



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL SUIT NO. 5 OF 2020

AMINA HIRSI ALI T/A NEW NYANZA SUPERMARKET LTD.....PLAINTIFF

VERSUS

DIAMOND TRUST BANK.....1ST DEFENDANT

DALALI TRADERS (AUCTIONEERS).....2ND DEFENDANT

RULING

By an application dated 21/7/2020, the plaintiff mainly sought;

1. Pending the hearing and determination of this application, an order of injunction be and is hereby issued restraining the defendants /respondents whether by itself, agents, servants and or auctioneers from transferring ownership or in any other manner interfering with ownership and quiet possession of all that parcel of land known as East Bukusu/South Kanduyi/3127 and all the improvements thereon.

The defendant on their part filed their application dated 19/9/2020 seeking;

1. That this court directs that this application be heard in priority to the Plaintiff's application dated 21st July, 2020.
2. Pending the hearing and determination of both Notice of motions, this Court be pleased to discharge the orders issued on 4th August, 2020 as against the Defendants.
3. The Plaintiff's suit be struck out as against the Defendants for being scandalous, vexatious, frivolous and an abuse of the court process.
4. In the alternative, the court be pleased to discharge the orders issued on 4th August, 2020 as against the defendants.
5. Costs of the application be borne by the plaintiff.

In the plaintiff's application, the applicant depones that she was advanced a loan facility by the 1st respondent and registered a charge over East Bukusu/South Kanduyi/3127 which is family property which she holds in trust for the family.

She depones that on 3/4/2018, she realized that the 1st respondent was charging an exorbitantly high interest rate whereupon she engaged the bank together with her co-directors with view of renegotiating the facility but the respondent turned down the request.

She depones that New Nyanza Supermarket Limited is being restructured and now under the management of Samir Investment Limited who sought the applicant's debt portfolio to no avail as the respondent only gave the applicant a handwritten statement which is not adding up.

She depones that she was shocked to see a newspaper advert of 13th July, 2020 advertising for the sale by public auction of the suit property slated for 4th August, 2020.

The defendants on their part through the 1st respondent's Debt Recovery Officer depones that the plaintiff filed a similar suit against the respondents in Nairobi HCCC 175/2018 seeking orders of restraining the defendants from selling the suit parcel herein and L.R No. 204/1063.

That in the aforesaid suit, the court ruled that the defendant was at liberty to sell the property upon issuing proper notices whereupon the 2nd defendant issued a 45 day notice which provoked an appeal to the Court Appeal. The Court of Appeal in a ruling of 21st June, 2019 gave the plaintiff a conditional appeal to file her appeal within 60 days failure of which the orders would lapse.

Despite this court's order that both applications be canvassed by way of written submissions, none of the parties complied.

The plaintiff's application was placed before the Judge who issued orders on 4th August, 2020 which are still in force.

Material placed before the court manifests that the plaintiff took out a loan facility with the 1st defendant and a charge created over the suit property. Upon default, the 1st defendant instructed the 2nd defendant to recover the amount due by way of exercise of statutory power of sale. The matter has been litigated in Nairobi High Court Civil Suit Number 175 of 2018 which matter ended up in the Court of Appeal in Civil Appeal Number 334 of 2018.

The material before this court further suggests that the Matter in the Court of Appeal was resolved with conditions where the plaintiff herein was to file her appeal within 60 days failure of which the orders would lapse. The orders lapsed and the defendants issued notices of sale whereupon the plaintiff approached this court.

The legal provisions which bestows the court with power to strike out pleadings is found in Order 2 Rule, 15 which provides;

15. (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(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 otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

These provisions were elaborated in the often cited Madan JA in *D.T. Dobie and Company (Kenya) Ltd Vs Muchina (1982) KLR 1* where the learned judge held:-

“The power to strike out should be exercised after the Court has considered all 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.”

Odunga J. in *Madison Insurance Company Limited v Augustine Kamanda Gitau [2020] eKLR* held;

In the exercise of its powers under the said provision there are certain well established principles that a court of law is to adhere to. Whereas the essence of the said provisions is the striking out of an action or defence, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case or striking out a defence for not disclosing a reasonable cause of action defence for being otherwise an abuse of the process of the court.

The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day, it may not succeed then the suit ought to go to trial. However, where the suit is without substance or groundless of fanciful and or is brought in instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be a forum for such ventures.

In the instant case, having considered the pleadings that were filed in the Nairobi High Court Suit, the court notes that there was a second party named Yurub Investment Limited and New Nyanza Supermarkets Limited who are not parties to the instant suit.

Taking into account that the power to strike out pleadings must only be invoked in the rarest and clearest of cases, the court is satisfied that this is not one of the cases where the power to strike out a pleading ought be invoked. The parties ought to be given a chance to ventilate their issues through a full trial where evidence can be adduced and tested by way of cross examination.

In the end, I make the following orders;

1. The application dated 19th September, 2020 is hereby dismissed.

2. An order is hereby issued restraining the defendants/respondents from auctioning, advertising or in any way interfering with the plaintiff's ownership and quiet possession of that parcel of land known as East Bukusu/South Kanduyi/3127 pending the hearing and determination of the suit herein.

3. The plaintiff to set down the suit for hearing and final determination within 60 days from the date of this ruling failure of which the orders herein shall lapse. For clarity, the suit should have been concluded by 17th January, 2020.

4. Costs of the application be in the cause.

DATED at BUNGOMA this 9th day of November, 2021

S.N. RIECHI

JUDGE