



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 213 OF 2017

DIDIER GEORGES JOSEPH GHISLAIN CRAHAY.....1ST PLAINTIFF

BEATRICE MARIE JOSE JULIE LUCAS.....2ND PLAINTIFF

VERSUS

DAVIDSON MATANO.....1ST DEFENDANT

ERASTUS GICHARU KIMANI

T/A GICHARU KIMANI &

ASSOCIATES ADVOCATES.....2ND DEFENDANT

RULING

1. I have before me for determination a Chamber Summons application dated 5th February 2019. By the said application, Erastus Kimani Gicharu T/A/ Gicharu Kimani & Associates Advocates (the 2nd Defendant) prays for an order that the suit against himself be struck out.

2. The application which is supported by an affidavit sworn by the 2nd Defendant Advocate is premised on the grounds:-

i) That the 2nd Defendant is improperly enjoined as a Party to this suit;

ii) That the issue in this suit pertains to the Sale Agreement dated 4th December 2012 entered into by the 1st Plaintiff and the 1st Defendant and in which the 2nd Defendant was acting for the 1st Defendant;

iii) That no reasonable cause of action has been presented against the 2nd Defendant in the Plaint dated 2nd November 2017;

iv) That the Plaint does not disclose how and where the 2nd Defendant failed in conducting his duties as the advocate of the 1st Defendant;

v) That the 1st and 2nd Plaintiffs have not demonstrated how the 2nd Defendant participated in

frustrating the Sale transaction;

vi) That be as it may, the 2nd Defendant is not the registered owner of the suit property Chembe/Kibabamshe/364;

vii) That the 1st and 2nd Plaintiff do not specify the remedy sought against the 2nd Defendant;

viii) That in addition, the remedies sought by the 1st and 2nd Plaintiffs in the Complaint can only be met by the 1st Defendant;

ix) That the 2nd Defendant was acting under instructions of the 1st Defendant;

x) That the 2nd Defendant has since ceased acting for the 1st Defendant and therefore has no instructions to act on behalf of the 1st Defendant in the matter.

3. The application is unopposed by the two Plaintiffs. In a Replying Affidavit sworn and filed herein by their Advocate on record Nicholas Odera Sumba on 25th March 2019, the Plaintiffs aver that the 2nd Defendant's application is frivolous and an abuse of the Court process since the 2nd Defendant is the main party around whom the cause of action revolves.

4. The Plaintiffs further aver that the subject matter of this dispute was investigated by the Police pursuant to a complaint lodged by the Plaintiffs and the outcome is yet to be communicated to the Plaintiffs. It is further their case that the 2nd Defendant is a crucial party herein as the 1st Defendant has denied executing the Sale Agreement and/or receiving the sum of Kshs 11,000,000/- paid to him towards the purchase price through the 2nd Defendant.

5. The Plaintiffs further assert that the signature said to be the 1st Defendant's in the Sale Agreement prepared by the 2nd Defendant has since been subjected to forensic examination by the Directorate of Criminal Investigations and the same has been found to be fraudulent and falsified.

6. The Plaintiffs further aver that the 2nd Defendant has himself in a statement recorded with the Police confirmed not having paid any money to the 1st Defendant and hence there is no basis for his application before the Court.

7. I have perused and considered the application by the 2nd Defendant and the Plaintiffs' response thereto. I have similarly considered the submissions and authorities placed before me by the Learned Advocates for the parties. The 1st Defendant neither filed any response nor participated in any way in the application.

8. The 2nd Defendant Counsel contests his having been enjoined in these proceedings as the 2nd Defendant. He asserts that he has improperly been enjoined in the matter as the Sale Agreement which is the subject matter of the dispute was entered into between the Plaintiffs and the 1st Defendant for whom he was then acting. He asserts that there is no reasonable cause of action against himself as he only rendered his professional services to a client for whom he has since ceased acting.

9. Rule 10(2) of Order 1 of the Civil Procedure Rules provides that:-

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

10. On the other hand Order 2 Rule 15 of the Civil Procedure Rules provides that:-

“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.”

11. The overriding principle to be considered in an application such as this is whether triable issues have been raised against a defendant. From their Plaintiff filed herein on 2nd November 2017, the Plaintiffs pray for Judgment against the two Defendants for an order that they be directed to facilitate the registration and transfer of Land Parcel No. Chembe/Kibabamshe/364 in the names of the Plaintiffs and/or that they be ordered to pay a sum of Kshs 21,002,140/- so far paid to them in pursuance of an agreement of sale of the said property.

12. From the material placed before me, the suit herein arises out of an Agreement of Sale dated 4th December 2012 and said to have been executed by the two Plaintiffs- Didier Georges Joseph Gihislain Crahay and Beatrice Marie Josee Julie Lucas as purchasers of the said property and Davidson Matano (the 1st Defendant herein) as the Vendor.

13. Paragraph 24 of the said Agreement identifies the Advocates for the Vendor as Gicharu Kimani & Associates Advocates and the said Vendor is shown to have executed the said Agreement in the presence of the 2nd Defendant who certifies at the end of the Agreement that the said Davidson Matano appeared before him on the said 4th day of December 2012 and acknowledged the signature to be his own.

14. Apparently, while the completion date is given as 90 days upon execution, the transfer of the suit property is yet to be done. When the Plaintiffs lodged a complaint in regard to the transaction, the 1st Defendant has apparently now disowned the signature on the Sale Agreement and denied ever receiving any money towards the purchase price from the 2nd Defendant.

15. Again it would appear from his statement recorded with the Police that the 2nd Defendant confirmed that he indeed has not paid any money to the would-be Vendor.

16. In *DT Dobie & Company (K) Ltd –vs- Muchina (1982) KLR*, the Court of Appeal in interpreting Order VI Rule 13(1) of the repealed Civil Procedure Rules which was the equivalent of the Current Order 2 Rule 15 defined the term “reasonable cause of action” to mean an action with some chance of success when allegations in the Plaintiff only are considered and went on to state that a cause of action will not be considered reasonable if it does not state such facts as to support the claim prayed for.

17. The Court in the *DT. Dobie Case (Supra)* went further to define what constitutes a cause of action and held that a cause of action referred to an act on the part of the Defendant which gave the Plaintiff a cause of complaint. Expressing himself on the matter Madan JA (as he then was) stated thus:-

“...No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak 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.”

18. From the pleadings before me, the 1st Defendant denies receipt of money from the 2nd Defendant and

more particularly the Sale Agreement pursuant to which various sums of money are said to have been paid to the 2nd Defendant.

19. In the circumstances of this case, I am in full agreement with the Plaintiff that the 2nd Defendant is a necessary party herein despite his protest that he has since ceased acting for the 1st Defendant.

20. The upshot is that I find no merit in the Chamber Summons application dated 5th February 2019. The same is dismissed with costs to the Plaintiff.

Dated, signed and delivered at Malindi this 27th day of May, 2020.

J.O. OLOLA

JUDGE