



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LANDS COURT OF KENYA AT ELDORET

ELC NO. 11 OF 2020

LAUREEN M. ISIAHO SAWE P/A

ISIAHO SAWE & COMPANY ADVOCATES.....PLAINTIFF

=VERSUS=

TERESA CHEBICHII RUTTO.....1ST DEFENDANT

TECLA CHERONO.....2ND DEFENDANT

PHILIP KIPTOO MAIYO.....3RD DEFENDANT

RULING

This ruling is in respect of an application dated 5th March 2020 by the defendant/applicants seeking for the following orders:

- a) Spent
- b) The suit be struck out for contravening section 3(3) of the Law of Contract Act and section 38 of the Land Act.
- c) Costs of the application be borne by the plaintiff.

The Plaintiff herein moved this Honourable court by way of an Originating Summons seeking declaratory orders over legal ownership of **L.R NO. ELDORET MUNICIPALITY BLOCK 21(KING'ONG'O)/5576 and 5578** in light of the agreement dated 24th February, 2015. The Plaintiff further filed an application for injunction dated 24th February 2020 which was compromised in terms of the consent order adopted on 18th June 2020.

Counsel agreed to canvass the application vide written submission which were duly filed.

DEFENDANT/APPLICANT'S CASE

Counsel for the applicant relied on section 3(3) of the Law of Contract Act and Order 2 Rule 15(d) of the Civil Procedure Rules 2010. Counsel further relied on the supporting affidavit, further affidavit of the applicant and the grounds on the face of the application.

Mr. Momanyi submitted that that Order 2 Rule 15 provides that:

- i. 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.

ii. No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.

iii. So far as applicable this rule shall apply to an originating summons and a petition.

Counsel relied on **Section 3 (3) of the Law of Contract Act, Section 38 of the Land Act and Section 46 of the Advocates Act**, and submitted that the substratum of the Originating summons is null and void for want of conformity and/or compliance with the aforementioned provisions.

Mr. Momanyi counsel for the defendant/applicant's contention is that the memorandum of understanding does not conform with the law and that the fact that the plaintiff was not formerly on record on behalf of the plaintiffs but were represented by the firm of Chemwok & Co Advocates. Further that the plaintiff's legal fees were discussed and paid.

Counsel submitted that the firm of Chemwok and Company Advocates represented the 1st defendant in Eldoret Environment and Land Court Case No.515 of 2013 where the 1st defendant was the plaintiff while the defendant was Talalei Kiptenai. The 1st defendant had filed a claim on behalf of the estate of the deceased father Ernest Kimaiyo for the beneficiaries which included the 2nd and 3rd defendants. The claim in Eldoret ELC No.515 of 2013 was 38 acres on account of their late father's and paternal grandmother's entitlements in land reference.

Counsel also submitted that Eldoret Municipality Block 21 (Kingongo) I comprised of 72 acres was registered in the sole name of Talalei Kiptenai the defendant's paternal uncle. That the plaintiff well aware that the 1st defendant in this matter (the plaintiff in Eldoret ELC No 515 of 2013 was represented by Chemwok and Company Advocates entered into an agreement whereby she succeeded, to receive 5 acres.

Counsel further stated that the judgment in the matter was delivered on 28th October 2015 whereby the case partially succeeded to the extent that the honourable court awarded 36 acres to the defendants in this case. The matter went on appeal and the Court of Appeal in Eldoret CACA No. 88 of 2016 reduced the acreage awarded to the defendants to 28 acres

Mr. Momanyi counsel for the applicant submitted that section 3 (3) of the Law of Contract Act prohibits the filing of a suit based on contract unless three parameters are met: -

- a) That the contract is in writing
- b) The contract is signed by all the parties thereto.
- c) The signature of each of the parties signing is attested to by a witness who is present when the signature is affixed to the contract.

