



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL SUIT NO. 77 OF 2017

COAST PROFESSIONAL FREIGHTERS LIMITED.....PLAINTIFF

VERSUS

INDUSTRIAL & COMMERCIAL

DEVELOPMENT CORPORATION.....DEFENDANT

RULING

1. The defendant/applicant on 2nd October, 2017 filed an application of even date brought under the provisions of Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, and Order 2 rule 15(a) and (d) of the Civil Procedure Rules. The applicant seeks the following orders:-

- (i) That the plaintiff's suit be struck out for disclosing no reasonable cause of action known to (sic) law;
- (ii) That in the alternative, the plaintiff's suit be struck out for being against public policy and otherwise an abuse of the process of the court; and
- (iii) That the costs of this application and of the struck out suit be awarded to the defendant/applicant.

2. The application is premised on the grounds on the face of it and the supporting affidavit sworn on 2nd October, 2017 by Edward Gikonyo Gitau, the applicant's Investments Manager. The plaintiff/respondent filed grounds of opposition on 22nd January, 2018.

3. Mr. Kongere Advocate, in highlighting the applicant's submissions filed on 14th February, 2018 stated that the Court of Appeal upheld a finding of fraud against the plaintiff which results in nullification of the respondent's title to Mombasa/Block X/291. Counsel expounded that no court has the powers to entertain a suit founded on fraud or illegality or both. He argued that there is a finding of fact in an appeal from Mombasa High Court Civil Case No. 50 of 1998 (Msa. HCCC No. 50 of 1998) by the Court of Appeal in Mombasa Civil Appeal No. 60 of 2016, that the respondent herein was guilty of fraud in the manner in which it acquired the suit premises. He submitted that the respondent was accusing the applicant of failing to assist it to conceal the fraud by not providing evidence that would have saved it from a finding that it was fraudulent.

4. Counsel cited the case of **Sirros vs Moore and Others** [1974] 3 ALL ER 776, to state that the law does not give a party any cause of action against another party for what it said or did in court in the course of a case. It was submitted that the immunity extends to the parties, jury, judge and advocates.

5. He also cited the case of **Leigh vs Sallivan Limited vs Aliakmon Shipping Co. Ltd** [1986] AC 785 where the court held that for one to sustain a suit for loss of property, they must have a legal possessory title at the time the loss occurred. It was submitted that the respondent herein had no possessory title to the property as at the time he sought to be awarded damages.

6. In citing the case of **Kenya Pipeline Ltd vs Gencore Energy (UK) Limited** [2005] eKLR, Mr. Kongere stated that it dealt with the court's refusal to be used to perpetrate illegalities. He therefore submitted that having been found guilty of fraud and illegality in acquisition of the title the subject of this suit, the respondent herein could not seek compensation for its own fraud and illegality by claiming that the applicant did not assist it to hide the fraud.

7. Counsel referred to the case of **Gabriel Mbui vs Mukindia** [1993] eKLR where the court held that a right of action does not arise from crime. He also made reference to **Kenya Farmers Association Ltd and Another vs Zipporah Kobilu Kangogo** [2015] eKLR where the court held that crime unravels everything and that once fraud is proved, it vitiates judgments, contracts and all transactions whatsoever.

8. Mr. Kongere also cited the case of **Credit Bank Ltd vs Panachand Jivraj Shah and Another** [2005] eKLR, where the court stated that if an interlocutory Judgment was entered in a suit of this nature, it should be set aside.

9. It was further submitted by Counsel for the applicant that the court always has inherent jurisdiction. He relied on the decision in **Ahmed Zain Mohamed vs Zain Ahmed Zain and 4 Others** [2003] eKLR to counteract the respondent's assertion in its written submission to the effect that a court should always strive to sustain disputes.

10. Mr. Kongere relied on the case of **Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd and 2 Others** [2009] eKLR where the court held that trials should be held on the discernible issues. He therefore was of the view that if the court finds that there are no discernible issues, nothing stops the court from striking out a suit, including summarily.

11. The applicant's Counsel also relied on a second further list of authorities filed on 1st March, 2018. He prayed for the Notice of Motion dated 22nd October, 2017 to be granted.

