



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1331 OF 2014

NJOKI CHEGE	1ST
PLAINTIFF	
DANSON N. MUKURURO.....	2ND
PLAINTIFF	
RUTH KAREITHI.....	3RD
PLAINTIFF	
ANTHONY MAINA MUHORO.....	4TH
PLAINTIFF	
CHARLES MUHIA.....	5TH
PLAINTIFF	
JOHN N. WAITHAKA.....	6TH
PLAINTIFF	
WHITE SKY INVESTMENT LTD.....	7TH
PLAINTIFF	
MAGI HOLDINGS LTD.....	8TH
PLAINTIFF	
MICRO-DOT ENGINEERING.....	9TH
PLAINTIFF	
VERSUS	
DAVIDMBURUGIBSON	
NELSON MWANGI BOTH T/ A NEMKA COMMERCIAL AGENCIES.....	1ST
DEFENDANT	
NATIONAL SOCIAL SECURITY FUND (NSSF).....	2ND

DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 11th November 2014 in which the 2nd Defendant/Applicant seeks for orders striking out the Plaint dated 14th October 2014 in so far as the 2nd Defendant is concerned and that the Plaintiffs do bear the costs of this Application.

The Application is premised on the following grounds:

1. That the Plaintiffs are precluded under the doctrine of privity of contract from seeking the enforcement of the sale agreement between the 2nd Defendant and the 1st Defendant or suing on its terms as they were not parties to that contract.
2. That the Plaint as drawn does not disclose any actionable cause against the 2nd Defendant as guided by the doctrine of privity of contract between the Plaintiffs and the 1st Defendant.
3. That the Plaintiffs' cause of action and/or relief, if any, lies solely between the Plaintiffs and the 1st Defendant by virtue of the sale agreements entered therewith as guided by the doctrine of privity of contract and to this extent, the suit against the 2nd Defendant is frivolous, vexatious and an abuse of the court process.
4. That the Plaintiffs' suit as against the 1st Defendant, as guided by the doctrine of privity of contract, does not disclose any cause of action against the 2nd Defendant and to this extent, the suit is frivolous, vexatious and an abuse of the court process.

The Application is contested. The Plaintiffs filed the Replying Affidavit of Ochieng' Opiyo, the Advocate on record for the Plaintiffs, sworn on 24th March 2015 in which he averred that emerging jurisprudence declines to rely on the strict interpretation of the doctrine of privity of contract in matters similar to this suit and that the court deserves to hear whether the suit is meritorious. He added that striking out of a suit is an extreme measure which this court will only exercise after it has been convinced that the suit sought to be dismissed lacks any legal standing or raises no triable issues.

The Plaintiffs and the 2nd Defendant/Applicant filed their written submissions.

According to the Plaint dated 14th October 2014, the Plaintiffs allege that the 1st Defendant entered into a Sale Agreement with the 2nd Defendant dated 17th May 2005 purchasing a portion of land measuring 20 acres which was to be hived out of L.R. No. 11895/24 belonging to the 2nd Defendant. Further, the Plaintiffs claimed that pursuant to that Sale Agreement, they purchased various plots measuring 50 x 100 emanating from the 1st Defendant's 20 acre portion of L.R. No. 11895/24.

It is the submission of the 2nd Defendant/Applicant that the sale agreement dated 17th May 2005 was strictly between the 2nd Defendant and the 1st Defendant, that the sale agreements upon which the Plaintiffs have founded this claim were signed between the Plaintiffs and the 1st Defendant without the knowledge or participation of the 2nd Defendant with the result that the Plaintiffs cannot enforce their sale agreements against the 2nd Defendant/Applicant. Further, the 2nd Defendant/Applicant submitted that there is no legal or contractual foundation for the claim for specific performance, demand for alternative land, liability for pecuniary damages stated and particularized by the Plaintiffs in Paragraph 22 of the Plaint as against the 2nd Defendant or indeed the claim for compensation as the 2nd Defendant was not aware of or privy to any contractual arrangements forming the basis of the claim against the 1st Defendant.

The issue I am called upon to determine is whether or not to strike out the Plaint as against the 2nd

Defendant/Applicant on the grounds enumerated earlier. The applicable law is to be found in **Order 2 Rule 15(1)** of the **Civil Procedure Rules, 2010** which states as follows:

“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;***
- 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.”

I have no doubt that this court has power at any stage of the proceedings, to strike out a pleading, including a plaint or defence. However, in what circumstances can the court properly exercise such power? In the case of **Sunday Principal Newspaper Limited [1961] 2 ALL E.R. 758**, the principles for striking out were expressed thus,

“It is established that the drastic remedy of striking out a pleading or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case. Indeed it has been conceded before us that the rule is applicable only in plain and obvious cases....”

In addition, the Court of Appeal in **Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** had this to say:

“A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial. It cannot be doubted that the court has inherent jurisdiction to dismiss that which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be unjustified merely because the story told in the pleadings was highly improbable, and one which was difficult to believe, could be proved... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail he will not be allowed to conduct a mini trial upon affidavits.. It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that is decisive. ... the issue had nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the court or is unarguable... No suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously disclosed no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”

The question whether or not there was privity of contract between the Plaintiffs and the 2nd Defendant is an issue that the court will determine after conducting the full trial of this suit. Further, the Plaintiffs claim portions of the 2nd Defendant’s parcel of land being L.R. No. 11895/24. The court will determine whether the Plaintiffs are indeed entitled to those portions at the main trial. This is not an issue that can be determined by way of an interlocutory application such as this one. Overall, I am not satisfied that this is a plain and obvious suit for the exercise of my inherent jurisdiction to strike out the Plaint as against the 2nd Defendant.

In the circumstances, this Application is hereby dismissed. Costs shall be in the cause.

DELIVERED AND SIGNED AT NAIROBI THIS 6TH DAY OF NOVEMBER 2015.

MARY M. GITUMBI

JUDGE