



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 216 OF 2011

KIMURI HOUSING COMPANY LIMITED.....PLAINTIFF

VERSUS

JULIUS NGWIRIKA RUHIU1ST DEFENDANT

JR INVESTMENTS LIMITED2ND DEFENDANT

RULING

The Plaintiff in a Notice of Motion dated 8th April 2013 has sought orders from this court that the 1st and 2nd Defendant's defence dated the 27th July 2011 be struck out with costs on the grounds that it is frivolous, and is intended to delay the fair trial of the suit and is otherwise an abuse of the process of the court.

The Plaintiff in a supporting affidavit sworn by his Advocate, Michael Kamau Kinga, on 8th April 2013 states that after the Plaintiff instituted this suit against the Defendants and obtained orders for injunction, the Defendants subsequently filed HCC ELC No. 240 of 2011 in respect of the same suit property. The Plaintiff further states that the Defendants herein have filed an affidavit in HCC ELC No. 240 of 2011 to withdraw the claim against all the other defendants therein, except the second defendant therein whom they claim sold the suit property to him fraudulently.

The Plaintiff attached a copy of the said Defendant's application, supporting affidavit and amended plaint filed in HCC ELC No. 240 of 2011 on 31st January 2013. The Plaintiff claims that the Defendants herein therefore have no valid defence to the Plaintiff's claim and that it is in the interests of justice that the defence filed be struck out.

The Defendants did not respond to the Plaintiff's Notice of Motion and the court directed the Plaintiff to file written submissions. The Plaintiff's counsel in submissions dated 17th October 2013 argued that the Defendants have not filed any replying affidavit and the Plaintiff's application is therefore unopposed. He also relied on the decisions of the Court of Appeal in **Faraj Maharus vs J.B Martin Glass Industries & 3 Others, Mombasa Civil Appeal No. 130 of 2003** and in **Margaret Mumbi Kagiri Wamairwe & 3 Others, Nyeri Civil Appeal No. 181 of 2002** for the position that the Defendants' claim was so weak that it was beyond redemption. He submitted that in view of the admissions in the Defendants' affidavit, the Plaintiff's claim should be allowed save for the claim of general damages which the Plaintiff has abandoned.

I have carefully considered the Plaintiff's Notice of Motion, together with the evidence and submissions made by the Plaintiff's counsel. The issue for determination is whether the Defence filed herein by the

1st and 2nd Defendants should be struck out for reasons that it is frivolous and an abuse of the process of court. The Plaintiff's Notice of Motion is brought under the provisions of Order 2 Rule 15 (1) (b),(c) and (d) of the Civil Procedure Rules which provides as follows:

(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; 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. "

It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 at p. 9 by Madan, J.A.as follows:-

"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. 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."

The overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. I have perused the Notice of Motion dated 21st November 2012 filed by the 2nd Defendant herein in ELC No. 240 of 2011 on 31st January 2013. It is evident from the pleadings filed by the said Defendant in ELC No. 240 of 2011 and by the Plaintiff herein that there are two titles in existence with respect to the same property. The 2nd Defendant herein was issued with a title to a parcel of land known as LR. THIKA MUNICIPALITY BLOCK 12/286, which the Plaintiff herein claims is LR No. 4953/2342 and has a title thereof. The Plaintiff in its Amended Plaint filed herein dated 3rd June 2011 is seeking a declaration that they are the owners of the said land and an injunction against the Defendants.

The 1st and 2nd Defendant in their Defence filed herein dated 27th July 2011 aver that the 2nd Defendant has a valid title to the said property. The issue of which party's title is the valid title is clearly a triable issue which cannot be decided at this interlocutory stage without the benefit of further evidence. It is therefore the finding of this Court that the 1st and 2nd Defendants' Defence merits adjudication by this Court. In addition the 1st Defendant herein is not a party to HCC ELC No. 240 of 2011, and while the 2nd Defendant has sought to amend its Plaint in HCC ELC No. 240 of 2011, none of the said Defendants have amended their Defence filed herein and their averments therefore still remains on record and should be considered.

The Plaintiff's Notice of Motion dated 8th April 2013 is therefore hereby denied for the reasons given in the foregoing. The costs of the Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 5th day of March, 2014.

P. NYAMWEYA

JUDGE