It was counsel's submission that the agreement dated 24/2/2015 meets the first two conditions however the signatures are not attested to making the contract a nullity having not met the legal threshold. Further that the endorsement of the document by one Samuel Kimutai Tenai is not the kind of attestation of each signature which is contemplated by the law.

Mr. Momanyi submitted that it was the realization of the requirement of the Law of Contract Act which made the plaintiff in this case to try and circumvent or fulfil the legal requirement by trying to be the attesting witness as well which is contrary to the dictates of the law.

On the provisions of the Advocates Act, counsel submitted that section 45 permits an advocate to enter into an agreement with a client for the payment of legal fees but the section is made subject to section 46 of the Advocates Act which prohibits making of some agreements and such agreements are declared invalid by the Act itself. Under section 46 the following agreements are declared invalid.

- a) Any purchase by an advocate of the interest or any part of the interest of his client in any suit or other contentious proceeding
- b) Any agreement by which an advocate retained or employed to prosecute or defend any suit or other contentious proceeding stipulates for payment only in the event of success in such suit or proceeding or that the advocate shall be remunerated at different rates according to the success or failure thereof.

Counsel submitted that from the record of the case, it is evident that the agreement dated 24th February which was entered into during the subsistence of the case, falls under the prohibited agreements. That the advocate was entering into the agreement on the basis of the suit succeeding. Clauses 2 and 3 of the agreement clearly satisfy the criteria set out in section 46 (a) and (c) of the Advocate's Act respectively as the advocate was purchasing a portion of the defendants' interest in the contentious suit. Further the defendants were to pay fees (five acres of land) if the judgment was favourable to them. Counsel therefore urged the court to find that the suit is incompetent having been filed in contravention of the law which clearly prohibits its filing.

On the third issue on whether the agreement was frustrated by the judgment of this honourable Court and the Court of Appeal, counsel submitted that judgments did not award the defendants the 38 acres they claimed but only 28 acres which amounts to frustration. That the agreement was premised on the understanding that the defendants were to get 38 acres in the judgments of the court.

On the issue of the manner in which the plaintiff approached the court, counsel submitted that Order 37 does not permit the filing of an Originating Summons between an advocate and client for the enforcement of an agreement under section 45 of the Advocate's Act. The originating summons is therefore incompetent and it ought to be struck out. Counsel therefore urged the court to allow the application as prayed and strike out the suit with costs to the defendants.

PLAINTIFF'S SUBMISSIONS

Counsel for the respondent opposed the application and relied on the affidavit sworn by the Plaintiff on 11th March, 2020 and the further affidavit sworn on 24th June, 2020 together with the annexures thereto. Counsel submitted that the defendant's application is a gimmick to deny the plaintiff and opportunity to ventilate her case on merit as stipulated by the law.

It was counsel's submission that the issues raised by the defendants on the legality or otherwise of the memorandum of understanding dated 24th February, 2015 (which forms the substratum of the main suit) are issues to be determined at the main hearing as it is a substantive issue.

Miss Cheso counsel for the respondent submitted on the issue of representation, and stated that the Plaintiff while confirming the fact that ELC No. 515/2013 was filed through the firm of M/s Chemwok & Company Advocates and not M/s Isiaho Sawe & Company Advocates, annexed the authority allowing her to file her personal brief through the said firm (M/s Chemwok & Company advocates. Further that it was on the strength of the aforesaid authority that ELC No. 515/2013 was filed by the Plaintiff through the said firm of advocates which evidence remains unchallenged by the Defendants.

Counsel listed the following issues for determination by the court:

- a) Whether the matters in issue particularly the validity of the memorandum of understanding dated 24th February, 2015 can be determined in a summary manner.
- b) Whether summary dismissal of the case will serve the best interest of justice.

On the first issue as to whether the matters in issue particularly the validity of the memorandum of understanding dated 24th February, 2015 can be determined in a summary manner, counsel submitted that the defendants are raising issues of the validity of the MOU dated 24th February 2015, representation of the plaintiff, payment of legal fees to the plaintiff by the defendant, and the MOU having been entered into under coercion and/or undue influence which issues cannot be determined without calling oral evidence.

