



NO.128

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIROMENT & LAND COURT CASE NO. 75 OF 2012

PETER M.NYAMBANE.....1ST PLAINTIFF
OTWORI NYABETA.....2ND PLAINTIFF
MESHACK OMBATI..... 3RD PLAINTIFF

VERSUS

JOSIAH ORINA NYABICHA.....1ST DEFENDANT
OSANO NYAMWEYA.....2ND DEFENDANT
EZRA NYARANGO MACHUKI.....3RD DEFENDANT
CHARLES KABA ONGERE.....4TH DEFENDANT
KIANGOSO TRADING COMPANY LTD 5TH DEFENDANT

RULING

1. The Plaintiff brought this suit against the defendants on 27th February, 2012 seeking among other reliefs, a declaration that the sale and/or transfer of the parcel of land known as LR. No. KISII TOWN/ BLOCK III/ 129 (hereinafter referred to as “**the suit property**”) was null and void, an order directing the Registrar of titles to cancel the registration of the suit property in the name of the 4th defendant and a permanent injunction

E&LCC.NO.75 OF 2012

NO.128

restraining the defendants from interfering with and/or selling and/ or charging and/or transferring and/or dealing with the suit property in any manner whatsoever. The Plaintiffs have described themselves in the plaint as vice-chairman, committee member and shareholder of the 5th defendant respectively. The 1st, 2nd and 3rd defendants are described in the plaint as chairman, director and secretary of the 5th defendant respectively. The 4th defendant has no relationship with either the Plaintiffs or the other defendants in this suit. The 5th defendant is a limited liability company in

which the Plaintiffs and the 1st, 2nd and 3rd defendants are officials as aforesaid. The Plaintiffs' claim against the defendants is that at all material times, the 5th defendant was the registered proprietor of the suit property and that sometimes in the year 2011, the 1st, 2nd and 3rd defendants without any authority and/or consent of the Plaintiffs and/or the members and/or shareholders of the 5th defendant caused the suit property to be unlawfully sold and

E&LCC.NO.75 OF 2012

NO.128

transferred to the 4th defendant together with all the developments thereon. The Plaintiffs claim that as a result of the said unlawful sale of the suit property, the Plaintiffs and/or members and/or shareholders of the 5th defendant have been deprived of the user of and income from the suit property which amounts to Ksh.46,900.00 per month. The Plaintiffs have therefore suffered considerable loss and damage for which they hold the defendants jointly and severally liable. The Plaintiffs claim that the sale of the suit property by the 1st, 2nd and 3rd defendants to the 4th defendant was irregular and unlawful since the committee members and shareholders of the 5th defendant did not pass a resolution sanctioning the same. It is on account of the foregoing reasons that this suit has been brought.

2. The 5th defendant filed a statement of defence on 23rd April, 2012 denying the Plaintiffs' claim in its entirety. The 5th defendant contended that the suit property was sold to the 4th

E&LCC.NO.75 OF 2012

NO.128

defendant lawfully at a consideration of Ksh. 21,000,000.00 and that all the necessary resolutions were passed by the 5th defendant's shareholders and committee members approving the said sale. The 5th defendant contended that the Plaintiff's suit discloses no cause of action. The 4th defendant filed its statement of defence on 13th April, 2012. The 4th defendant also denied the Plaintiffs' claim and contended that the Plaintiffs who are neither directors nor shareholders of the 5th defendant have no *locus standi* to bring this suit. The 4th defendant contended that he lawfully purchased the suit property from the 5th defendant and is the registered proprietor of the same. The 4th defendant contended that during the sale of the suit property, he dealt with the 5th defendant through its lawful representatives in good faith and without any notice of internal disagreements within the 5th defendant and as an innocent third party; his rights are protected by the law. On their part, the 1st, 2nd and 3rd defendants filed a joint statement of defence

E&LCC.NO.75 OF 2012

NO.128

on 25th April, 2012 in which they also denied the Plaintiffs' claim in its entirety. The 1st, 2nd and 3rd defendants denied any irregularity or illegality in the sale of the suit property to the 4th defendant and maintained that the transaction was approved by the shareholders of the 5th defendant. The 1st, 2nd and 3rd defendants contended that after the completion of the sale transaction the 5th defendant passed a resolution approving a payment of a sum of Ksh. 396,000.00 per share to each shareholder from the proceeds of the sale and that the Plaintiffs were beneficiaries of the said pay out. The 1st, 2nd and 3rd defendants denied that the Plaintiffs or the 5th defendant has suffered any loss or damage as claimed by the Plaintiffs. The 1st, 2nd and 3rd defendants also contended that the Plaintiff's suit discloses no or any reasonable cause of action against the defendants.

