



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 249 OF 2014

RIMCO OIL COMPANY LIMITED.....PLAINTIFF

VERSUS

JINAT INVESTMENT COMPANY LIMITED....1ST DEFENDANT

VIVO ENERGY KENYA LIMITED.....2ND DEFENDANT

RULING

1. What is before me is the 2nd defendant's application by way of Notice of Motion dated 26th November 2014 in which the 2nd defendant has sought the following orders:-

- a. **THAT this honourable court be pleased to strike out the plaint filed herein by the plaintiff and dismiss the suit as against the 2nd defendant with costs.**
- b. **THAT the costs of the application and the suit be provided for.**
- c. **THAT this honourable court be pleased to make such other or further orders as it may deem just and fit in the circumstances of this case.**

The 2nd defendants' application was brought under Order 2 Rule 15(1)(d) of the Civil Procedure Rules, 2010 and sections 1A, 1B and 3A of the Civil Procedure Act, Chapter 21 Laws of Kenya. The application was supported by the affidavit of the 2nd defendant's company secretary, one, Naomi Assumani sworn on 26th November 2014. In her affidavit Ms. Assumani stated that the 2nd defendant is occupying and carrying out business on all that parcel of land known as LR No. Kisii/Block III/77(hereinafter referred to as "the suit property") pursuant to a lease agreement between the 2nd defendant and the 1st defendant who is the proprietor thereof.

2. Ms. Assumani stated further that in recognition of the 2nd defendant's leasehold interest in the suit property, the plaintiff withdrew its application for temporary injunction dated 30th June 2014 that it had filed herein on 7th July 2014 against the defendants. Ms. Assumani contended that the 2nd defendant was not privy to any dealings the plaintiff may have had with the 1st defendant which in any event are not superior to the 2nd defendant's interest in the suit property which has been registered against the title thereof. She contended further that the withdrawal of the said application for injunction by the plaintiff amounted to a compromise of the plaintiff's alleged claim against the 2nd defendant when considered

together with the fact that the 2nd defendant obtained possession of the suit property peacefully and is currently in occupation thereof. She argued that, the pendency of this suit amounts to an abuse of the process of the court and it would be just and fair if judicial time is saved by the dismissal of the same as against the 2nd defendant.

3. The 2nd defendant's application was opposed by the plaintiff through a replying affidavit sworn by the plaintiff's director, Hon. Richard Onyonka on unspecified date. In his affidavit, Hon. Onyonka stated that among the reliefs that the plaintiff has sought in the plaint sought to be struck out is, a declaration that the lease agreement that the defendants entered into with respect to the suit property is illegal, null and void. He argued that the 2nd defendant was properly joined in this suit because it may be affected by the court's determination on the issue of the validity of the said lease. He argued that the 2nd defendant's occupation of the suit property pursuant to a registered lease by itself cannot justify the striking out of its name from this suit. He has termed the 2nd defendant's application as premature and ill timed.

4. When the application came up for hearing on 12th May 2015, Mr. Ondati appeared for the 2nd defendant/applicant while Mr. Ochoki appeared for the plaintiff/respondent. In his submission in support of the application, Mr. Ondati submitted that the main relief sought by the plaintiff against the 2nd defendant in its plaint dated 30th June 2014 is a permanent injunction to restrain the 2nd defendant from entering upon, trespassing onto and/or otherwise interfering or dealing howsoever with the plaintiff's use of the petrol station situated on the suit property. He submitted that this relief was the basis of the plaintiff's application for temporary injunction that was filed herein on 7th July 2014. Counsel submitted that when the plaintiff's said application for temporary injunction came up for hearing on 11th November 2014, the plaintiff was asked by the court to elect either to proceed with the application or to have the same withdrawn and the plaintiff chose the latter. Counsel submitted that by choosing to withdraw the said application for injunction, the plaintiff must be taken to have acknowledged the validity of the lease agreement that the defendants had entered into with respect to the suit property. Counsel submitted that if the plaintiff was contesting the validity of the said lease, it would not have withdrawn the said injunction application.

5. Mr. Ondati submitted that, the withdrawal of the said application amounted to a compromise whereby the plaintiff admitted the validity of the lease agreement aforesaid and the circumstances under which the same was executed. Counsel submitted that this compromise gave rise to estoppel by record that precluded the plaintiff from challenging the said lease and the circumstances under which it was made. According to Mr. Ondati, this situation laid to rest the injunctive relief that the plaintiff has sought in the plaint against the 2nd defendant. As concerns the other reliefs sought in the plaint, Mr. Ondati submitted that the same cannot be granted as against the 2nd defendant. Counsel submitted that the 2nd defendant was not privy to the agreement that the plaintiff may have entered into with the 1st defendant and as such cannot be liable for the damages that the plaintiff is said to have suffered as a result of the alleged breach thereof which has been put at Kshs. 6,528,000/=. Counsel submitted that since the 2nd defendant was not privy to the alleged lease agreement between the plaintiff and the 1st defendant and, the plaintiff on the other hand was also not privy to the lease agreement between the 2nd defendant and 1st defendant with respect to the suit property, the reliefs sought in paragraphs (a), (c) and (d) of the plaint which he termed as alternative reliefs are not available to the plaintiff as against the 2nd defendant. Counsel submitted that since the main relief sought against the 2nd defendant in the plaint which is an injunction has been compromised as aforesaid and the alternative reliefs are not obtainable against the 2nd defendant for reasons given above, the continued existence of this suit as against the 2nd defendant cannot be justified. Mr. Ondati referred to a number of authorities in support of his submissions that I will comment on later in this ruling.

