



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 126 OF 2019**

**TRACK: FAST TRACK**

**JOHN LEMISO OLE LEKAKENY.....PLAINTIFF/APPLICANT**

**-VS-**

**DAVID KIPKURUI KANDIE.....DEFENDANT/RESPONDENT**

**RULING**

1. Coming up for determination is the notice of motion dated 1<sup>st</sup> July 2019 by the plaintiff seeking for orders of temporary injunction restraining the defendant from selling, charging, constructing, interfering with the suit premises known as MOMBASA MUNICIPALITY/BLOCK XXXVI/212 until the hearing and determination of this suit; the notice of motion dated 13<sup>th</sup> August 2019 by the defendant seeking to have the plaintiffs said application and the plaint dated 1<sup>st</sup> July 2019 struck out with costs and to have the orders of 'status quo' given on 30<sup>th</sup> July, 2019 discharged/lifted, and the notice of preliminary objection dated 13<sup>th</sup> August 2019 by the defendant seeking to have the plaintiff's suit struck out and/or dismissed with costs.

2. The plaintiff's application for injunction is based on the grounds that the defendant is in the process of selling the suit premises anytime to the detriment of the plaintiff. It is the plaintiff's contention that the defendant falsely misrepresented himself in respect of the agreement for sale of the suit premises and failed to honour the terms and obligations of the said agreement and that the said agreement ought to be revoked and or cancelled. That in blatant breach of the said agreement and mutual trust the defendant paid the plaintiff a sum of Kshs.300,000 but failed, refused and neglected to pay the balance of the purchase price and interest. The plaintiff states that the cause of action hereof arose on 15<sup>th</sup> February 2019 and denies that the defendant paid the plaintiff the entire amount of Kshs.10,000,000 as alleged in the said agreement.

3. The motion is supported by the affidavit of John Lemiso Ole Lekakeny sworn on 1<sup>st</sup> July 2019 in which he depones that by a sale agreement dated 7<sup>th</sup> January 2010, the plaintiff as vendor and the defendant as purchaser of the premises known as MOMBASA MUNICIPALITY /BLOCK XXVI/212 for a purchase price of Kshs.10,000,000, the defendant was under legal obligation to pay the plaintiff the said sum of Kshs.10,000,000. That in full trust and great friendship between the plaintiff and the defendant, the plaintiff entrusted and transferred the said premises to the defendant in expectation that the defendant would make good his promise to pay the plaintiff the entire purchase price of Kshs.10,000,000. The plaintiff avers that the defendant begged him to accept a deposit of Kshs.300,000/= being part payment of the purchase price and await the balance and the transfer of the property in favour of the defendant was completed. That a dispute arose over ownership of the suit premises and the defendant sued Water Front Holdings, the District Land Registrar and the commissioner of Lands in Mombasa ELC No. 22 of 2012 where the plaintiff was called and testified as a key witness. The court delivered judgment in favour of the defendant on 15<sup>th</sup> February, 2019. The plaintiff states that he had mutually agreed with the defendant to await the determination of the said suit for the defendant to pay the plaintiff the balance of the purchase price, interest and compensation thereof. That in blatant breach of the said agreement and mutual trust the defendant paid the plaintiff a sum of Kshs.300,000 but failed, refused and neglected to pay the balance of the purchase price and interest after successful of determination of the said suit. Therefore the plaintiff contends that the cause of action hereof arose on 15<sup>th</sup> February, 2019. The plaintiff avers that he has been reliably informed that the defendant is in the proceeds of selling the suit premises any time and appropriate the process thereof to the plaintiff's detriment. The plaintiff states that the failure by the defendant to honour the terms and obligations of the said agreement, the said agreement is vitiated and ought to be revoked and/or cancelled because the defendant falsely misrepresented himself in respect of the said agreement for sale of the suit premises. The plaintiff further states that it was not correct that the defendant had paid him the entire amount of Kshs.10,000,000 as alleged in the said agreement and that by reason of the defendant's breach of contract, the plaintiff has suffered loss and damage. The plaintiff avers that unless the application is urgently heard and determined the respondent will receive proceeds of the sale of the suit premises thus rendering the applicant to suffer irreparable loss and damage. The plaintiff exhibited copies of the sale agreement dated 7<sup>th</sup> January 2010; decree dated 15<sup>th</sup> February, 2019 in Mombasa ELC Case No. 22 of 2012; judgment dated 15<sup>th</sup> February 2019 in Mombasa ELC Case No. 22 of 2012; Certificate of Lease dated 12<sup>th</sup> May, 1998 in favour of the plaintiff in respect of MOMBASA MUNICIPALITY/BLOCK XXVI/212; Certificate of Lease dated 30<sup>th</sup> April, 2010 in favour of the defendant in respect of MOMBASA MUNICIPALITY/BLOCK XXVI /212; valuation report dated 25<sup>th</sup> September, 2009 and Allotment documents dated 4<sup>th</sup> April, 1994 in favour of the plaintiff in respect of the suit premises.

