



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)**

**COMMERCIAL AND TAX DIVISION**

**CIVIL CASE NO. 205 OF 1999**

**KESHAVJI JIVRAJ SHAH .....PLAINTIFF**

**VERSUS**

**KANWAL SARJIT SINGH DHIMAN.....DEFENDANT**

**R U L I N G**

1. Keshavji Jivraj Shah the plaintiff herein through a Notice of motion dated 13<sup>th</sup> October 2017 pursuant to Section 3A of the Civil Procedure Act, Order 2 Rule 15(1) (b), (c) and (d) as read with Order 11 Rule 3(2) (o) (i), (ii) and (iii) and Order 40 Rule 10(1) (a) and (b) of the Civil Procedure Rules, 2010) seeks the following orders:-

**a. Pending the hearing and determination of this application the Defendant/Respondent shall preserve the property known as Land Reference No.209/8192/8 within the Nairobi County and shall permit the Plaintiff/Applicant on proper and adequate notice to the Defendant/Respondent to enter into and upon the land and appurtenances thereof to inspect the property for the purposes of confirming its preservation and maintenance.**

**b. The Defendant's Statement of Defence and Counterclaim dated and filed the 6<sup>th</sup> August, 2015 is struck out.**

**c. The Defendant Statement of Defence on record in these proceedings dated 16<sup>th</sup> November, 2006 and filed therein with the Defendant/Respondent's application for review and setting aside of judgement dated 16<sup>th</sup> November, 2006, is struck out.**

**d. Judgement is entered for the Defendant as prayed in the Plaint dated 25<sup>th</sup> February, 1999 and amended on 16<sup>th</sup> September, 1999.**

**e. For the avoidance of doubt, the property known as Land Reference No. 209/8192/8 within the Nairobi County vests in the Plaintiff/Applicant and the court reiterates the orders granted on 13<sup>th</sup> June 2006 for (a) a certificate to issue to him that the sale of L.R. No. 209/8192/8 had become absolute; (b) the defendant to deliver up vacant possession of the property; (c) the plaintiff to be put in possession of the property; and (d) a vesting order to issue for the property in the name of the Plaintiff Keshavji Jivraj Shah.**

**f. Cost of the application and of the suit are awarded to the Plaintiff/Applicant.**

2. The application is founded on several grounds on the face of the application and is duly supported by the Applicant's affidavit dated 13<sup>th</sup> October 2017 together with several annexures thereto and whose content in a nutshell together repeats the contents of the grounds on the face of the application.

3. The Defendant/Respondent is opposed to the application and is doing so filed preliminary objection dated 17<sup>th</sup> November 2017 setting on seven(7) points of law *interlia*;

**a. Application is incompetent and amounts to an abuse of the process of the Honourable Court.**

**b. The application is filed in bad faith and with the sole purpose of embarrassing/delaying the expeditious disposal of this suit.**

**c. It runs foul to Order 11 of the Civil Procedure Rules and has been filed without leave of court, this matter having already been confirmed for hearing.**

**d. It runs at cross purposes with the decisions of the court of appeal in CA No.33 of 2007 delivered on 4<sup>th</sup> July 2008 and 31<sup>st</sup> July 2015 thereby negating the very intent/import of those decisions.**

**e. It is founded on technicalities and not substance and contradicts the overriding objective principle as propounded under Section 1A, 1B & Article 159(2) of the constitution (2010).**

4. The application together with the preliminary objection were ordered to be heard and determined together by way of written submissions and highlighting the same.

5. At the hearing Mr. Mwenesi, learned Advocate, appeared for the Plaintiff/Applicant while Mr. Nduati, learned Advocate, appeared for the Defendant/Respondent. The counsel urged their respective client's case and also highlighted on their opposing respective submissions.

6. From the counsel respective detailed submissions both in writing and oral, there is no doubt that this matter has been subjected to several applications and has taken long to determine.

7. The issues for determination in this application can briefly be summed up as follows;

**a. Whether the application is misconceived, bad in law and an abuse of the process of court?**

**b. Whether the defendant defence and counterclaim can be struck out at this stage?**

**c. Whether any party will be prejudiced if the suit goes to a full trial?**

**A. Whether the application is misconceived, bad in law and an abuse of the process of court?**

8. The instant application is brought to court pursuant to order 2 Rule 15 (1) (b) (c) and (d) which specifically provides:-

**"(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."**

9. The application is also premised under Order 11 Rule 3(2) (o) (i) (ii) and (iii) of Civil Procedure Rules which provides:-

**"(2) In addition to any other general power the court may at the case conference —**

.....

