REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISON

CIVIL SUIT NO. 129 OF 2010

FRANCIS BEN NJUGUNA T/A PROPENSITY

PROPERTIES & CONSULTANTS.....PLAINTIFF/ RESPONDENT

VERSUS

HON. STANLEY M. GITHUNGURI.....1ST DEFENDANT/ APPLICANT

TASSIA COFFEE ESTATE LTD. .....2ND DEFENDANT/APPLICANT

RULING

1. This ruling relates to a notice of motion application dated 21st February 2019, brought under the provisions of the Inherent jurisdiction of the court, Sections 1A, IB and 3A of the Civil Procedure Act (Cap 21) Laws of Kenya, Order 16 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law.

2. The Applicant is seeking for orders that;

> *(a) That the Honourable court be pleased to issue witness summons to the Registrar of the Estate Agents Registration Board for purposes of procuring her attendance before court to give evidence and produce documents with respect to the Plaintiff's status as an estate agent for the years 2007, 2008 and 2009.*
>
> *(b) That consequence upon the said Registrar of Estate Agents Registration Board giving evidence and producing documents with respect to the Plaintiff's status as a licensed estate agent for the years 2007, 2008 and 2009, the Plaintiff be at liberty to re-open his case for the limited purposes of adducing rebuttal evidence (if any) to the Registrar's evidence;*
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> *(c) That the costs of the application be costs in the cause.*

3. The application is premised on the grounds on the face of it and an affidavit in support thereof dated 21st February 2019 sworn by Judy Muthoki Reuben, the manager of the 2nd Defendant. She deposed that, the plaintiff's claim herein is based on an alleged commission arising from the sale of property namely; L.R. No. 10916 and L.R. No. 4299, whereby the plaintiff seeks for payment of the sum of Kshs. 79,000,000. That by reason of a plaint dated 5th March 2010, the plaintiff pleaded that, he was a registered estate agent under the provisions of the Estate Agents Act (Cap 533) laws of Kenya. The Defendants have denied the claim in their joint statement of defence dated 9th April 2010.

4. That by way of a letter dated 11th February 2013, the Defendants Advocates on record at the time, Kelvin Mogeni & Company Advocates wrote to the Registrar of the Estate Agents Registration Board, enquiring as to whether the Plaintiff had taken out a practicing certificate for the years 2007, 2008 and 2009. The Board responded vide a letter dated 12th February 2013, and confirmed that the Plaintiff did not have a practicing certificate to practice in the years 2007, 2008 and 2009. The Defendants thereafter applied by way of a notice of motion application dated 12th March 2013 to have the plaint struck out on the basis that the suit was based on an illegality in that the Plaintiff was not licensed to act as an estate agent at the relevant time to the suit.

5. The court vide a ruling delivered on 17th October 2014, declined to take what it deemed to be the severe step of striking out the plaint, but nevertheless rendered itself in the following terms, among other things:-

> "*The issues being raised now can as well be raised in evidence when the Defendant takes the stand to testify. The alleged letter*

from the Estate Agents Registration Board can be a good piece of evidence if the said Registrar should be called by the Applicant to give evidence upon which the Plaintiff can also cross-examine the said testimony.

It is noted for record that, on 26th October 2012, this court delivered a ruling on another interlocutory application in the same suit and observed as follows:-

"it is clear that a full hearing would be necessary to determine which party is telling the truth....."

I still believe that the matters in issue are best determined in a full hearing where the Defendant's testimony can be subjected to interrogation. In any case, and to avoid any doubt, this suit cannot be struck out on the strength of an annexure to the supporting affidavit, in which an officer of a 3rd party body denies that the Plaintiff has a practicing certificate. That officer to be believed, must give oral evidence upon which he shall be cross examined by the Respondent."

6. It was averred that, the Defendants have previously, through the Deputy Registrar, applied and obtained the issuance of witness summons to the Registrar of the Estate Agents Registration Board for purposes of procuring her attendance before court to testify with respect to the Plaintiff's status as an estate agent for the years 2007, 2008 and 2009. However, on the said occasions, the Plaintiff, through his advocate on record has indicted that he would vehemently oppose the calling of the said witness and/or production of any documents notwithstanding that such testimony is fundamental to the Plaintiff's suit and is necessary for the purposes of establishing the legality of the services that the Plaintiff claims as giving rise to the commission.

7. The Applicants argued that, the Defendants only got to know of the Plaintiff's status as an estate agent after the suit was confirmed for hearing and could not have availed themselves of the provisions of applying for witness summons to issue before the pre-trial conference in accordance with Order 16 Rule 1 of the Civil Procedure Rules. However, notwithstanding the foregoing, the Honourable court has the inherent and overriding jurisdiction to make any order as is necessary for the purposes of ensuring that the ends of justice is met.

8. The Applicant averred that the court correctly stated in its ruling of 17th October 2014 that, it is only through calling the said Registrar to give oral evidence being subjected to cross examination thereon, that the truth regarding the Plaintiff's status as an estate agent can be established. That any prejudice that may be suffered by the Plaintiff by reason of having closed his case (which is denied), may be cured by allowing him re-open his case for the limited purpose of advancing rebuttal evidence (if any) to the Registrar's evidence.

9. The Applicant averred that, in the ordinary course of hearings in civil cases, a Defendant calls witnesses after the close of the Plaintiff's case as such; there is nothing ipso facto prejudicial in the fact that the Plaintiff has already closed his case in this matter. As the evidence sought to be adduced by the Registrar of estate agents Registration Board is both relevant and admissible, it is in the interest of justice that the orders sought be granted. Conversely, refusal of the orders sought would severely compromise the Defendants ability to effectively defend the Plaintiff's suit and would further be a violation of the Defendants right to a fair hearing contrary to Article 50 of the Constitution.

10. However, the Plaintiff filed a replying affidavit dated 22nd February 2019, sworn by the Respondent where he deposed that, Judy Muthoki Reuben, who has sworn the Affidavit to support the application is not a party to this suit and is not legally authorized to swear any affidavits on behalf of the 2nd Defendant and neither is she a director nor shareholder of the 2nd Defendant. As such, the Plaintiff/Respondent reserves the right to raise a preliminary objection thereon at the first hearing of the application.

11. However, on a without prejudice to the same, the Respondent stated that, the issue of his registration as an estate agent is Res judicata, having been exhaustively and conclusively determined by the Honourable court vide its ruling dated 17th October 2014. Neither party appealed against the ruling.

12. Further a perusal of the statement of defence filed herein on 14th April 2010, on behalf of the Defendants and which has never been amended reveals no allegation and/or pleading challenging or questioning his registration as an estate agent. Therefore to challenge the same is purely an afterthought and ought not to be entertained.

13. The Respondent argued that, parties are bound by their pleadings and cannot capriciously and haphazardly raise issues that they subsequently think of which are not based in their pleadings. That, notwithstanding a finding of the Honourable court five (5) years ago that, the subject issue was not included in the statement of defence, the Defendants, have not found it wise or necessary to amend their pleadings. It is thus the best example of total disregard for the legal process and in the absence of any amendment of pleadings; no evidence should be led on an issue that has not been pleaded.

14. That the only way that one can challenge the registration is by production of a certified copy of an extract of the Register to prove and/or disprove the allegations that the Defendants now want to belatedly peddle, that he was not at the material time a duly registered agent. That the Defendants purported evidence is not an extract of the Register and is thus not founded in law and contravenes the mandatory provisions of Section 12(2)(b) of the Estate Agents Act, Cap 533, which provides that:

"the Registrar shall not in any legal proceedings to which he is not a party, be compelled....to appear as a witness to prove any entry in the Register or the matters recorded in the register of any document.

(2) The registrar shall not in any legal proceedings to which he is not a party, be compelled ;

(a) to produce the register or any document if its contents can be proved under sub section (1);

(b) to appear as a witness to prove any entry in the register or the matters recorded in the register of any document, unless the court

for special cause so orders."

15. Therefore, the Defendants steadfast and consistent ignorance of statutory provisions, is clear evidence of their intention is to derail the hearing of this matter which is scheduled for 26th February 2019. Thus, in line with the provisions of Article 159(2)(b) of the Constitution of Kenya, it is trite that "Justice shall not be delayed" and the Honourable court should proceed with the main hearing of the suit scheduled for 26th February 2019.

16. The parties deposed of the application by filing submissions wherein the applicants reiterated that, the evidence sought is both relevant and admissible. The case of; *Apollo Mboya vs Judicial Service Commission & 6 Others (2016) eKL*R, was cited where the court stated that, in the modern law of evidence, relevance is the dominant consideration.

17. It was submitted that, it is the central rule that evidence is admissible only if it is relevant, that is, if it tends to prove or negate, in the sense of making more or less probable any fact which requires proof; (see *Phipson on Evidence (17th Ed) at paras 7.08-7.09 and also DPP vs Kilbourne (1973) AC 729, 756).* Conversely, evidence that is relevant is generally admissible. Thus is the case of; *Hollington vs Hewthorn (1943) 1 KB 587, 394* Court of Appeal stated that:

> *"nowadays, it is relevance.....that is the main consideration, and generally speaking, all evidence that is relevant to an issue is admissible, while all that which is irrelevant is excluded."*

18. Further, the Halsbury's Laws of England (4th Ed) Vol 17 at para 5 states that:

> *"The prime requirement of anything sought to be admitted in evidence is that it is of sufficient relevant. What is relevant (namely what goes to the proof or disproof of a matter in issue) will be decided by logic and human experience, and facts may be proved directly or circumstantially. But while no matter should be proved which is not relevant by the normal tests of logic may not be proved because of exclusionary rules of evidence. Such matters are inadmissible. Admissible evidence is thus that which is (i) relevant and (2) not excluded by any rule of law or practice. It may be that an item of evidence is admissible on one ground and inadmissible on others; if so, it will be admitted. Evidence may also be admissible for one purpose and not for another."*

19. The Applicant further relied on the Privy Council's case of; *Kuruma s/o Kaniu vs Reginam (1966) AC 364,* where it was held that, the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible.

20. The Applicant argued that, the Plaintiff's attempt to introduce evidence of a receipt (ostensibly of back payment for fees for various years as per annexure "FBN-1" in the Plaintiff's Replying affidavit) only goes to show that, indeed the matter as to the status of the Plaintiff as an estate agent during the material time between the years 2007 to 2009, requires to be fully ventilated.

21. The Plaintiff argued that this matter was instituted the year 2010, about nine (9) years ago and the Plaintiff closed his case on 13thOctober 2015, about three and half (3 ½) years ago, yet the Defendants have steadfastly and consistently at every turn tried to derail the hearing of the matter by filing application after application, instead of going to the full hearing of the matter.

22. Finally the Applicant submitted that the Registrar may indeed appear as a witness notwithstanding that she is not a party to the suit, with the sanction of the court.

23. However, in response submissions, Respondent reiterated that, pleadings are the bedrock upon which all the proceedings derive from. Hence any evidence adduced in a matter must be in consonance with the pleadings, and any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. Reliance was placed on the court of Appeal case of; *Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others (2014) eKLR*, which cited with approval the decision of the Nigeria's Supreme court decision in *Adetoun Oladeji (NIG) vs Nigeria Breweries PLC SC 91/2002* where Adereji, JSC stated that:-

> *".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....*
>
> *.....in fact, that parties are not allowed to depart from the pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."*

24. The Respondent revisited the issue of the affidavit sworn in support of the application and submitted that, the affairs of the 2nd Defendant are conducted only through company resolutions. Therefore the question that arises is, at what point did the 2nd Defendant resolve to appoint the deponent Judy Muthoki as their spokesperson and legally competent officer. Further, the 1st Defendant is an individual and the question that arises is; why would Judy Muthoki Reuben who does not have a power of Attorney purport to defend a suit on behalf of the 1st Defendant herein?.

25. It was stated that, when Judy Muthoki Reuben testified before the Honourable court on 26th February 2019, she stated on oath that she does not have a Power of Attorney from any of the Defendants and neither is she a director or shareholder of the 2nd Defendant. The Respondent questioned her appointment engagement and/or instructions to file the present application on 21st February 2019.

26. The respondent relied on the case of; *Assia Pharmaceuticals vs Nairobi Veterinary Ltd HCCC No. 391 of 2000,* where the court stated;

> *"it is settled law that where a suit is to be instituted for and on behalf of a company, there should be a company resolution to that effect.....As regards litigation by an incorporated company, the directors are as a rule, the persons who have the authority to act for the company; but in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so....."*.

27. It was also submitted that, Section 12(2)(b) of the Estate Agent's Registration Act (Cap 533) provides that;-

> *"12. (1) In any legal proceedings a document purporting to be a copy of an extract from the register or of or from any document kept or published by the registrar, and purporting to be certified by the registrar as a true copy or extract shall be admissible as prima facie evidence of the contents of the register or document."*

28. I have considered the application alongside the arguments advanced and/or the submissions tendered. I find that this is a simple and straight forward matter where the main issue to determine is whether the Defendants should be granted the summons to call the Registrar of the Estate Agents as a witness in relation to the subject matter herein.

