REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 337 OF 2010

ROSE WAMBUI KAMAU...…..…….……1st PLAINTIFF

JUDY WAIRIMU KAMAU……..……2nd PLAINTIFF

JULIUS KARUGA MACHARIA……...……3rd PLAINTIFF

VERSUS

CECILIA MOU CHARLES HARRIS…….....……DEFENDANT

RULING

1. Before me is the Defendant's application dated 20th July, 2015. The application seeks the following prayers :-

> ***"This application seeks a mandatory /permanent injunction to the Plaintiff's aversion to accepting the ruling made on 20/11/2013, which struck out the participation of the 2nd Defendant and that of the Memorandum of Understanding (MOU), the contract which the Plaintiff cleaves on, so as to restore the Defendant's status quo in the case."***

2. The said application is supported by the affidavit of the defendant sworn on the same date. As I have understood the grounds and the lengthy averments in the affidavit, the instant application was premised on the fact that following the decision of the court to strike out the case against Victor Karume as the 2nd Defendant through a ruling dated 20thNovember, 2013, by **Havelock J**, there was need for the Plaintiffs to amend their Amended Plaint to reflect that position. It was the disposition of the Defendant that the Plaintiffs' cause of action is based on the contract and damages in which the Plaintiff relied on an MOU. That **Havelock J** in the ruling dates 20thNovember, 2013 found that the MOU was null and void being neither the sale contract nor the Sale Agreement. It was therefore the Defendant's contention that the said MOU which was at the center of the dispute was null and void and therefore the court should not allow the Plaintiffs to rely on the same. She added that the said MOU was introduced in original plaint vide paragraph 7 of the same.

3. In view of the foregoing, it was the Defendant's prayer that following the ruling of **Havelock J**, the Plaintiffs should be compelled to strike out the issue with regard to the MOU since the same was not valid.

4. In her oral submissions during the hearing of the application on 8th October, 2015, the Defendant

restated the contents of her affidavit. She also argued that the MOU in question was secretly signed and that she was not a party to the same. That as such, she was being dragged into trial. That therefore she was seeking an injunction to stop the Plaintiffs from bothering her.

5. The defendant also pointed out that she had severally requested the Plaintiffs' advocates to drop the MOU issue, but her arguments and requests were in vain. She therefore urged the court to allow her application and grant the orders sought.

6. In opposing the application, the Plaintiff's filed grounds of opposition dated 7th October, 2015. It was contended that the application before the court is misconceived, bad in law and was an abuse of the court process. According to the Plaintiff the application was incompetent as it offends the mandatory provisions of section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya. That as such, the application was done with the sole intention of delaying the matter and the Defendant had not demonstrated that she had any reasonable grounds to warrant the orders sought.

7. Mr. Odoyo, Learned Counsel for the Plaintiffs submitted that the Defendant, through her application dated 5th November, 2014 seeking to strike out the Plaint, had brought similar arguments with regard to the MOU to court. He reiterated that the said application was dismissed through a ruling by Gikonyo J on 27th April, 2015.

8. It was also the argument of Mr. Odoyo that in dismissing the aforesaid application, the court reasoned that the issue on the legitimacy of the MOU was a question for trial. That since the validity of the MOU is being raised in the current application, the same is res judicata under section 7 of the Civil Procedure Act and the court cannot therefore determine the issue at this point. The Plaintiffs consequently urged the court to dismiss the application, and deliberate the matter during the trial of the case.

9. Having considered all the arguments by parties, affidavit evidence as well as the pleadings and the applicable law, I take the following view of the matter. I note that the instant application is brought under order 40 rule 2, Order 25, Order 2 rule 5 (15) . It is important to note that the application herein is set in an omnibus fashion as the Defendant attempts to get different orders.

10. On one hand she seeks injunctive relief under order 40, while on the other hand she seeks the striking out of parts of the Plaintiffs' amended Plain. It is essential to note that the court frowns on such kinds of applications. In the case of **PYARALAL MHAND BHERU RAJPUT vs BARCLAYS BANK AND OTHERS Civil Case No. 38 of 2004** stated as follows;

> ***"There is no doubt the application is an all-cure, omnibus application. It is a wide net cast over a large body of water, and out of all the lake or sea, creatures caught in it, there will be one or two edible crabs or fish. It is not quite so. An omnibus application is incapable of proper adjudication by the court for each of the reliefs sought apart from being governed by different rules, is also subject to long established and different judicial principles which counsel need to bring to the attention of, and the court needs to consider before granting the entire relief sought. This alone makes the plaintiff's application incurably defective, and a candidate for striking out."***

11. From the foregoing case it is clear that the application before this court is a prime candidate for striking out. Be that as it may, I am still of the view that though the instant application may not be the epitome of elegant drafting, the Court still has the discretion to examine the arguments brought forth by Defendant. After all, I note that she is a layperson and acting in person, and may not be well versed with the rules of drafting pleadings. I shall therefore look at the merits of the application.