**(o) Make any such orders as may be appropriate including —**

**(i) Striking out the action or defence;**

**(ii) Making an award of costs;**

**(iii) Striking out of any document or part of it; or....."**

10. I have in dealing with this issue perused the proceedings of this suit to ascertain the status of this matter and the court record reveals that this matter has gone through pre-trial and Case Management Conference stages and directions were duly given on how the trial is to proceed. On 2/11/2016 case was set down for hearing on 29/3/2017 and 30<sup>th</sup> March 2017 and again on 29/3/2017 the case was set down for hearing on 23/8/2017.

11. That under order 2 Rule 15(1) (b) (c) and (d) of the Civil Procedure Rules a court may order at any stage of the proceedings striking out of the pleadings on the grounds that it is scandalous; frivolous or vexatious or on the grounds that it may prejudice, embarrass or delay the fair trial of the action or on the grounds of being otherwise an abuse of the process of court. Under Order 11 Rule 3(2) (o) of Civil Procedure Rules, the court may during the case management conference deal with interlocutory applications by ordering striking out the action or defence.

12. The issue raised in the present application ought to have been raised at the case management conference and before a hearing date had been set in this matter. It is in my view not prudent for the plaintiff to have filed this application after case management conference had been concluded; otherwise the application with all due respect appears to be an afterthought. That at any rate the issues raised being based on affidavits and not purely on point of law, can be dealt with upon evidence having been given by all parties; as the application is not brought under order 2 Rule 15 (1) (a) of Civil Procedure Rules where no evidence is admissible on an application for striking out the pleadings.

13. In view of the above I find and hold that this matter is passed the stage of interlocutory application. I find no merit in ground No.(a), in the preliminary objection.

**B. Whether the defendant’s defence and counterclaim can be struck out at this stage?**

14. The plaintiff applicant urges this court to strike out the defence and counterclaim on the grounds that they are embarrassing and cause uncertainty and waste of time. The two defences are termed as vexatious pleadings by the applicant referring to the case of (orbit chemical Industry Ltd Vs. Attorney General (2006) eKL ). The defendant on his part objects to the application alleging it is founded on technicalities.

15. The defendant did not file the draft defence as ordered by the Court of Appeal when he filed his defence, but filed a fresh defence and counterclaim. There is no dispute, however that a defence and counterclaim were subsequently filed, whether it was as per draft defence or not, I find that there is a defence on record which cannot be wished away. The defence and counterclaim filed has been served and responded to. I think it is not correct to say that the draft defence was the only defence and counterclaim that should have been filed and as fresh defence and counterclaim were filed within the time given by the Court of Appeal; and as no court fees was paid for draft defence, the filed fresh defence and counterclaim is not valid. Article 159 (2) (d) of the Constitution of Kenya 2010 clearly bars dismissal of matters on procedural technicalities as that may result into injustice to the parties and encourages in determination of cases to do substantial justice. The courts are enjoined to administer justice without undue regard to procedural technicalities. What the Applicant is raising in this matter is nothing but procedural technicalities which if accepted would not see substantial justice being done in this matter.

16. I have perused the contents of the defence and counterclaim and I find on their face value they raise triable issues. The same cannot be said to be without basis nor can it be termed as scandalous, frivolous or vexatious nor is it prejudicial, or an embarrassment to the plaintiff or intended to delay fair trial of the action nor can it be said to be an abuse of the process of the court.

**C. Whether any party will be prejudiced if the suit goes on to full trial?**

17. The parties in this suit have filed and exchanged their respective pleadings. This matter as per court record went through pre-trial and case management conference stages and direction have been given on how this matter shall proceed. Several issues raised in the plaintiff’s application can fully and fairly be determined once evidence is adduced as the application is based on evidence. I find that it would not be fair to summarily determine the several other issues raised in this application without hearing all parties orally. No party would be prejudiced by hearing all parties and allowing them to canvass their case before final determination of the case.

18. The upshot is that the application dated 13<sup>th</sup> October 2017 is dismissed and the costs shall be in the cause.

**Dated, signed and delivered at Nairobi this 12<sup>th</sup> day of July, 2018.**

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**J .A. MAKAU**

**JUDGE**