3. On 20th March, 2013, the 4th defendant filed an application by way of Notice of Motion of the same date seeking an order that

E&LCC.NO.75 OF 2012

NO.128

this suit be struck out as against the 4th defendant on the ground that it discloses no or any reasonable cause of action against the 4th defendant and in the alternative, on the ground that the suit as against the 4th defendant is vexatious and amounts to an abuse of the process of the court. The 4th defendant's application was brought under Order 2 rule 15 and Order 51 rule 1 of the Civil Procedure Rules and sections 1A and 3A of the Civil Procedure Act. It is this application which is the subject of this ruling. The application was brought on the grounds set out in the body thereof and in the supporting affidavit of the 4th defendant sworn on 20th March, 2013. The Plaintiffs filed neither grounds of opposition nor replying affidavit in opposition to the application. The 5th defendant filed an affidavit sworn by Joseph Momanyi Aunga on 24th May, 2013 in support of the 4th defendant's application. In the grounds set out in the body of the application and in the supporting affidavit, the 4th defendant contended that the cause of action

E&LCC.NO.75 OF 2012

NO.128

on the basis of which this suit has been brought rests with the 5th defendant and as such the Plaintiffs in their personal capacities have no cause of action against the 4th defendant with whom they had no personal dealings. The 4th defendant contended further that the issues brought out in this suit are internal disagreements within the 5th defendant which can only be resolved by the 5th defendant through meetings provided for in its memorandum and articles of association. In the circumstances, the 4th defendant contended that the court has no jurisdiction to determine the issues raised in this suit. The 4th defendant contended that the Plaintiffs' claim herein could only be pursued through a derivative action for which the Plaintiffs did not seek leave. The 4th defendant contended that he purchased the suit property lawfully. In his affidavit in support of the 4th defendant's application, Joseph Momanyi Aunga, advocate who acted for the 5th defendant in the sale transaction and who is appearing for the 5th defendant in this

E&LCC.NO.75 OF 2012

NO.128

suit set out in detail how the sale transaction of the suit property between the 5th defendant and 4th defendant took place from the beginning to the end. He annexed to his affidavit copies of the resolution that was passed by the 5th defendant's special management committee to sell the suit property to one of the 5 potential purchasers who had been identified one of which was the 4th defendant, the agreement for sale between the 5th defendant and the 4th defendant dated 28th July, 2011, a letter dated 1st August, 2011 from his firm notifying the 5th defendant of the sale of the suit property to the 4th defendant at Ksh. 21,000,000.00, a notice by the 5th defendant dated 4th August, 2011 convening a meeting of the shareholders of the 5th defendant to discuss the sale of the suit property, a resolution by the shareholders of the 5th defendant in a meeting held on 9th August, 2011 to pay Ksh. 396,000.00 per share to each shareholder out of the sale proceeds of the suit property and a list containing the names of the shareholders of the 5th

E&LCC.NO.75 OF 2012

NO.128

defendant who received the payment. Joseph Momanyi Aunga maintained that the sale of the suit property by the 5th defendant to the 4th defendant was done legally and procedurally and that the Plaintiffs participated fully in the transaction and even got their share of the sale proceeds.

4. The application came up for hearing on 27th May, 2013 when Mr. Ochoki appeared for the Plaintiffs/Respondents, the 1st and 2nd defendants appeared in person, Mr. Bosire appeared for the 3rd defendant, Mr. Nyanchoga appeared for the 4th defendant/applicant and Mr. Momanyi appeared for the 5th defendant. In his submission, Mr. Nyanchoga reiterated the contents of the 4th defendant's affidavit in support of the application and submitted that the Plaintiffs' complaint in this suit is with respect to wrongs allegedly committed against the 5th defendant and that the prayers sought are for the benefit of the 5th defendant and not the Plaintiffs. Counsel submitted that the Plaintiffs are non-suited because the suit property with

E&LCC.NO.75 OF 2012

NO.128

respect to which this suit has been brought was owned by the 5th defendant and not by the Plaintiffs and as such the Plaintiffs have no business bringing this suit against the 4th defendant for a wrong allegedly done to the 5th defendant. Mr. Nyanchoga cited several authorities to support his submission that shareholders of a limited liability have no right to sue for wrongs committed against the company save in exceptional circumstances but even in such circumstances leave of the court must be obtained. I will refer to these cases later in this ruling. Mr. Bosire advocate for the 3rd defendant associated himself with the submissions of Mr. Nyanchoga and submitted that the Plaintiffs are busy bodies who had no business at all bringing this suit. On his part Mr. Momanyi relied entirely on the contents of his affidavit mentioned above and submitted that the 4th defendant's application is well merited. The 1st and 2nd defendants opposed the application. The 1st defendant submitted that the 4th defendant is a necessary party in these

E&LCC.NO.75 OF 2012

NO.128

proceedings and should not be struck off the case. The 2nd defendant submitted that he is a stranger to the 4th defendant and that as far as he was concerned the suit property should have been sold for Ksh. 36,000,000.00 and not Ksh. 21,000,000.00 only. He contended that the 4th defendant should remain a party to the suit. Although the Plaintiffs who are the main respondents in the present application did not file any affidavit in reply to the application, in view of the seriousness of the orders sought, I allowed the Plaintiff's advocate Mr. Ochoki to address the court nevertheless. Mr. Ochoki submitted that the orders sought by the 4th defendant call for the exercise of the court's discretion. Mr. Ochoki submitted that the orders sought if granted would lead to the removal from the case of a very important party to the proceedings and as such the Plaintiffs would be denied an opportunity to pursue their claim as against the party. In the circumstances, counsel submitted that the court should exercise its discretion in the matter with a

E&LCC.NO.75 OF 2012

NO.128

lot of restraint. In his response to the submissions by the 1st and 2nd defendants Mr.Nyanchoga submitted that the affidavit sworn by Mr. Momanyi made it very clear that the purchase price for the suit property was Ksh. 21,000,000.00 and not Ksh. 36,000,000.00 as claimed by the 2nd defendant.

5. I have considered the 4th defendant's application, the submissions that were made in support thereof and the submissions in opposition thereto. This is my view of the matter. The Plaintiff's application has been brought as I have stated above under Order 2 rule 15 of the Civil Procedure Rules 2010. The rule gives the court the discretion to strike out any pleading at any stage of the proceedings on the grounds among others, that it discloses no reasonable cause of action or defence or that it is scandalous, frivolous and vexatious. Striking out a suit as against a defendant is a very drastic action. It denies the Plaintiff(s) who had joined such a defendant to the suit the remedy it had sought against such a

E&LCC.NO.75 OF 2012

NO.128

defendant before the hearing of the case. In view of the draconian nature of this remedy, it has been held that the court's power to strike out pleadings should be exercised with great caution and only in clearest of cases. See the case of, **Chatte vs. National Bank of Kenya Ltd. Civil Appeal No. 50 of 1996**. See also the case of, **D.T.Dobie & Company (K) Ltd. vs. Joseph Mbaria Muchira & Another, Civil Appeal No. 37 of 1978(unreported)**, where Madan J.A stated as follows regarding the exercise of this 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."** Is the Plaintiff's case as against the 4th defendant so hopeless that it plainly and obviously discloses no reasonable cause of action and so weak to be beyond redemption by amendment? That is the question that I need to answer. Since the order sought is discretionary, I also need to

E&LCC.NO.75 OF 2012

NO.128

consider whether the 4th defendant deserves the exercise of this court's discretion. The Plaintiffs in this suit are shareholders of the 5th defendant. The 5th defendant was at all material times the registered proprietor of the suit property until it was transferred to the 4th defendant. The Plaintiffs' complaint in this suit is that the suit property was unlawfully, fraudulently and irregularly sold to the 4th defendant by the 1st, 2nd, and 3rd defendants who are also shareholders and officials of the 5th defendant. The Plaintiffs have claimed that as a result of the irregular sale of the suit property, the Plaintiffs and other shareholders of the 5th defendant have suffered loss and damage. I am fully in agreement with the submission by the advocate of the 4th defendant that the cause of action that could arise from the wrongs if any that is alleged to have been committed by the defendants herein in relation to the suit property could only accrue to the 5th defendant and not to the Plaintiffs. The Plaintiffs are mere shareholders of the 5th

