



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 37 OF 2009**

**KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF**

**VERSUS**

**ALI BUNOW KORANE.....1<sup>ST</sup> DEFENDANT**

**ADROIT DEVELOPERS LTD.....2<sup>ND</sup> DEFENDANT**

**BARCLAYS BANK OF KENYA.....3<sup>RD</sup> DEFENDANT**

**WILSON GACHANJA.....4<sup>TH</sup> DEFENDANT**

**RAINYDAYS LTD.....5<sup>TH</sup> DEFENDANT**

**ASHOK LABSHANKER DOSHI.....6<sup>TH</sup> DEFENDANT**

**MAHESH K. DOSHI.....7<sup>TH</sup> DEFENDANT**

**RULING**

4. The application is premised on the grounds inter alia that the amended plaint does not disclose any reasonable cause of action; that it is scandalous and vexatious against the applicants; that it is an abuse of the court process; that it is based on fraud the particulars of which are not pleaded; that the 6<sup>th</sup> defendant is not a director of the 5<sup>th</sup> defendant and therefore has nothing to do with this suit; that the 7<sup>th</sup> defendant is deceased; that directors of a company cannot be sued without first lifting the corporate veil; the plaintiff has abandoned its challenge to the title of the suit land by consenting to the removal of the 1<sup>st</sup> defendant from the case. The application is supported by the affidavit of Anish Doshi, a director of the 5<sup>th</sup> defendant. He has deposed inter alia that the 7<sup>th</sup> defendant died on 25 December 2009 and he has annexed a Certificate of Death. He has further deposed that the 6<sup>th</sup> defendant is not a director of the 5<sup>th</sup> defendant and therefore this suit cannot be sustained against him despite the description in the plaint that the 6<sup>th</sup> and 7<sup>th</sup> defendants are directors of the 5<sup>th</sup> defendant. He contended that even if they were directors they cannot be sued without lifting the veil of incorporation. He averred that no allegation of fraud have been pleaded against the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants and he argued that allegations of fraud must be pleaded in order for the suit against them to be sustained. He further stated that the suit cannot be sustained against them because the plaintiff has consented to the removal of the 1<sup>st</sup> defendant who was the original allottee. He has averred that the title is with an innocent purchaser and the same cannot be challenged or revoked on ground of fraud unless the purchaser is proved to be a party to the fraud and no fraud can be sustained without particulars being disclosed. He deposed that the title of the 5<sup>th</sup> defendant cannot be challenged because Adroit Developers Limited, who sold the property to the 5<sup>th</sup> defendant was removed from this suit.

5. The plaintiff opposed the application by filing Grounds of Opposition and a Replying Affidavit of Dedan Okwama. Inter alia, it is averred that the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants are necessary parties to the suit so as to enable the court effectively and completely adjudicate all questions and triable issues. The affidavit of Mr. Okwama more or less gives reasons why the plaintiff feels that the land is still Government land and was irregularly allocated and that the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants all participated in the transactions.

6. Both Mr. Oluga, learned counsel for the applicants and Mr. Makori learned counsel for the respondent filed written submissions and referred me to various authorities all of which I have taken into account.

7. The first issue as framed by Mr. Oluga is whether this suit is proper as against the 7<sup>th</sup> defendant who it is said died on 25 December 2009. Mr. Makori in his submissions submitted that the Certificate of Death exhibited is one of Maheshkumar Kishorkumar Doshi and contended that there is no scintilla of evidence that Mahesh K. Doshi is deceased. It is actually correct that the Certificate of Death bears the name Maheshkumar Kishorkumar Doshi and the name given in respect of the 7<sup>th</sup> defendant is Mahesh K. Doshi. Now, it is not easy for me to determine at this stage of the proceedings whether the Certificate of Death refers to the same person named as Mahesh K. Doshi in these proceedings. I assume that the parties when they are giving evidence will elaborate on whether or not the 7<sup>th</sup> defendant is deceased and a determination can then be made on the veracity of the suit against the 7<sup>th</sup> defendant at that stage in time. I see absolutely no prejudice to the parties.

8. The second issue is whether the suit can be sustained against the 6<sup>th</sup> defendant and Mr. Oluga submitted that the 6<sup>th</sup> defendant is not a director of the 5<sup>th</sup> defendant. He referred me to a search of the company dated 24 June 2019. Mr. Makori in his submissions averred that it is concealed that the 6<sup>th</sup> defendant was a director of the 5<sup>th</sup> defendant at the time the transactions in issue were done. Again it would not be wise for me to determine, at this stage of the proceedings, that simply because the 6<sup>th</sup> defendant is not currently a director of the 5<sup>th</sup> defendant then no cause of action exists against him. Maybe at trial the plaintiff may tender evidence showing that the 6<sup>th</sup> defendant is culpable and it would be unfair for me to judge the plaintiff's case even before it has commenced.

9. Thirdly, it is contended that because no particulars of fraud are pleaded against the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants then they need to be struck out. I would hesitate to make that conclusion. I am aware of decisions where the title of one who may not have participated in fraud is cancelled and again I do not want to prejudge that simply because no particulars of fraud are pleaded against the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants, then the suit against them should be struck out. That again will need to await a full trial. In any event, I have seen that in their Reply to Defence, the plaintiff has outlined some particulars of fraud against the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> defendants. It can be argued that this ought to have been in the plaint, but given that the plaintiff has stated them in the Reply to Defence, we cannot rule out the possibility of amendment of the plaint to plead the same in the plaint.

10. The fourth issue is whether the 6<sup>th</sup> and 7<sup>th</sup> defendants can be sued as directors of the 5<sup>th</sup> defendant. Again, it will not be fair for me to make a decision whether the plaintiff can only sustain the suit as against the 5<sup>th</sup> defendant and not its directors. These are matters that can only be considered once evidence is taken.

11. There was an issue raised that the suit is unsustainable because the plaintiff has entered into a consent with the 1<sup>st</sup> defendant to withdraw the suit against the 1<sup>st</sup> defendant. I have noted from the record that the plaintiff withdrew that consent before it was adopted as an order of the court and nothing arises out of it.

12. From the above, it will be seen that I am not persuaded as to the merits of this application. I see no prejudice that will be caused to the applicants for they will have their day in court. The application is hereby dismissed with costs to the plaintiff.

13. Orders accordingly.

**DATED, SIGNED and DELIVERED at MOMBASA this 6<sup>th</sup> day of February, 2020.**

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**MUNYAO SILA,**

**JUDGE.**

**IN THE PRESENCE OF:**

Mr. Waziri holding brief for Mr Oluga for the applicants.

Mr Makori present for the respondents.

Ms. Abdi holding brief for Mr Hussein for the 1<sup>st</sup> defendant.

Other parties; Absent.

Court Assistant; David Koitamet.