Counsel relied on the case of **Branco Arabe Espanol v Bank of Uganda (1999) 2 EA 22** it was stated that:

"The administration of justice should normally require that the substance of all disputes should be investigated on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered."

Counsel further cited the case of **Noormohamed Abdulla v Patel [1962] EA 447 at 453** where the court upheld the importance of affording a litigant the right to be heard on merit by stating thus;

"It is right that a litigant, however poor, should be permitted to bring his proceedings without hindrance and have his case decided."

Miss Cheso submitted that the principles guiding the striking out of pleadings and cases is now well settled as set out in **D T Dobie & Company (K) Ltd vs. Muchina [1982] KLR 1**, that 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 as to be beyond redemption and incurable by amendment. Further that 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 for a court of justice ought not to act in darkness without the full facts of a case before it.

Counsel also relied on the case of **MBAKI & OTHERS V. MACHARIA & ANOTHER (2005) 2 EA 206**, at page 210, where the Court stated as follows:

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

On the second issue of summary dismissal of the case, counsel submitted that it would be in the interest of justice that the plaintiff be accorded a hearing and relied on the case of **Barnabas Arap Kiprono v Desterio Andadi Oyatsi & 2 others [2019] eKLR** where Lady Justice Olga Sewe said:-

"Hence, where, as in the case herein, the so-called admission is denied, the justice of the case requires a hearing and determination on the merits. I therefore find no merit in the Defendant's application and would accordingly dismiss the same with costs".

Counsel therefore urged the court to dismiss the defendant's application with costs to the plaintiff.

ANALYSIS AND DETERMINATION

This is an application for striking out of the plaintiff's suit on the grounds that it offends section 3 (3) of the Law of Contract Act. The defendant applicant gave an elaborate background to a case that was concluded between the plaintiff and the defendant in ELDORET ELC

The Court of Appeal summarized the principles for striking out of proceedings in the case of **Co-Operative Merchant Bank Ltd. vs George Fredrick Wekesa Civil Appeal No. 54 of 1999** as follows;:

“The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”

The question is whether this is a plain case and whether it does not disclose a semblance of a cause of action which is incurable by an amendment. The applicant states that the memorandum of understating which is the basis of this case offends the provisions of Section 3(3) of the Law of Contract Act on the issue of signature attestation.

The applicant further elaborated extensively on the facts and what transpired in Eldoret ELC No 515 of 2013. The facts would be more appropriate when tendered through oral evidence with an opportunity for the respondent to clarify the issues raised. The court is not in a position to verify all the allegations raised without seeking further clarification on certain issues.

It is trite law that striking out of suits is a draconian measure which should be used sparingly and only in cases which are hopeless and cannot have a recourse to the window of opportunity for amendment. This does not mean that the court will turn a blind eye to cases that are obviously an abuse of the court process. The court has discretion in striking out of cases and the discretion should be used judiciously.

In the case of **Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR as quoted in Isat Africa Limited Fzc v Commcarrier Satellite Service Limited [2015] eKLR** Musinga J (as he then was) had the following to say:-

“It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.”

The case before the court does not fall under the category of clearest of cases which is beyond redemption. Let the plaintiff be allowed to give evidence then the court will decide on the evidence whether he has a case or not. Striking out the case at this point would lead to locking out the plaintiff from the seat of justice where she has already been offered a seat.

Further in the case of in **Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR** the court held that:

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.

The court will therefore not go into the substance of the case as was elaborately submitted by the applicant as the issues will be handled during the hearing of the main suit. The applicant can canvass all those issues during the hearing. Having said that I find that the application lacks merit and is therefore dismissed with costs to the plaintiff.

DATED and DELIVERED at ELDORET this 6TH DAY OF AUGUST, 2020

M. A. ODENY

JUDGE