



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 256 OF 2018

JUMWA TINGA KALU.....PLAINTIFF

VERSUS

MORIN LEAH AKECH AUMA & 4 OTHERSDEFENDANTS

RULING

(Application for striking out of defence of 1st and 2nd defendants; plaintiff claiming that the same are frivolous; plaintiff having filed suit claiming that title to her land was fraudulently transferred to the 1st defendant; 1st defendant subsequently transferring the land to the 2nd defendant; 1st defendant alleging to have properly purchased the land from the plaintiff and lawfully transferring it to the 2nd defendant; 2nd defendant pleading that she is an innocent purchaser for value; defences raise triable issues and cannot be considered frivolous; application dismissed with costs)

1. The application before me is that dated 13 February 2019 filed by the plaintiff. The application seeks orders that the defences of the 1st and 2nd defendants be struck out. It is the view of the applicant that the said defences are scandalous, frivolous, vexatious, and will prejudice, embarrass, and delay the fair trial of the suit. The application is opposed.

2. To put matters into context, this suit was commenced through a plaint which was filed on 29 October 2018. The applicant pleaded that she is the registered proprietor of the land described as Plot Subdivision No. 2767 (Original No. 408/4) of Section III Mainland North, measuring 5.820 Ha or thereabouts (the original plot). It is pleaded that in the year 2007, she subdivided the original plot into several parcels and transferred five of the subdivisions. She then remained with one of the subdivisions measuring 3.5 acres identified as Plot Subdivision No. 4372/3 of Section III Mainland North and out of this she sold one acre to one Eddah Dzame Albert who was represented by the law firm of M/s Kenga & Company Advocates. It is averred that the original certificate of title was handed over to M/s Kenga & Company Advocates and the plaintiff believes that the said title is still held by the said firm. It is pleaded that in June 2013, the 2nd defendant approached the plaintiff's family and proposed to purchase 2 acres out of the plot Subdivision No. 4372/3 (the suit land). The plaintiff agreed to this proposal and a sale agreement was prepared but when the deed plan came she saw that it prescribed a sale of 2.43 acres and not 2 acres. She then refused to sign the sale agreement and the same was rescinded. She has pleaded that unknown to her, the 2nd defendant proceeded to process a title for the Plot No. 4372/3 in the name of the plaintiff and lodged a caveat claiming a purchaser's interest which was registered on 16 September 2013. The plaintiff has pleaded that on 15 June 2015, the 1st defendant showed interest to purchase the property and approached her with an offer to purchase at Kshs. 15,000,000/= which the plaintiff declined. She has averred that in the year 2016 she was informed by her children that the property has been sold to the 1st defendant. She reported the matter to the police and the 1st defendant was charged with a criminal offence. She has pleaded that investigations revealed that there is an alleged sale agreement dated 18 June 2015 between her and the 1st defendant selling the suit land at Kshs. 18,000,000/=; a transfer dated 18 June 2015; an application for consent of the Land Control Board; a letter of consent from the Land Control Board; a sale agreement between the 1st and 2nd defendant dated 22 June 2015 selling the suit property for Kshs. 20,000,000/=; a transfer dated 23 June 2015 between the 1st and 2nd defendant; and some electronic fund transfers. The plaintiff has refuted selling the suit property to the 1st defendant for Kshs. 18,000,000/= and is unaware of the sale to the 2nd defendant at Kshs. 20,000,000/=. She has denied executing the sale agreement and transfer of 18 June 2015 and has denied receiving the sum of Kshs. 18,000,000/=. It is her contention that the alleged sales are fraudulent. In the suit, she wants orders inter alia of a declaration that the suit property belongs to her and that she has never transferred or sold it to the 1st or 2nd defendant or indeed to anyone. She further wants a declaration that the 1st defendant acquired the suit land fraudulently and could not pass a good title to the 2nd defendant.

3. The 1st defendant in her defence pleaded inter alia that there was a lawful agreement of sale between her and the plaintiff. She denied all allegations of fraud. She pleaded that at all material times the plaintiff was accompanied by her children in executing documents relating to the suit property. She pleaded that the transfer of the suit property from the plaintiff to her was lawfully done and so too the subsequent transfer to the 2nd defendant.

4. In his defence, the 2nd defendant denied the allegations of fraud. He stated that he paid the purchase price for the sale of the suit property

to him. He has pleaded that the plaintiff at all material times had a firm of advocates who ostensibly acted for her. He asked that the suit against him be dismissed with costs. He also filed a witness statement where he stated that he purchased the suit property for the sum of Kshs. 20,000,000/= and he paid stamp duty and all charges before the property was transferred to him. He believes that he is a bona fide purchaser.

5. In opposing the application, both the 1st and 2nd defendants contended that their defences raise weighty issues that can only be addressed at a full hearing of the suit.

6. Counsel were invited to file written submissions which they did and I have taken note of these before arriving at my decision.

7. The subject application is brought pursuant to the provisions of Order 2 Rule 15 (1) which provides as follows :-

Striking out pleadings [Order 2, rule 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.

8. It will be seen that the law does allow for the striking out of pleadings if it is clear that they disclose no cause of action or defence. The purpose of this is to avoid unnecessary delays in the dispensation of justice. In so far as a defence is concerned, it must be clear that the same does not raise any matter that can be said to be a reasonable opposition to the claim of the plaintiff.

9. In this case, the plaintiff alleges that her property was fraudulently transferred to the 1st defendant who then transferred it to the 2nd defendant. It is her case that she never signed any sale agreement to the 1st defendant and therefore the registration of the 1st defendant as owner of the suit property is fraudulent. She has also contested the sale of the property to the 2nd defendant on the argument that the 1st defendant had nothing to transfer to the 2nd defendant. All these allegations have been denied in the defences of the 1st and 2nd defendants who assert that the plaintiff properly sold the suit land to the 1st defendant and thus the sale from the 1st to the 2nd defendant was lawful.

10. Can it be said that these defences are frivolous? Certainly not. These are valid defences which dispute the claim of the plaintiff and cannot be said to be vexatious or frivolous. The 1st and 2nd defendants deserve to be given a chance to ventilate their defences. Indeed, the allegations of the plaintiff can only be proved after a full hearing on merits. I see no need of saying more.

11. There is clearly no substance in this application and it is hereby dismissed with costs.

12. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 27th day of February, 2020.

MUNYAO SILA

JUDGE.

IN THE PRESENCE OF: