



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL & LAND COURT**

**AT NYAHURURU**

**ELC CASE NO. 441 OF 2017**

**SIMON WALLINGTON HORNER.....PLAINTIFF/RESPONDENT**

**VERSUS**

**ROGER CLARENCE SEYMOUR HURT.....1<sup>st</sup> DEFENDANT/ APPLICANT**

**HILLARY JOANNE DALPHINE HURT.....2<sup>nd</sup> DEFENDANT/ APPLICANT**

**SASHA ELIZABETH HORNER.....3<sup>rd</sup> DEFENDANT/ APPLICANT**

**JANET ELIZABETH HURT.....4<sup>th</sup> DEFENDANT/ APPLICANT**

**GOODISON NINETY NINE LTD.....5<sup>th</sup> DEFENDANT/ APPLICANT**

**RULING**

1. Before this Honorable Court for determination is the Defendants'/ Applicants' Notice of Motion Application dated the 30<sup>th</sup> May, 2018, brought pursuant to the provisions of Order 2 Rule 15 (b) (c) & (d), Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3 and 3A of the Civil Procedure Act Cap 21 of Laws of Kenya. The Defendants/Applicants have sought for orders to have the Plaintiff's suit against them struck out singularly as against each Applicant or alternatively, collectively as it is without merit, for being inherently defective, frivolous and vexatious and an abuse of the court process.
2. The application was supported on the grounds on the face of it as well as on the affidavit sworn by Roger Clarence Seymour Hurt, the 1<sup>st</sup> Applicant/Defendant on 30<sup>th</sup> May 2018.
3. By consent the said Application was disposed of by way of written submissions wherein the Applicants submitted to the effect that the suit property being No. Nanyuki 13543/148, original No. 13543/13/3 was purchased from Machamuka Farmers Company Ltd by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Applicants herein as a family investment wherein the 5<sup>th</sup> Applicant was used as vessel to purchase the same. That he 1<sup>st</sup> and 4<sup>th</sup> Applicants herein raised their respective share of the purchase price wherein the Plaintiff/ Respondent and the 3<sup>rd</sup> Defendant/Applicant who were a couple contributed Ksh 8,200,000/= being the outstanding amount. The 2<sup>nd</sup> Defendant/ Applicant also paid the 4<sup>th</sup> Defendant's Contribution.
4. That subsequently the Plaintiff being estranged from his wife after filing a divorce case now wanted to reap the family off all that it owned such that in the instant case although he sought for a refund of his money, he had not stated his cause of action or how his claim arose.
5. It was the Applicants' submission that the suit property being agricultural land, there was no written agreement upon its purchase on the sub-division amongst all family members. That the Plaintiff/Respondent's claim to the suit property was founded on an oral agreement. There were no documents granting the Plaintiff/Respondent interest in the same as was held in the case of **Daudi Ledama Morintat vs Mary Christine Karie & 2 Others [2017] eKLR**.
6. The Applicants' further submission was that the Plaintiff/Respondent had all along known that the 5<sup>th</sup> Defendant Company had been purchased s a special purpose vehicle to own the Company and therefore should be estopped from claiming that he was not aware of the incorporation of any Company. as was held in the case of **Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 Others [2014] eKLR**
7. The Applicant's further submitted that the Plaintiff, being a foreign National, could not own agricultural land. They relied on the provisions of Article 65 of the Constitution and the decided case in **Care Mission Kenya & 4 Others vs Benta Akinyi Otieno & Another**

[2019] eKLR to buttress their submissions and to submit that since the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Applicants were Kenyan Citizens, they had their names registered as shareholders of the 5<sup>th</sup> Defendant and not the names of the Plaintiff and the 4<sup>th</sup> Defendants herein who were foreign nationals. At no point had it been contemplated that the suit property would be sub-divided to each party.

8. The Applicants also submitted that since the Plaintiff's cause of Action was not in relation to disposition in land, that Court ought to down its tools and ask the Plaintiff to seek redress elsewhere. In so submitting, they relied on the decided case in **Kenya Ports Authority vs Modern Holdingg [eA] Limited [2017] eKLR**.

9. That the Environment and land Court was vested with jurisdiction to deal with Land disputes stemming from written agreements. The Plaintiff, knowing that he had no such agreement was now claiming that his agreement was towards contribution of money towards the purchase of the subject suit.

10. That the suit on the face failed to disclose any reasonable cause of action as against any of the Defendants. The suit property is not owned by any of the defendants but vests in the 5<sup>th</sup> Defendant. That the suit herein ought to be struck out pursuant to the provisions of Order 2 Rule 15. The Applicants also relied on the decided case in **Jones M. Musa & Another vs Kenya Hospital Association & Another [2017] eKLR** to submit that the Plaintiff's suit was bad in law, scandalous, frivolous and vexatious and an abuse of Court process and should be struck out.