12. Mr. Munyithya, Learned Counsel for the plaintiff/respondent relied on the grounds of opposition filed on 22nd January, 2018 and written submissions filed on 28th February, 2018 in which he cited several authorities.

13. He submitted that the present application is misconceived and referred to the statement of claim at paragraph 14 of the plaint to refute the submissions made by Mr. Kongere. Counsel for the respondent stated that following the Court of Appeal decision, the respondent filed an appeal in the Supreme Court, being petition No. 4 of 2017. He submitted that the petition was filed in line with the provisions of Article 163(4)(a) of the Constitution of Kenya and that the respondent had an automatic right of appeal to the Supreme Court.

14. It was argued that all the issues canvassed that were decided in Mombasa HCCC No. 50 of 1998 and Mombasa Court of Appeal, Civil Appeal No. 18 of 2016 were yet to be conclusively decided by the Supreme Court. He stated that the applicant's submissions were misconceived and the authorities cited were not relevant as the issues surrounding the property were yet to be decided by the Supreme Court.

15. Mr. Munyithya referred to paragraph 14 of the plaint where the respondent avers that on 20th February, 2017, he was evicted from plot Mombasa/Block X/291. Counsel also stated that the respondent also demonstrated the losses he incurs daily as a result of the eviction. It was contended that it would be oppressive if this court was to strike out the suit on issues that are yet to be conclusively decided by the Supreme Court.

16. He counteracted the submission by Mr. Kongere that the interlocutory judgment obtained by the respondent was irregular. He cited the case of **Butuli Hassan vs James Njuguna Njoro** [2016] eKLR where the court stated that the effect of the interlocutory judgment was that liability in regard to the respondent's claim was no longer in issue, as the applicant failed to dispute the facts pleaded by the respondent in the plaint.

17. Mr. Munyithya made reference to the case of **Felix Mathenge vs Kenya Power and Lighting Company Ltd** [2008] eKLR, where it was stated that the role of the court after entering an interlocutory judgment in a case such as this was only to assess damages. He submitted that since interlocutory judgment was regularly obtained there can never be any doubt that the judgment was final with regard to liability and was unassailable. Counsel for the respondent therefore argued that liability was not an issue in this case as his client has an interlocutory judgment.

18. It was contended that the case herein does not fall in the category stated in the case of **Jacqueline Rita Wanjiru vs Daso Des Limited University of Nairobi** [2004] eKLR. It was his submission that they are dealing with a regular judgment. He relied on the provisions of order 10 rule 6 of the Civil Procedure Rules.

19. In responding to the applicant's contention that the suit is against public policy, Mr. Munyithya stated the first 3 authorities cited in their list of authorities address the said issue. He indicated that after determination of the issues pending before the Supreme Court, this court will not be seized of public policy. He prayed for dismissal of the application and for this court to list the matter for formal proof.

20. Mr. Kongere responded by stating that there was no misconception on their part. He was of the view that once the appeal in the Supreme Court succeeds, title will revert to the respondent and there will be no cause of action. He distinguished the cases cited by Mr. Munyithya. He stated that in authorities Nos. 1 and 2 on the applicant's list of authorities filed on 1st March, 2018, the courts therein emphasized the importance of regularly obtained interlocutory judgments as per the holding in **Tea Board of Kenya vs Gideon Asivigwa** [2015] eKLR.

ANALYSIS AND DETERMINATION

21. The issues for determination are:-

- (i) If the respondent's suit should be struck out for disclosing no reasonable cause of action and/or for being against public policy and for being an abuse of the court process;

22. I have carefully gone through the submissions that were made before me, the numerous authorities cited, the applicant's supporting affidavit as well as the grounds of opposition that were filed by the respondent. It was not in contention that the respondent lost possession of the property the subject of this suit, namely, title No. Mombasa/Block X/291 pursuant to a Judgment delivered on 21st August, 2015 in Mombasa HCCC No. 50 of 1998, **Welsa Bange Oganda vs ICDC, CPFC and Nadhia Limited**. The said decision was upheld by the Court of Appeal in Mombasa Civil Appeal No. 18 of 2016, **Coast Professional Freighters Limited vs Welsa Bange Oganda and 2 Others** in a Judgment delivered on 17th February, 2017.