4. In opposing the application, the defendant filed a replying affidavit sworn by David Kipkurui Kandie, the respondent on 13<sup>th</sup> August, 2019 in which he deposed that he is the registered owner of the suit property having purchased it from the plaintiff. The Defendant states that the purchase price was Kshs.10 million and that the entire amount was paid at the time of signing the agreement and the same was captured in the sale agreement. That the plaintiff received Kshs.7.5 million as part payment and setoff the balance with debt he owed the defendant. The defendant has exhibited copies of the proceedings and decree in Mombasa ELC Case No. 22 of 2012 and stated that the property was encroached upon by 3<sup>rd</sup> parties whom he sued and called the plaintiff as his witness and the plaintiff testified in court how he sold the property to the defendant in the year 2010 and released all the documents to the defendant for transferring ownership. The defendant has denied the plaintiff's averments in the application, arguing that no evidence has been produced in support thereof. The defendant avers that the plaintiff having executed the sale agreement and transferred to him and having stood before court of law and testified on the sale of the property, the present suit by the plaintiff amounts to perjury and that the plaintiff deserves punishment by the court. That for these reasons it is just and fair the prayers sought in the plaintiff's application be denied and the application be dismissed with costs. Relying on advise, the defendant states that the agreement having been executed on 7<sup>th</sup> January, 2010, the suit filed is statute barred under Sections 4 of the Limitation of Actions Act Cap 22 Laws of Kenya.

5. The defendant also filed a notice of preliminary objection dated 13<sup>th</sup> August 2019 on the grounds that the plaintiff's suit is based on a sale agreement executed on 7<sup>th</sup> January 2010 hence it is statute barred by virtue of Section 4 (1)(a) of the Limitation of Actions Act Cap 22 Laws of Kenya, it is bad in law, and that the suit is vexatious, frivolous and amount to abuse of the court process as the sale agreement relied upon by the plaintiff shows that the entire purchase price was paid in full at the time of the execution, hence it should be struck out dismissed pursuant to Order 15 (1)(b) and (d) of the Civil Procedure Rules.

6. The defendant also filed a Notice of Motion dated 13<sup>th</sup> August 2019 seeking to have the plaintiff's suit and the application struck out with costs and the orders of status quo given on 30<sup>th</sup> July 2019 discharged/lifted. The defendant's motion is premised on the grounds thereon and supported by the affidavit of David Kipkurui Kandie which are basically the same grounds as those in the replying affidavit and the notice of preliminary objection aforesaid. The defendant added that the entire suit is a sham and only intended to vex the defendant and prevent him from enjoying the benefits of his property.

7. The plaintiff opposed the notice of preliminary objection by the defendant on the grounds that the same is frivolous, misconceived, vexatious and lacks merit; that the cause of action accrued in 2019 when the court confirmed ownership of the property and that the preliminary objection offends the provisions of Section 20 (of the Limitation of Actions Act) on actions concerning trust property and actions to recover land.

8. The applications and the preliminary objection were canvassed by way of written submissions. The defendant filed his submissions on 25<sup>th</sup> October, 2019 in which it was submitted that the court should find that time started running when the sale agreement was executed on 7<sup>th</sup> January 2010 and the present suit was filed on 5<sup>th</sup> July 2019 which is nine (9) years later, hence the suit is time barred pursuant to Section 4(1) of the Limitation of Actions Act. That it is not true that the cause of action arose on 15<sup>th</sup> February 2019. It was submitted that there was no binding obligations from the judgment of the court in Mombasa ELC Case No. 22 of 2012 in respect of the plaintiff and the defendant. The defendant urged the court to uphold the preliminary objection and relied on the case of **Bartholomew Mwanyangu & Others –v- Florence Dean Karimi (2018)eKLR** and the case of **Diana Katumbi Kiio –v- Reuben Musyoka Muli (2015)eKLR**. The defendant further submitted that the action founded in Section 20 of the Limitation of Actions Act as alleged by the plaintiff is also time barred as it ought to have been brought within six (6) years from the date the of right of action accrued. Relying on the case of **Kivanga Estate Limited –v- National Bank of Kenya (2017)eKLR** the defendant submitted that plaintiff's suit is frivolous, vexatious and amounts to abuse of the court process and urged the court to strike out the suit.

9. Regarding the plaintiff's application for injunction, the defendant submitted that the plaintiff has failed to demonstrate the existence of the principles set out in the case of **Giella –v- Cassman Brown (1973)EA 358**.

10. In his submissions filed on 25<sup>th</sup> October, 2019 the plaintiff submitted that the preliminary objection does not plead a valid point of law within the context of pleadings, neither is there one which arises by clear implication out of the pleadings, and which, if argued as a preliminary objection, may dispose of the suit. The plaintiff relied on the case of **Mukisa Biscuit Co. Ltd. –v- West End Distributors (1969) EA 696 at 701**. The plaintiff submitted that he is a licensee protected within the framework of condition 6(1) of the Law Society Conditions of sale (1989 Edition) , and relied on the case of **Gurdev Singh Birdi & Marinder Singh Ghatora –v Abubakar Madhubuti; Thrift Homes Ltd –v- Kenya Investment Ltd (2015)eKLR; Lamare –v- Dixon 1873 L.R. 6 HL 414; in Alghussein Establishment –v- Eton College (1991) 1 ALL ER PP 667; and Manzoor –v- Baram (2003) 2 EA 580**.

11. I have carefully considered the submissions rendered in support and against the applications and the preliminary objection. I will first deal with the preliminary objection and the defendant's application. In the celebrated case of Mukisa Biscuit Manufacturing Co. Ltd – v- West End Distributors Ltd (supra) at page 701 Sir Charles Newbold P stated:

*“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of discretion.”*

In the same case, Law JA stated

*“So far as I am aware, a preliminary objection consists of a pint of law which has been pleaded, or which arises by clear implication out of pleading and which if argued as a preliminary point may dispose of the suit.”*

12. The main ground of objection is that the suit is time barred for reasons that the same is based on a sale agreement executed on 7<sup>th</sup> January 2010 hence is statute barred by virtue of Section 4(1) (a) of the Limitation of Actions Act Cap 22 Laws of Kenya. Section 4(1) (a)

provides as follows:

**4 (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued**

**a. Action founded on contract.**

13. In this case, the plaintiff argues that the cause of action accrued on 15<sup>th</sup> February 2019 when the court delivered judgment in Mombasa ELC Case No. 22 of 2012 in respect of the suit property. The plaintiff further submitted that the preliminary objection raised offends the provisions of Section 20 of the Law of Limitation Actions Act concerning trust property and which provides as follows:

**20 (1) None of the periods of Limitation prescribed by this Act apply to an action by a beneficiary under a trust, which is an action :-**

**a. In respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or**

**b. To recover from the trustee trust property or proceeds thereof in the possession of the trustee or previously received by the trustee and converted to his use.**

