



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC NO. 73 OF 2016

MOHAMED FEISAL MOHAMUD.....1ST PLAINTIFF

IBRAHIM MOHAMED OSMAN.....2ND PLAINTIFF

YASIN MOHAMED MOHAMUD.....3RD PLAINTIFF

VERSUS

RICHARD GUYA MEMBO.....1ST DEFENDANT

DISTRICT LAND REGISTRAR KISUMU.....2ND DEFENDANT

RAMOGI CHEMISTS LIMITED.....3RD DEFENDANT

HAFISIWA NAMUKHOSI MUHAMED.....4TH DEFENDANT

MUSA MUHAMED.....5TH DEFENDANT

ALI OKUMU MOHAMMED.....6TH DEFENDANT

RULING

The 1st and 3rd Defendants/Applicants filed a Notice of Motion dated 31st May 2019 seeking orders that the court:

- a) Strikes out the entire suit for being scandalous, frivolous; vexatious and otherwise an abuse of the process of the court.**
- b) Enter judgment in favour of the 3rd Defendant compelling the Plaintiffs by themselves, servants or agents to vacate and hand over vacant possession of Plot Title Kisumu/Municipality Block 5/275 and 276; and**
- c) The balance of the claim of the counter-claim on mesne profit to proceed for assessment.**
- d) That costs of the application be provided for.**

The application is premised on the grounds set forth on the face of the application and the supporting affidavit of the 1st Defendant dated 31st May 2019. The Applicants aver that they had purchased the suit properties from the 4th – 6th Defendants and one Ali Okumu Mohamed (hereinafter Vendors) vide a sale agreement and irrevocable instructions of payment both dated 11th March 2016. That the Applicants and the Vendors executed a transfer of lease dated 21st March 2016. That the 1st Defendant proceeded to register the transfer of lease and a new lease issued in the name of the 3rd Defendant on 22nd March 2016 without complaint from the Vendors. That from that date, the Vendors could not sell the parcel until the new lease was cancelled.

The Applicants deponed that their advocates received a letter dated 4th April 2016 forwarding bankers cheques and purporting to refund Kshs. 10,500,000/= which they had paid to the Vendors. That the banker's cheques were not banked. That it was after these events that they came to know about an alleged revocation of the sale agreement dated 29th March 2016. That there was no way the Vendors could cancel a sale agreement after the transfer was registered without going through the court.

The applicants are therefore urging the court to find that the amended plaint filed on 27th November 2018 is groundless because:

i. The amended plaint states that the 4th – 6th Defendants were registered owners of the suit properties when the Plaintiffs and the 4th -6th entered into a sale agreement for the suit properties executed yet the Applicants had already registered the transfer and a new lease issued.

ii. The amended plaint states that the sale agreement dated 11th March 2016 between the Applicants and the Vendors was validly revoked yet the purported deed of revocation was not signed and attested in the same manner as the sale agreement and was furthermore executed after the transfer was registered and new lease issued to the 3rd Defendant.

iii. The amended plaint implies that that the transfer of the suit property was going on concurrently with the sale of the suit properties to the Plaintiffs yet the at the time of signing of the agreement between the Vendors and the Plaintiffs, the suit properties had already been transferred to the 3rd Defendant.

iv. The amended plaint states that the transfer by the Applicants of the suit parcel was done fraudulently yet the Plaintiffs were not in the picture as at 22nd March 2016. The Plaintiffs have no *locus standi* to challenge the sale agreement dated 11th March 2016.

The Applicants averred that the Plaintiffs were tenants of the Vendors and, since they are yet to sign a lease with the Applicants, the Plaintiffs are trespassers who are deriving benefit from the suit property and should therefore pay mesne profit to be assessed by the court.

In response, 1st Respondent filed Grounds of Opposition to the application stating that the grounds set out in the application did not fall within the confines of Order 2 Rules 15 (1) (b), (c), and (d) of the Civil Procedure Rules. That the application was against the spirit and letter of Article 50 (1) of the Constitution, as well as Sections 1A and 1B of the Civil Procedure Act. That the matters relied on in support of the application were matters of fact that could only be determined through evidence in a full trial.

Applicants' Submissions

Counsel for the Applicants submitted that as from 26th March 2016, the registered proprietor was the 3rd Defendant and therefore the agreement between the Plaintiffs and Vendors dated 29th March 2016 was null and void. That the 3rd Defendant enjoyed exclusive ownership by virtue of Sections 27 and 28 of the repealed Registered Land Act. That the Vendors did not have capacity to sell the suit property as they purported to in the sale agreement of 29th March 2016.