12. First, the Defendant has sought an injunction against the Plaintiffs'. The arguments in support of this prayer seems to be hinged on the alleged fact that the Plaintiffs have centered their claim on a memorandum of understanding dated 17th July, 2009 which was drawn up by Victor Karume and signed by him and the 1st and 2nd Plaintiffs. That given the findings of the Havelock J in his decision dated on

20th November, 2013, the Plaintiffs reliance on the same should not be allowed by the court, and the court should therefore injunct them from doing so.

13. I am of the view that the same is a curious prayer, unheard of in law. One cannot injunct a Plaintiff from pleading its case as the Defendant purports to do. Any issue raised by the Plaintiff, should be examined in the main trail no matter how hopeless it seems.

14. Furthermore, the Defendant has not demonstrated that she is entitled to an injunction using the principles laid in the case of **Giella vs. Casman Brown Limited (1973) EA 358** that is , that she is likely to prevail on the merits (prima facie case with probability of success); that she will suffer imminent irreparable harm if the injunction is not granted which cannot adequately be compensated in damages and that the harm she is likely to suffer absent the injunction outweighs the harm it would cause to the adverse party (balance of convenience). As such, I am of the view that an injunction cannot issue in this circumstances.

15. I now turn to the issue with regard to striking out on the paragraph of the Amended Plaint with regard to the MOU. Order 2 Rule 15(1) (a) of the Civil Procedure Rules. The rule 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. ***it discloses no reasonable cause of action or defence in law;***

16. When a party approaches the court under Order 2 Rule 15(1) (a) of the Civil Procedure Rules, he submits himself to the legal restriction provided in rule 15(2) thereof which states that no evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made.

17. Bearing this in mind, I note that the issue raised by the Defendant was with regard to the validity or otherwise of the concerned MOU. The same is a concise ground that does not necessarily call for evidence. According to the Defendant, Havelock J in his ruling dated 20th November, 2013 made pronouncements to the effect that the MOU is not legitimate. That in the foregoing, as I understand it, the Plaintiffs should not be allowed to rely on the same.

18. I have read the concerned paragraph in the aforesaid ruling. In paragraph 13 at page 22 off the ruling, the Honourable Judge expressed himself as follows ;-

> ***"13…….The Plaintiffs made a lot of the Memorandum of understanding dated 17th July, 2009. It appears that this document was drawn up by the 2nd Defendant and indeed signed by him as well (I presume), by Mr. Mugucia on behalf of the 1st and 2nd Plaintiffs. There is no mention of the 3rd Plaintiff. I am unimpressed by the this document and in view of the clause in the Agreement for sale dated 9th September, 2009 superseding and cancelling all previous negotiations and agreements such is extremely dubious evidence of the 2nd Defendant's participation in the contract for the sale and purchase of the 1st Defendant's property" (emphasis mine)***

19. From the abovementioned paragraph, it is obvious that the ruling of Havelock J did not touch on the validity of the MOU as such. He only stated that the same was not enough evidence to show that Victor Karume, who was the 2nd Defendant then, was liable to the Plaintiffs under the sale agreement that is the subject matter of this case. Indeed the Honourable Judge, found that there was no cause of action against the said Victor Karume. From the foregoing, I do not agree with the submissions of the Defendant that there were firm findings as to the validity of the MOU. The pronouncement was only restricted to the involvement of Victor Karume. Whether or not the same was binding on the Defendant is a question for trial.

20. I have seen the ruling of Gikonyo J on the application by the Defendant dated 5th November, 2014. The issue on the validity of the MOU had also been raised in that application which sought for the striking out of the Original Plaint. In dismissing the application, the learned Judge asserted that there were bona fide triable issues contained in the Amended Plaint and the same should be allowed to proceed on trial for a determination of their merits. I therefore agree with the averment of Mr. Odoyo, that the said issue under section 7 of the Civil Procedure Act Cap 21 cannot be raised again which provides that ;-

> ***"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

21. From the above, it is clear that the law prohibits a party from reopening a subject matter that had been the subject of a previous determination. The essence of the doctrine of res judicata is that a party should not be vexed twice over the same cause and to bring an end to litigation.

22. Essentially, it is my view that the application before the court lacks merit and the same is dismissed with costs to Plaintiff/ Respondent. The matter should proceed on trial on in accordance to the directions given by Gikonyo J in his ruling dated 27th April, 2015.

Dated, signed and delivered in court at Nairobi this 6thday of November, 2015.

……

C. KARIUKI

JUDGE