14. In the plaint dated 1<sup>st</sup> July, 2019 the plaintiff has pleaded trust against the defendant. The plaintiff has attempted to persuade this court that limitation under Section 4 (1)(a) does not apply in this case. Moreover, the parties are at variance as to when the cause of action arose. In my view such are matters of fact to be proved at the trial of the suit. The court cannot properly make a finding on whether the suit is caught by limitation of time unless it investigates on evidence when the cause of action arose. The moment a court is invited to conduct a mini-trial on facts to establish whether a preliminary objection is valid, then that preliminary objection itself ceases to be a preliminary objection. This cannot be regarded as a pure point of law as it requires investigation of some facts. At this stage, I am only beholden to look at the pleadings rather than consider any statement of fact detailed in submissions. Instead, these are matters that are fit and proper for arguments in the substantive suit. The prudent thing for a court to do in the circumstances of this case is to allow the parties to proceed to trial so that the parties can present facts for and against the time the cause of action accrued for the court to make a determination on the matter. It would be against the dictates of fair play and justice to decide such a case at the preliminary stage. For the foregoing reasons, I am inclined to dismiss the preliminary objection and decline to dismiss the suit as requested by the defendant.

15. The defendant's notice of motion dated 13<sup>th</sup> August 2019 seeks to strike out the plaintiff's suit and application herein. It is the defendant's submission that the suit is frivolous, vexatious and amounts to an abuse of the court process. The application is brought under Order 2 Rule 15(1)(a), (b), (c) and (d), among others.

16. In the case of **Mohamed Mohammed Hatimy -V- Lameck Oluoch t/a Lamathe Hygienic Foods Civil Appeal No.93 of 2018**, the court of Appeal at Mombasa stated as follows:

**“In as much as the power to strike out pleadings by a court is discretionary, it should be exercised sparingly and only in the clearest of cases. This is because the consequence of striking out a pleading is that a court does not subject the parties' dispute to a full hearing. It follows, therefore that whenever a court is faced with the question of whether or not to strike out a pleading, it has to strike a balance between two competing rights; on the one hand, a party's right to have his/her case determined in a full trial and on other, an opposing party's right not to be unduly burdened with a suit which is otherwise non-starter. This much was appreciated by this court in Kivanga Estates Limited –v- National Bank of Kenya Limited (2017)eKLR.”**

17. In the case of **Yaya Limited –v- Trade Bank Limited (in Liquidation) (2000)eKLR**, the Court of Appeal expressed itself as follows:

**“A plaintiff is entitled to pursue a claim in our courts however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of court, it must be allowed to proceed to trial.....it cannot be doubted that the court has inherent jurisdiction to dismiss that which is an abuse of the process of the court.....”**

18. In the case of **D. T Dobie & Company (Kenya) Ltd –v- Muchina (1982)KLR**, the Court of Appeal stated:

**“ No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action as is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it. ”**

19. The overriding principle therefore to be considered in an application for striking out of a pleading is whether it raises any triable issue. I have looked at the plaint dated 1<sup>st</sup> July 2019. In it, the plaintiff's pleaded claim is that the defendant is registered as the owner of the property known as MOMBASA MUNICIPALITY BLOCK XXVI/212/ in trust for the plaintiff and that the same belongs to the plaintiff. The plaintiff avers that he entered into sale agreement with the defendant wherein he sold and transferred the suit property to the defendant. The plaintiff states that the defendant was to pay him the sum of Kshs.10,000,000 as purchase price but only paid Kshs.300,000 and failed, refused and neglected to pay the balance. The plaintiff is seeking a declaration that the defendant is registered as owner of the suit property in trust for the plaintiff and that the same belongs to the plaintiff. The plaintiff is also seeking an order cancelling and revoking the certificate of lease and the sale agreement and an order compelling the defendant to transfer the property to the plaintiff as well as general damages.

20. I note that in the statement of defence dated 13<sup>th</sup> August, 2019, the defendant has denied the plaintiff's claim. The defendant avers that he discharged his obligation at the time of signing the agreement and as confirmed by the plaintiff in his testimony in court in **Mombasa ELC Case No. 22 of 2012**. It is the defendant's case that the suit was filed is bad in law, frivolous, vexatious and amounts to abuse of the court process. The defendant further avers that the plaintiff's suit is statute barred under the provision of Section 4(1) (a) of the Limitation of Actions Act.