Counsel submitted that the Plaintiffs had not demonstrated how they paid the deposit or full purchase price as set out in the sale agreement of 29th March 2016. That the deposit which was in the form of bankers cheques sent to the Applicants' advocates had been returned to the Plaintiffs therefore they had effectively not paid any consideration to validate the alleged conveyance. That without a valid contract, the Plaintiffs could not be entitled to specific performance and denied the Plaintiffs a foundation to allege the existence of fraud. That, on the other hand, the Applicants had paid full consideration and there was no dispute between the Vendors and Applicants in the transaction leading to the transfer of title.

1st Respondent's Submissions

Counsel for the 1st Respondent cited several cases highlighting the proposition that the power to strike out pleading and summarily dismiss a suit was discretionary and should be exercised with great care and caution. That no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action and is so weak as to be beyond redemption and incurable by amendment. That the court should consider available alternatives before striking out proceedings.

Counsel submitted that there were several triable issues which revealed that the Plaintiff had a sufficient cause of action to proceed to trial. That some of the issues included the what the actual terms and conditions for the two sale agreements were and whether the terms and conditions were breached; whether the relevant consents were obtained for transfer of the parcels to the 3rd Defendant; whether there was a valid revocation of the sale to the Applicants; and whether there was any fraud in the transaction leading to the transfer of the parcels to the 3rd Defendant.

2nd and 3rd Respondents' Submissions

Counsel for the 2nd and 3rd Respondents questioned the timing of the application, having been made three years since the matter was first in court. Counsel submitted that there were several facts in issue that could not be summarily determined by an application of this nature. That the affidavits sworn by the 4th – 6th Defendants in Kisumu ELC No. 76 of 2016 which was consolidated with this matter but later withdrawn revealed the extent of the mischief perpetrated by the Defendants.

Issues for Determination

1. *Whether the suit is scandalous, frivolous; vexatious and otherwise an abuse of the process of the court*

The application is premised on Order 2 Ruler 15 (b), (c) and (d) of the Civil Procedure Rules which provide that:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(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.”

The Court of Appeal in *Trust Bank Limited v H.S.Amin & Company Ltd & another* [2000] eKLR held:

“In *Buller & Leake and Jacobs Precedents of Pleading* (12th Edition) on chapter dealing with striking out pleadings at page 145 it stated:

"A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense."

And a pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the court machinery or process.”

The basis of the Plaintiffs’ case as stated in the amended plaint is that they had purchased the suit properties from the Vendors in the understanding that the agreement dated 11th March 2016 had been revoked but the 1st Applicant unlawfully and fraudulently transferred the property into his name. And among the particulars of fraud pleaded is that the Vendors failed to obtain a legitimate consent to transfer; that the Applicants transferred the suit property despite the sale agreement stipulating that this could only be done upon full payment of the entire purchase price; and the Applicants acquiring the suit land through unlawful process.

The issues raised in the amended plaint cannot be said to be trivial, fanciful or vexatious, more so where the validity of the entire process of transfer and registration of the new lease in the 3rd Defendant’s name has not been fully exposed and proved through the Defendants’ pleadings. The Applicants have still not demonstrated with sufficient clarity the circumstances under which the 1st Applicant proceeded to register the transfer before making full payment of the purchase price.

The Plaintiffs’ suit cannot be said to be frivolous also considering Kisumu ELC No. 76 of 2016 which was consolidated with this suit, with the 4th – 6th Defendants making claims against the 1st and 3rd Defendants which they have since curiously withdrawn. The Applicants cannot merely dangle just their certificate of lease as conclusive proof that the transfer of the suit properties and the issuance of a new lease was carried out in a lawful manner.

In conclusion, it is clear that the Plaintiffs deserve the right to prove their case further in a full trial. The application ought to be, and is hereby dismissed with costs to the Respondents.

DATED, DELIVERED and SIGNED THIS 22nd DAY OF MAY, 2020.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE

This judgment is hereby delivered to the parties by electronic mail due to the measures restricting court operations due to COVID -19 pandemic and in light of directions issued by the Honourable Chief Justice on 15TH March 2019 and with the consent of the parties.

A.O. OMBWAYO

ENVIRONMENT & LAND

JUDGE