11. On its part, the Plaintiff opposes the Defendants'/Applicants' application through a Replying Affidavit sworn and notarized in the United Kingdom on 20<sup>th</sup> July, 2018 by Simon Wallington Horner.

12. In their written submission, the Respondent/Plaintiff recounted all the facts pertaining to this case in great details arguing that his suit had merit and urged the Honorable Court to allow him ventilate all the issues raised in his suit during the full trial.

13. It was his submission that after the family members had had contributed Ksh 36,000,000/= towards the purchase of the suit land, his own share being 8,200,000/=, which money was channeled through the firm of JM Mwangi & Co. Advocates, he had a rude shock to learn that the suit land had been registered in the name of the 5<sup>th</sup> Defendant, a Company that he was a stranger to and where the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants had been registered as Directors.

14. That he was neither interested in the land nor in the 5<sup>th</sup> Defendants and therefore he sought for the reimbursement of Ksh 8,200,000/= plus interest at 16% per annum from the 2<sup>nd</sup> December 2011 till payment in full.

15. The Respondent /Plaintiff submitted that striking out his claim was a drastic remedy which out to be resorted to only where a pleading was a complete sham as was held in the case of **D.T Dobie & Company (Kenya) Limited vs Joseph Mbari Muchina & Another [1980] eKLR** .

16. That the he was entitled to the reimbursement of Ksh 8,200,000/= plus interest at 16% per annum from the 2<sup>nd</sup> December 2011 till payment in full for reasons that although he had been the sole contributor to these monies, the action by the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants of registering the land to the 5<sup>th</sup> Defendant as its owner and themselves as Directors and shareholders without his Knowledge was meant to cheat the Plaintiff/Respondent off his investment.

17. That the Plaintiff/Respondent's suit against the Applicant/Defendants was not subject to the provisions of Section 3 (3)of the Law of Contract Act but an oral agreement towards the contribution of money towards the purchase of the suit property. The agreement therefore was not for disposition of an interest in the above mentioned land.

18. It was their submission that as was held in the case of **Mpaka Road Development Ltd vs Kona [2014] 1E.A 161** their suit was not frivolous and vexatious nor an abuse of Court process and therefore should be sustained and be allowed to proceed to its logical conclusion.

19. That further, the Plaintiff/Respondent's claim for re-imburement was not time barred by virtue of the Limitation of actions Act. That the Applicants had not pleaded specifically pleaded the same in their Defence, which offended that the provisions of Order 2 Rule 4(1) of the Civil Procedure Rules.

20. They also relied on the case of **Stephen Onyango Achola & Another vs Edward Hongo Sule & Another [2004] eKLR** to submit that the plea of limitation ought to fail. That the Applicants'/Defendants' application did not meet the threshold for granting the orders sought and the same should be dismissed with costs. That the Application was a clear demonstration of the desperate attempts to ridicule his claim in the face of the uncontroverted evidence to clear him of his contributions to the property. It was a waste of the courts time and delay of a fair trial.

### **Analysis and Determination**

21. Upon considerations of the Notice of Motion Application dated 30<sup>th</sup> May, 2018 including the respective affidavits and Written Submissions filed herein by all the parties, the only single issue for determination is whether the Respondent's/Plaintiff's suit should be struck out singularly as against each of the Applicants/Defendants or alternatively, collectively for being without merit, inherently defective, frivolous, vexatious and hence an abuse of Court process.

22. The Defendants/Applicants submitted that the cause of action by the Plaintiff was not in relation to a disposition in land. On this aspect, the Defendants/Applicants cited the averments deponed by the Plaintiff/Respondent under Paragraph 23 of his Replying Affidavit to wit:-

*“my claim is this Suit is not subject to the Provisions of the Laws of Contract Act Cap 23, of Laws of Kenya. My pact with the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants was an oral agreement to contribute money towards the purchase of the property and was not an agreement for the disposition of an interest in the said land as is being made to appear.”*