E&LCC.NO.75 OF 2012

NO.128

defendant. The law is settled that shareholders of a limited liability company have no proprietary interest in the assets of the company. Only the 5th defendant could suffer loss and damage as a result of wrongful disposal of its asset. The Plaintiffs could not suffer any individual personal losses. See the case of, **Burland vs. Earle (1902) 71 LJPC 1** cited in the case of **Sultan Hasham Lalji & 3 Others vs. Ahmed Hasham Lalji & 4 Others, Nairobi HCCC No. 189 of 1998**, that was cited by

Mr.Nyanchoga herein in which it was stated as follows, **“It is an elementary principle of the law relating to joint stock companies that the court will not interfere with the internal management of companies acting within their powers and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company, or to recover monies or damages alleged to be due to the company, the action should prima facie be brought by the company itself.”** In the case of, **Stein vs. Blake and others (1998) 1 All ER 724** also cited in the **Sultan Hasham**

E&LCC.NO.75 OF 2012

NO.128

Lalji case cited above, it was held that, **“loss sustained by a shareholder by the diminution of the value of his share by reason of the misappropriation of the company’s assets was a loss recoverable only by the company and not by the shareholder, who had suffered no loss distinct from that suffered by the company.”** The rationale behind the forgoing principles is that the court is not supposed to interfere with the internal management of companies. The Plaintiffs have brought this suit on the ground that the Plaintiffs and the other shareholders of the 5th defendant have suffered loss and damage as a result of fraudulent and irregular sale of the 5th defendant’s asset namely, the suit property. As set out in the authorities cited above, the Plaintiffs being the shareholders of the 5th defendant have suffered no loss. The loss if any has been suffered by the 5th defendant and it is only the 5th defendant who can maintain an action against the defendants herein who are alleged to have participated in the alleged fraudulent sale. The Plaintiffs could

E&LCC.NO.75 OF 2012

NO.128

of course bring a suit on behalf of the company with respect to the loss suffered by the company. This is only possible if the suit was brought by the Plaintiffs as minority shareholders and leave has been obtained from the court to bring such suit as a derivative action. That is not the case herein. It is clear therefore from the foregoing that the Plaintiffs have no valid cause of action against the 4th defendant. The Plaintiffs’ suit as against the 4th defendant would therefore be liable all things being equal to be struck out as plainly and obviously disclosing no reasonable cause of action.

6. As I have stated above, the remedy of striking out a pleading is not granted as of right. It is a discretionary remedy. It follows that even where a party has met the conditions that justify the striking out of a pleading, the court can still having regard to the circumstances of the case decline to grant the order. This case has been brought on the ground that the suit property was sold fraudulently and irregularly to the 4th defendant. The

E&LCC.NO.75 OF 2012

NO.128

Plaintiffs claim that the 5th defendant and its shareholders were defrauded. In their witness statements filed in this suit, the Plaintiffs claim that the shareholders of the 5th defendant had resolved to sell the suit property. Thereafter, they called for interested buyers. Out of several interested buyers, they shortlisted four who had offered to pay between Ksh. 20 million to Ksh. 25 Million for the suit property. The shareholders of the 5th defendant then resolved to sell the suit property to the highest bidder whose name was to be forwarded to the 5th defendant’s advocates for approval after which the matter was to be discussed by the 5th defendant’s management committee before a final decision was made. The Plaintiffs’ have claimed that before the 5th defendant’s management committee could meet to conclusively deliberate on the matter, it came to the attention

of the Plaintiffs that the suit property had been sold to one, **Edward Mainga Kagora** who was not even shortlisted among the interested buyers for **Ksh. 36,000,000.00**. Before the

E&LCC.NO.75 OF 2012

NO.128

dust settled on the sale of the suit property to the said Edward Mainga Kagora, the Plaintiffs learnt that the suit property had been sold once again to the 4th defendant herein at Ksh. 10,000,000.00. The Plaintiffs claim that the 1st, 2nd and 3rd defendants have not disclosed the actual amount they realized from the sale of the suit property. The 1st and 2nd defendants filed in court on 21st January, 2013 a bundle of documents that throws a spanner in the works as far as the transaction relating to the sale of the suit property to the 4th defendant is concerned. They submitted to court, an agreement for sale between the 5th defendant and the said **Edward Mainga Kagora T/A D.C Foundation** dated 28th March, 2011. The Agreement was drawn by Momanyi Aunga & Co. Advocates and the purchase price of the suit property was indicated as Ksh. 36,000,000.00 of which the vendor had already deposited a sum of Ksh. 11,000,000.00 in the 5th defendant's bank account. The balance of the purchase price was payable within 30 days

E&LCC.NO.75 OF 2012

NO.128

of the date of the execution of the agreement. The completion date of the agreement was given as 2nd May, 2011 when in exchange of the purchase price, the 5th defendant was to deliver to the purchaser, **Edward Mainga Kagora**, the certificate of lease duly registered in his name. The 1st and 2nd defendants also produced consent to transfer the suit property issued by the Land officer on behalf of the Commissioner of Lands dated 31st March, 2011 and consent from the Municipal Council of Kisii dated 8th March, 2011. This agreement was concluded by the registration of Edward Mainga Kagora as the proprietor of the suit property on 4th April, 2011. The 1st and 2nd defendants also produced a copy of a certificate of lease for the suit property in the name of Edward Mainga Kagora dated 4th April, 2011. The 4th defendant has maintained in these proceedings that he bought the suit property from the 5th defendant at Ksh. 21,000,000.00. I have looked at the agreement for sale between the 4th defendant and the 5th defendant. The same is dated 28th

E&LCC.NO.75 OF 2012

NO.128

July, 2011 and the same was made about 3 months after the suit property had been sold and transferred to Edward Mainga Kagora. The question that loudly begs for an answer is how did the 4th defendant purchase from the 5th defendant at Ksh. 21,000,000.00 a property that had already been sold and transferred to Edward Mainga Kagora for Ksh. 36,000,000.00? It is instructive to note that none of the parties herein annexed a copy of the instrument of transfer of the suit property from the 5th defendant to the 4th defendant to their affidavits in support of the present application. It is this instrument of transfer that would have revealed from whom the 4th defendant purchased the suit property. An extract of the register of the suit property would have also served the same purpose but even that has not been exhibited or produced by either party. The affidavit of Joseph Momanyi Aunga has not helped at all in answering these questions. He has annexed to his affidavit a copy of the agreement for sale between the 4th and 5th

E&LCC.NO.75 OF 2012

NO.128

defendants but without the accompanying instrument of transfer. He has also not mentioned the agreement that he is said to have prepared between the 5th defendant and Edward Mainga Kagora to whom the same property was sold and transferred at a consideration of Ksh. 36,000,000.00 and in which he is said to have acted for both the 5th defendant and the said Edward Mainga Kagora. From the foregoing, I am of the view that the circumstances under which the 4th defendant got registered as the owner of the suit property are not certain. Although I have held hereinabove that the Plaintiffs seems to have no cause of action against the 4th defendant, I am of the view that it would not be in the interest of justice to release the 4th defendant from these proceedings at this stage. I am of the view that the presence of the 4th defendant in these proceedings is necessary to enable the court to arrive at a just determination of this case.

7. In conclusion, it is my finding that the 4th defendant's

E&LCC.NO.75 OF 2012

NO.128

application has merit. I am however convinced from the circumstances of this case that the 4th defendant is a necessary party to these proceedings whose presence in this suit is required to enable the court to effectually and conclusively determine all the issues in dispute in this suit. Due to the foregoing, I am unable to allow the 4th defendant's application dated 20th March, 2013. The same is hereby dismissed. The costs shall be in the cause.

Dated, signed and delivered at KISII this 7th day of October, 2013.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Bigogo holding brief for Bichanga for plaintiffs

1st defendant present in person.

2nd defendant present in person.

Mr. Bosire for the 3rd defendant

Mr. Otieno holding brief for Nyanchoga for the 4th defendant

Mr. Bosire holding brief for Momanyi for the 5th defendant

Mobisa Court Clerk.

S. OKONG'O,

JUDGE.

E&LCC.NO.75 OF 2012