21. From the pleadings filed, in my view there are triable issues between the parties worth a trial by the court. I do not need to go into the merits of those issues. It suffices to state that from the pleadings, the suit raises triable issues in the sense of the law. The upshot is that the Notice of Motion application dated 13<sup>th</sup> August 2019 by the defendant is without merit and is hereby dismissed.

22. The other application for determination is the Notice of Motion dated 1<sup>st</sup> July 2019 in which the plaintiff seeks temporary injunctive orders restraining the defendant from selling charging constructing and interfering with the suit property until the hearing and determination of the suit. The plaintiff avers that he has been reliably informed that the defendant is in the process of selling the suit premises any time and appropriate the proceeds thereof to the plaintiff's detriment.

23. The principles to be considered when considering an application for injunction are well settled. In the **case Giella –v- Cassman Brown & Co Ltd (1973) EA 358**, the applicant must show that he has a prima facie case with a probability of success; that he stands to suffer irreparable damage which would not be compensated by an award of damages and if the court is in doubt, it will decide the case on the balance of convenience. In the case of **Mrao Ltd – v – First American Bank of Kenya (2003) KLR 125**, a prima facie case was said to be one in which on the material presented to the court tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter. The courts have also accepted that in dealing with an application for an interlocutory injunction, the court is not necessarily bound only by the three principles set out in the case of **Giella – v- Cassman Brown & Co. Ltd (1973) EA 358**. The court may look at the circumstances of the case generally and the overriding objective of the law. In **Suleiman –v – Amboseli Resort Ltd (2004) KLR 589** Ojwang Ag. J (as he then was) at page 607 stated thus:

**“.....Counsel for the defendant urged that the shape of the law governing the grant of injunction relief was long ago in Giella –v- Cassman Brown, in 1973 cast in stone and that no new element may be added to that position. I am not, with respect, in agreement with Counsel in that point, for the law as always kept growing to greater levels of refinement, as it expands to cover new situations not exactly foreseen before. Justice Hoffman in the English case of Films Rover International made this point regarding the grant of injunctive relief (1986) 3 ALL ER 772 at page 770-781. A fundamental principle of..... that the court should take whichever counsel appears to carry the lower risk of injustice if it should turn out to have been “wrong”.... Traditionally, on the basis of the well accepted principles set out by the Court of Appeal in Giella –v Cassman Brown the court has had to consider the following questions before granting relief.**

**iv) is there a prima facie case....**

**v) does the applicant stand to suffer irreparable harm....**

**vi) on which side does the balance of convenience lie? Even as those must remain the basic tests, it is worth adopting a further, albeit rather special and more intrinsic test which is now in the nature of general principle. The court in responding to prayers for interlocutory relief, should always opt for the lower rather than the higher risk of injustice.....”**

In that case, the court granted an injunction on the general principle that it is better to safeguard and maintain the status quo for a greater justice than to let the status quo be disrupted by not granting an interlocutory injunction and after hearing the case, find that a greater injustice has been occasioned.

24. At this interlocutory stage, pending the substantive canvassing of the case, in relation to the prayers sought my understanding is that the plaintiff seeks injunctive relief to the extent that the suit property may not be pre-empted through alienation, disposal or waste. In my view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined. Having looked at the application and considering the circumstances of this case, I allow the notice of motion dated 1<sup>st</sup> July 2019 in terms of prayer (c) thereof.

25. Upon hearing the two applications and the preliminary objection herein, and arising from all the above reasons, the final orders of this court are as follows:

**a. The Notice of Motion dated 1<sup>st</sup> July 2019 is allowed in terms of prayers (c) thereof.**

**b. The notice of motion dated 23<sup>rd</sup> August 2019 is dismissed.**

**c. The preliminary objection dated 23<sup>rd</sup> August 2019 is dismissed.**

**d. Each party to bear his own costs.**

**DATED, SIGNED and DELIVERED at MOMBASA this 30<sup>th</sup> day of January 2020.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Kurauka for plaintiff/Applicant

Ms. Nyaga for Ms. Rajab for defendants/respondents

Yumna Court Assistant

**C.K. YANO**

**JUDGE**