23. To buttress its argument on this issue the Defendants/Applicants relied on the Court of Appeal case of **Kenya Ports Authority (Supra)**
24. The Defendants/Applicants argued further that the Plaintiff was a foreigner and by virtue of Article 65 of the Constitution of Kenya which contemplates that a person who is not a citizen may own land on basis of leasehold tenure only and any such lease, however granted shall not exceed ninety nine years.
25. Further, to support its case, the Defendants/Applicants cited the case of **‘Care Mission (supra)**. In summary the Defendants/Applicants submitted that the Plaintiff’s case was a non- starter and hence should be dismissed under the provisions of Order 2 Rule 15 of Civil Procedure Rules.
26. On its part, the Plaintiff/Respondent averred that striking out of a suit against him was a drastic remedy that should only be in case where a suit was a complete sham. He cited the two (2) cases of **DT Dobie & Co. [Kenya] Ltd vs Joseph Mbara Muchina & Another [1980] eKLR’** to support his argument. He argued that his claim emanated from a contribution of money towards the purchase of the suit land being parcel known as Land Reference No. 13543/148 original No. 13543/13/3. He held that his claims against the Defendants could not be classified as being frivolous or vexatious. He stressed that the fact that the Defendant made admission to the effect that the Plaintiff/Respondent contributed the said amount towards the Purchase of the aforementioned parcel of land only vanquished the 1<sup>st</sup> Defendant’s assertion of the suit being frivolous and vexatious. It was the Plaintiff’s contention that the Defendant’s assertion could not cause annoyance to the Defendants because they already admitted that the Plaintiff/ Respondent had already satisfied his part of the agreement.
27. He held that his suit was based on a serious and reasonable cause of action which needed to be ventilated and determined by this Honorable Court on its own merit in a full trial.
28. Fundamentally, the Defendants/Applicants seem to have raised an issue on whether this court has jurisdiction to hear and determine this case. I must point out that this is a very weighty matter as clearly rationed and stated out in the now celebrated case of **Caltex Oil Company Limited - Versus - MV Lillian Vessel “S”**. From the filed Plaint, the cause of action revolves around all that parcel of land known as **Land Reference Nanyuki No. 13543/148 original No. 13543/13/3** measuring approximately 121.4 Hectares situated North of Nanyuki Municipality in Laikipia County. At a glance, the Plaintiff has sought relief to be refunded a sum of Kenya Shillings Eight Million Two Hundred Thousand (Kshs. 8,200,000/=) being the amount due and owing from the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> & 5<sup>th</sup> Defendants being contributions for the purchase of the suit land.
29. According to the preamble of The Environmental & Land Act 2012, the main legislation which guides the jurisdiction and operation of this court spells out that *“its a superior court to hear and determine disputes relating to the environment and the use and occupations of title to land and to make provisions for its jurisdiction functions and powers.....”*
30. On that front alone, therefore, I strongly hold that this court has jurisdiction to hear and determine this case on its merit.
31. With regard to the limb that sought by the Defendants/Applicants in their application under Order 2 Rule 15 of the Civil Procedure Rules to the effect that the Plaintiff fails to disclose a clear cause of action. I find this argument is founded on matters of facts deponed in the affidavits by the Defendant. To this regard, I seek solace from the Provisions of Article 159 (2) (d) of the Constitution of Kenya in exercising judicial authority courts shall be guided by the principles that *justice shall be determined without undue regard to procedural technicalities*.
32. Indeed, it is my further preposition that it would be fair and just to hear all the issues of facts and contention strongly alluded to by the Applicant/Defendant, particularly, those pertaining to the nationality of the Plaintiff and his right to own agricultural land as per provision of Article 65 of the Constitution the Laws of Contract Cap 23, the existence and/or non-existence of a written contract for the disposition of land and it’s legality or otherwise therein as per the filed suit by the Plaintiff which matters are difficult to fairly proof through affidavit.
33. I direct that these issues be proved by production of tangible documentary documents and their credibility be proved vide cross examination in accordance by the Evidence Act, Cap 80 Laws of Kenya.
34. Therefore, arising from the foregoing, this court takes cognizance that striking out this suit at this stage against the Applicants/Defendants would be a drastic measure which should only have been resorted to if the Plaintiff’s Pleadings were a sham.
35. In my view, the Pleadings by the Plaintiff bear great seriousness. It does not annoy or tend to annoy as it contains serious and relevant to the action. A frivolous and scandalous pleadings is *‘ipso facto’* vexatious. The court has decided to act very cautiously and carefully by wishing to consider all the fact of the case by embarking upon a trial. Thus, before dismissing the Plaintiff’s case for allegedly not disclosing a reasonable cause of action or otherwise abuse of the process of court, the court has decided to deal with any merits of the suit hereof and reserve that role during the full trial, where the case will be tested through oral evidence by cross-examination on the ordinary way.
36. Having stated this and based on my analysis and associating myself to the decision of **DT Dobie & Co. [Kenya] Ltd vs Joseph Mbara Muchina (supra)**, I find the instant application unmeritorious and hence proceed to dismiss it with cost.

**Dated and delivered at Nyahuru this 3<sup>rd</sup> day of March 2020.**

**M.C. OUNDO**

