisions of Section 35 of the Evidence Act which states that: -

35. (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say -

(a) if the maker of the statement either –

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

(2) In any civil proceedings, the court may at any stage of the proceedings, if having regard to all the circumstances of the case it is satisfied that undue delay or expense would otherwise be caused, order that such a statement as is mentioned in subsection (1) shall be admissible or may, without any such order having been made, admit such a statement in evidence –

(a) notwithstanding that the maker of the statement is available but is not called as a witness;

(b) notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof certified to be a true copy in such manner as may be specified in the order or the court may approve, as the case may be.

(3) Nothing in this section shall render admissible any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) For the purposes of this section, a statement in a document shall not be deemed to have been made by a person unless the

document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialed by him or otherwise recognized by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible by virtue of this section, the court may draw any reasonable inference from the form or contents of the document in which the statement is contained, or from any other circumstances, and may, in deciding whether or not a person is fit to attend as a witness, act on a certificate purporting to be the certificate of a medical practitioner.”

21. Order 19 rule 3 (1) of the Civil Procedure Rules 2020 states that:

“1. Any court may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such conditions as the court thinks reasonable: Provided that, where it appears to the court that either party bona fide desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

2. (1) Upon any application, evidence may be given by affidavit, but the court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in court, unless the deponent is exempted from personal appearance in court, or the Court otherwise directs.

22. Order 19 rule 6 of the Civil Procedure Rules provides that: -

The court may order to be struck out from any affidavit any matter which is scandalous, irrelevant or oppressive.

23. In *Joseph Gitau & 2 others vs. Ukay Estate Ltd NBI HCCC NO 813 OF 2004* the court observed that: -

“Allegations in a pleading are scandalous if they state matters which are indecent or offensive or made for mere purpose of abusing or prejudicing the opposite party. Moreover, any unnecessary or immaterial allegations will be struck out as being scandalous if they contain any imputation on the opposite party, or make any charge of misconduct or bad faith against him or someone else”.

24. I have examined the impugned paragraph and I find that there is nothing scandalous, oppressive or irrelevant that would make the court invoke the provisions to strike it out. I note that the plaintiff did not demonstrate that the document in question was obtained illegally. Moreover, in an application such as this, the court has to consider the right of the respondent to be heard. I am not persuaded that this is a proper case for the striking out of a paragraph and annexure.

25. In sum I find that the application is not merited and I therefore dismiss it with no orders as to costs.

Dated, signed and delivered via Microsoft Teams at Nairobi this 22nd day of July 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Osodo for Owino for Plaintiffs.

Ms Mutisya Ogunde for 2nd Defendant

Mr. Bawazir for Wangila for 1st Defendant.

Court Assistant: Sylvia