29. Basically, what the Applicants aver in a nutshell is that, they only got to know of the Respondent's status as an estate agent after the suit was filed and confirmed for hearing. What apparently is not clear is how the Applicants came across this information and whether they were in a position to know of the same earlier.

30. Be it as it were, the Applicants aver that, the evidence to be adduced is relevant and admissible and in the absence thereof, their ability to defend the suit will be compromised and/or their right to a fair hearing will be violated.

31. In response, the Respondent in a nutshell avers that, the issue of the status of his status as an estate agent has not been pleaded and thereof is not available for determination. Further, the same is raised as an afterthought and is intended to delay the expeditious disposal of this matter.

32. However, before I can deal with the main issue herein, several other issues have arisen, which include inter alia, whether, Judy Muthoki Reuben who has sworn the affidavit in support of the application herein is competent to swear the affidavit. In this regard, the court was invited by the Respondents Learned Counsel Mr. Gichuru to take note of the fact that, on the 26th February 2019, when the deponent testified on behalf of the Applicants, she admitted in the cross examination that, she does not have a power of attorney from the Applicants to represent them, and neither is she a director in the 2nd Defendant's Company or a shareholder thereof.

33. The Respondent submitted that, the 2nd Defendant has pleaded under paragraph 2 of the statement of defence that, its affairs are conducted through company resolution. The Respondent sought that the application be struck out and/or dismissed for that reason.

34. It is noteworthy that, the Applicants did not respond to this issue. I note from the affidavit sworn by Judy that, she deposes under paragraph 1 as follows:-

> *"I am employed as the Manager of the 2nd Defendant and I am duly authorized to swear this affidavit on the 2nd Defendant's behalf. I am also familiar with the dispute between the parties and can positively attest to the matters deponed to hereinafter."*

35. However, the deponent does not explain how she was appointed and even so, does not produce any evidence in support of the same. At the hearing of the evidence of this witness, the Plaintiffs' counsel cross-examined her on her authentity to testify on behalf of the Defendants and she admitted she had none. It is therefore clear that, the Defendants were put on notice of the need to prove that the said witness had authority to represent the Defendants. In fact, after cross-examination, the Defendants counsel did not re-exam the witness on the same.

36. It is trite law that only a party to a suit has the locus standi to prosecute and/or defend it. As is well known, locus standi is a right to bring an action to be heard in court on a matter before it. It is the ability of a party to demonstrate to the court sufficient connection to an action challenged to support that party's participation in the case. Where a party cannot demonstrate the locus standi, the courts will usually, rule that, the party lacks standing to bring the suit and that suit is dismissed without considering the merit of the claim. Basically therefore, locus standi means a right to be heard before a court of law.

37. For a party to authorize another to appear in court over a matter, that party must guarantee the "assignee" legal authority to represent the assignor. In case of an individual, the authority usually takes the form of a power of attorney. A power of attorney is a legal document giving one person, usually (an agent) the power to act for another, (the principal) to make legal decisions on behalf of the principal. The power is usually used when the principal is ill or under a disability or when the principal cannot be present to sign necessary legal documents (usually in financial transactions). In my considered opinion, the deponent required at least a Power of Attorney to depone to the averments in the supporting affidavit. That is lacking herein.

38. Indeed, the 2nd Defendant has clearly stated under paragraph 3 of the statement of account that, "the affairs of the 2nd Defendant are conducted through the company resolution." It therefore follows that; the 2nd Defendant can only authorize the deponent through a Board of Directors resolution to act on its behalf. A Board of Directors resolution is a written statement created by the Board of Directors of a company detailing a binding corporate action. This is informed by the fact that, the directors are the alter ego of a company. Therefore, the deponent is required to produce a Board's resolution authorizing her to represent it in the filing of the application and/or swearing the impugned affidavit in support thereof.

39. It therefore follows that, in the absence of a legal authority authorizing Judy Muthoki Reuben to depone to the matters in the affidavit dated 21st February 2019, the affidavit is not valid. In that case, I concur with the submissions of the Respondents that, the application is unsupported, and is not competent. I am therefore left with no option than to strike out the application which I hereby do. Therefore, I do not have to delve in the merits of the rest of the issues raised in the submissions.

40. It is so ordered.

Dated, delivered and signed in an open court, this 8th day of April 2019.

G.L.NZIOKA

JUDGE

In the presence of;

Mr. Gichuru for the Plaintiff/Respondent

Mr. Mbaluto for the Defendants/Applicants

Dennis ……Court Assistant