6. In his submission in reply, Mr. Ochoki referred the court to the reliefs sought in prayers (a) and (c) of the plaint in which the plaintiff has sought a declaration that the lease agreement that was made between the plaintiff and the 1st defendant on 1st December 2013 with respect to the suit property is valid and that, the subsequent lease that was made between the defendants with respect to the same property is illegal,

null and void. Counsel submitted that the issues surrounding these reliefs cannot be determined in the absence of the 2nd defendant in this suit. He submitted further that the validity or otherwise of the leases that the 1st defendant is said to have entered into with the plaintiff and the 2nd defendant cannot be determined in the present application. Counsel submitted that the withdrawal of the plaintiff's application for injunction has no effect on the plaintiff's claim herein against the 2nd defendant.

7. I have considered the 2nd defendant's application together with the affidavit filed in support thereof. I have also considered the plaintiff's affidavit in opposition to the application and the respective submissions by the advocates for the parties. As I have stated earlier in this ruling, the 2nd defendant's application was brought under order 2 rule 15 (1) (d) of the Civil Procedure Rules. Order 2 rule 15 (1) (d) of the Civil Procedure Rules provides as follows:-

“15(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-

a.

b.

c.

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.”

8. What I need to determine in the present application is whether the plaintiff's suit herein amounts to an abuse of the process of the court as against the 2nd defendant and whether it is appropriate to strike it out summarily without a hearing. In the case of **D. T. Dobie Company (Kenya) Ltd –vs- Muchina [1982]KLR 1**, Madan J. A stated as follows at page 9 regarding the court's power to strike out pleadings:-

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

9. In the court of appeal case of, **Richard Nchapi Leiyagu –vs- IEBC & 2 Others, Civil Appeal No. 18 of 2013 (unreported)**, the court stated as follows:-

“The right to be heard has always been a well protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent power to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

As I have stated above, the 2nd defendant has sought the striking out of the plaintiff's suit herein on the ground that the same is an abuse of the process of the court. In the book, **Pleadings: Principles and Practice by Sir Jack Jacob and Iain S. Goldrein**, the authors have defined what amounts to an abuse of the process of the court as follows:-

“An action is an abuse of the process of the court where it is “pretenceless.” or “absolutely groundless” and the court has the power to stop it summarily and prevent the time of the public and the court from being wasted.”

10. Can the plaintiff's claim herein against the 2nd defendant be considered as pretenceless or absolutely groundless? I don't think so. The plaintiff's claim against the defendants as set out in the plaint dated 30th June 2014 is that; at all material times, the 1st defendant had leased the suit property to one, Hezron

Miyungo t/a Rohemic Petroleum Products Services for a term of 5 years with effect from 1st October 2012 on terms and conditions that were set out in a lease agreement between them dated 22nd September 2012. Through an agreement that was made between the plaintiff and the said Hezron Miyungo on 25th October 2013, Hezron Miyungo with the consent of the 1st defendant assigned the remainder of the term of the said lease to the plaintiff at a consideration of kshs. 5,000,000/=. The 1st defendant thereafter agreed to enter into a new lease with the plaintiff with respect to the suit property for a term of ten (10) years with effect from 1st December 2013. The plaintiff has contended that following the agreements aforesaid and not otherwise, he paid to Hezron Miyungo a sum of kshs. 5,000,000/= as consideration for the assignment of lease aforesaid and kshs. 1,528,000/= as rent for the suit property to the 1st defendant. He thereafter took possession of the suit property and started renovating the same with the intention of commencing business thereon. The plaintiff has contended that, on 16th June 2014, the 2nd defendant's employees invaded the suit property, broke the plaintiff's locks and took possession thereof claiming to be the 1st defendant's tenants. After the said forceful takeover of the suit property, the plaintiff was prevented from accessing the property. It is on account of the foregoing that the plaintiff brought this suit against the defendants and sought judgment against them jointly and severally for;

a. A declaration that the plaintiff's lease agreement made on the 1st day of December 2013 with regard to the petrol filling station on land parcel No. Kisii Municipality/Block III/77 is valid.

b. A permanent injunction restraining the defendants either by themselves, or through their agents/servants from entering upon, trespassing onto and/or otherwise interfering or dealing howsoever with the plaintiff's use of the petrol station on land parcel No. Kisii Municipality/Block III/77.

c. A declaration that any lease agreement made between the defendants regarding the petrol station on land title No. Kisii Municipality/Block III/77 is illegal, null and void.

d. Kshs. 6,528,000/=.

e. Interest on (d) above.

f. Such further and/or other relief as the honourable court may deem fit and expedient to grant.

g. Costs of the suit to be borne by the defendant.

11. The 1st defendant filed a statement of defence on 14th July 2014 in which it admitted that it had a tenancy agreement with Hezron Miyungo with respect to the suit property. The 1st defendant also admitted that it received a total sum of kshs. 1,028,000 from the plaintiff which amount it claimed was on account of rent that was due from Hezron Miyungo pursuant to the tenancy agreement aforesaid. The 1st defendant however denied that it had consented to the assignment of the tenancy agreement that it had with Hezron Miyungo to the plaintiff or that it had agreed to grant to the plaintiff a lease of ten (10) years over the suit property.

12. From the material on record, the 2nd defendant seems to have neither entered appearance nor filed a statement of defence. What is on record are, notice of appointment of advocates dated 14th July 2014, grounds of opposition of the same date, replying affidavit sworn by Steve Munyasia and supplementary affidavit sworn by Naomi Assumani on 23rd October, 2014 that were filed in opposition to the plaintiff's application for temporary injunction dated 30th June 2014 which was withdrawn on 11th November 2014. In the absence of a statement of defence, it is difficult for the court to know the nature of the defence that the 2nd defendant intends to put forward against the plaintiff's claim herein. There is no doubt however from the defence that has been put forward by the 1st defendant that the plaintiff's suit raises several

issues which should go to trial such as, whether the 1st defendant had agreed to the assignment to the plaintiff of the tenancy agreement that it had with Hezron Miyungo, whether the 1st defendant had agreed to grant to the plaintiff a fresh lease over the suit property for ten (10) years, whether the monies that had been paid by the plaintiff to the 1st defendant were on account of rent due by the plaintiff to the 1st defendant for the suit property or the rent that was due by Hezron Miyungo to the 1st defendant, whether there was a valid lease between the plaintiff and the 1st defendant and whether the subsequent lease between the plaintiff and the 2nd defendant in respect of the suit property is valid.

13. I don't think that the plaintiff's claim herein as against the 2nd defendant can be said to be pretenceless or absolutely groundless. The 2nd defendant has contended that the only relief sought against it in the plaint is a permanent injunction. This contention is not correct. The plaintiff has sought four main reliefs against the defendants in its plaint the particulars of which I have set hereinabove. The 2nd defendant has contended further that the said injunctive relief sought against it by the plaintiff was compromised by the parties when the plaintiff withdrew its application for temporary injunction by consent. Again, I find this contention legally and factually flawed. According to the court record, when the plaintiff's application for temporary injunction came up for hearing on 11th November 2014, the plaintiff's advocate Mr. Ochoki informed the court that he had been instructed by the plaintiff to withdraw the application so that he can concentrate on the main suit. The reason he gave for the withdrawal of the said application was that it would save the court's time to do so. Mr. Ochwang'i and Mr. Luseno who appeared for the 1st and 2nd defendants respectively consented to the withdrawal subject to the payment of the costs of the application. The order that was made by the court on that day was on the following terms:-

“The application dated 30th June 2014 is marked as withdrawn with costs to the defendants”.

14. From what I have set out above, I wonder where the 2nd defendant has obtained this idea of “compromise”. There was no compromise at all with regard to any of the reliefs sought herein by the plaintiff and none can be inferred from the withdrawal of the said application for temporary injunction. The whole argument by the 2nd defendant about the plaintiff electing to withdraw the application for temporary injunction and the consequences flowing therefrom to me are misplaced. The authorities that were cited by the 2nd defendant in support by his election and compromise arguments aforesaid were totally irrelevant. I am of the view that if the 2nd defendant is serious about its contention that the suit herein as against it has been compromised, the 2nd defendant should have brought an application for judgment to be entered in its favour under Order 25 rule 5 of the Civil Procedure Rules rather than moving the court under Order 2 rule 15 of the Civil Procedure rules.

15. In conclusion, it is my finding that the plaintiff's claim herein as against the 2nd defendant has not been compromised and that this suit is not an abuse of the process of the court. This is therefore not an appropriate suit to dismiss summarily without a hearing. The 2nd defendant's application dated 26th November 2014 is for the foregoing reasons not for granting. The same is accordingly dismissed with costs to the plaintiff.

Delivered, Dated and Signed at Kisii this 17th day of July, 2015.

S.OKONG'O

JUDGE

In the presence of:

N/A

for the plaintiffs

Sankale h/b for Oguttu Mboya for the defendants

Milcent Maore Court Assistant

S.OKONG'O

JUDGE