23. It was submitted by the applicant's Counsel that the respondent herein and/or its agent, Patrick Mutune Kiasyo, was/were guilty of illegality and fraud in the acquisition of the property the subject of the suit. It was also submitted that as a result of the foregoing the respondent is not entitled to a claim for compensation from the applicant as the respondent was adjudged to have participated in the fraud.

24. Mr. Muniyithya on his part submitted that the respondent has filed an appeal to the Supreme Court against the Court of Appeal decision, a fact which is averred to in paragraph 6 of the plaint filed by the respondent. He further submitted that the respondent herein has an interlocutory judgment that is regular as the applicant failed to file a defence as required, thus the only issue that is outstanding is on liability. On this aspect, I do concur with Mr. Kongere for the applicant on the issue of regularity of an interlocutory judgment and as specifically stated by the court in the case of **Kenya Farmers Association Ltd and Another vs Zipporah Kobil Kangogo** (supra), that once fraud is proved, it vitiates Judgments, contracts and all transactions whosoever. The respondent herein however has an interlocutory Judgment dated 20th November, 2017 but I do not wish to preempt what the Supreme Court will determine.

25. I have anxiously considered if I should grant the orders sought in the application that is before me or whether I should let the appeal that is pending before the Supreme Court to run its course as its outcome will determine whether or not the suit herein should be struck out or sustained. At face value and in line of the authorities cited by Mr. Kongere, it would appear as if the applicant has a strong and convincing case. The tables would however turn in favour of the respondent if the appeal before the Supreme Court was to be determined in its favour.

26. In Supreme Court of Kenya appeal/application No. 9 of 2015, **Michael Mungai v Housing Finance Co. (K) Ltd. & 5 others** [2017] eKLR, SCJJ Ibrahim and Wanjala stated thus:-

“This court will not contravene the judicial hierarchy which is at the core of our judicial independence and competence in decision making as expounded in the Peter Oduor Ngoge vs Francis Ole Kaparo and Others [2012] eKLR case thus:-

“In the interpretation of any law touching on the Supreme Court's appellate jurisdiction, the guiding principle is to be that the chain of courts in the Constitutional set up, running up to the Court of Appeal, have the professional Competence, and proper safety designs, to resolve all matters turning on the technical complexity of the law; and only cardinal issues of law or jurisprudential moment, will deserve the further input of the Supreme Court.”

27. Mr. Muniyithya submitted that the respondent filed an appeal to the Supreme Court under the provisions of Article 163(4)(a) of the Constitution of Kenya which granted on automatic right to the respondent to appeal. Article 163(4) of the Constitution provides as follows:-

“Appeals shall lie from the Court of Appeal to the Supreme Court-

(a) as of right in any case involving the interpretation or application of this Constitution;

(b) In any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5).”

28. The respondent's appeal to the Supreme Court had not been allowed or dismissed at the time the application herein was heard. Taking into account the decision in **Peter Oduor Ngoge vs Francis Ole Kaparo and Others** (supra), it means that the respondent herein believes that it has a cardinal issue of law or jurisprudential moment to be canvassed before the Supreme Court.

29. If this court was to strike out the suit herein when there is an appeal pending in the Supreme Court arising from a Court of Appeal decision on the subject property, the effect of so doing would be counter-productive. It would also hinder the realization of the overriding objectives of the Civil Procedure Act and the rules thereof to facilitate just, proportionate and affordable resolution to civil disputes. It would also run counter to efficient disposal of the business of the court and efficient use of the available judicial and administrative resources as provided in Section 1B (1)(a), (b) and (c) of the Civil Procedure Act.

30. I am of the considered view that the applicant has put its cart before the horse. I say so, because it is aware of the appeal pending before the Supreme Court but would still want this court to go ahead and strike out the suit herein. I decline to be persuaded to do so at this point in time as the present application has been prematurely brought before this court. The applicant should bid its time and await the decision that will be rendered by the Supreme Court in petition No. 4 of 2017. For the said reasons, I strike out the application dated 2nd October, 2017. I award costs of the said application to the plaintiff/respondent.

It so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 16th day of November, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Mwanzia Ms Ndinda for plaintiff/respondent

No appearance for the defendant/applicant

