



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO. 107 OF 2017**

**PATRICIA MUSUNGU SHABAN.....PLAINTIFF**

**VERSUS**

**1. MOHAMED SHAABAN**

**2. DAMIANI NTHAMBI**

**3. DESINGH SWERD**

**4. DESMOND PATRICK MAINA**

**5. PAWAN KUMAR.....DEFENDANTS**

**RULING**

1. The plaintiff/applicant filed a Notice of Motion dated 17<sup>th</sup> July 2018 under Order 2 Rule 15 (1)(a) and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act praying that the 1<sup>st</sup> Defendant's defence dated 24<sup>th</sup> April 2018 the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant's joint defence dated 19<sup>th</sup> June, 2017 and the 5<sup>th</sup> Defendant's defence be struck out and judgment be entered for the Plaintiff as against the Defendants as prayed in the plaint.

2. The application is supported by the affidavit of Patricia Musungu Shaaban sworn on 17<sup>th</sup> July 2018 and is based on the grounds on the face of the motion. It is the Plaintiff's contention that the Defendants' defence on record do not disclose any reasonable defence and that it is in the interest of justice that the same be struck out and judgment entered for the Plaintiff as prayed in the plaint.

3. The Plaintiff avers that she filed **HCCC No. 1088 of 2006** against the 1<sup>st</sup> Defendant which suit was consolidated with **HCCC No. 163 of 2016** (formerly **SRMCC No.159 of 2006**) and allocated **Case No. HCCC No. 3 of 2014 (O.S.)** claiming a portion of her matrimonial property in **TITLE NO.KWALE/DIANI BEACH/BLOCK/172** which was heard and determined by Justice Mugure Thande on 8<sup>th</sup> February 2016 in which judgment was entered in favour of the Plaintiff and an order issued declaring the land matrimonial property and that the same should be divided equally between the Plaintiff and the 1<sup>st</sup> Defendant herein. That there was no appeal against the said order and therefore the same cannot be revisited. The Plaintiff further avers that during the pendency of **HCCC No.3 of 2014 (O.S.)**, the 1<sup>st</sup> Defendant subdivided and transferred the Suit Property to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants. It is the Plaintiff's contention that the said transfer was an affront to the doctrine of lis pendens and in contravention of Section 52 of the Transfer of Property Act 1882 of India that was governing the land regime at the time this suit was filed. It is therefore the Plaintiff's contention that the defences on record do not disclose any reasonable defence and it is in the interest of justice that the said defences be struck out and judgment entered for the Plaintiff as prayed.

4. The Application is opposed by the Defendants. The 5<sup>th</sup> Defendant filed a Replying Affidavit sworn on 11<sup>th</sup> October, 2018 in which she depones inter alia that she bought the property **KWALE/DIANI BEACH BLOCK/1362** from the 1<sup>st</sup> Defendant in good faith and for a consideration of Khss.7,000,000/= vide an agreement dated 4<sup>th</sup> July 2013. That at the time of purchase, the 1<sup>st</sup> Defendant was the sole registered owner of the property and the property was transferred to the 5<sup>th</sup> Defendant who was issued with a certificate of lease dated 8<sup>th</sup> July 2013 and thereafter the 5<sup>th</sup> Defendant developed it. It is the 5<sup>th</sup> Defendant's case that her defence cannot be struck out as it raises a plausible defence and issues which have to be determined at the trial. The 5<sup>th</sup> Defendant urged the court to dismiss the application with costs.

5. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants opposed the application through a replying affidavit sworn by *Dissing Svend* on 25<sup>th</sup> October, 2018. They aver that their defence raises triable and bona fide issues including whether the property **KWALE/DIANI BEACH/1359** was matrimonial property which was subject to division in the judgment in **HCCC NO.3 of 2014 (OS)**, and therefore the suit should proceed to full hearing.

6. The application was canvassed by way of written submissions. The applicant filed her submissions on 11<sup>th</sup> December, 2018, while the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed theirs on 18<sup>th</sup> January 2019 and the 5<sup>th</sup> Defendant filed hers on 22<sup>nd</sup> February, 2019. The 1<sup>st</sup> Defendant filed his submissions on 12<sup>th</sup> February, 2019.

7. I have considered the application. The principles which guide the courts in determining an application for striking out pleadings are well settled. In the case of **DT. Dobie & Company Kenya Limited –v- Muchina (1982)KLR 1**, Madan JA stated as follows:

***“i) The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.***

***ii) The court should aim at sustaining rather than terminating suit. A suit should only be struck out if it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”***

8. In the case of **Henkel Polymer Co. Ltd & 2 Others (2004)eKLR**, Ojwang, J (as he then was )after analyzing several authorities stated as follows:

***“From the foregoing review of authorities, it is clear that only very sparingly will any application for the striking out of a statement of defence be entertained..... The decision to strike out a defence should not be based on the unlikely success of the defence case.”***

9. I will apply this test in this application. I have considered the argument by the plaintiff that there was a civil suit **HCCC No. 3 of 2014 (OS)** in which judgment was entered that the property be divided between her and the 1<sup>st</sup> Defendant. The 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants in their respective defences allege that they purchased the suit properties from the 1<sup>st</sup> Defendant, and the 1<sup>st</sup> Defendant admits selling the properties to them. In the plaint, the plaintiff seeks *inter alia*, a declaration that the transfer to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants were illegal, null and void. I do not need to go into the merits of those issues. It suffices to state from the pleadings whether the issues are or are not triable issues in the sense of the law. I find that the defences on record raise triable issues and I sustain them.

10. Further, I note that the application is brought is brought under Order 2 Rule 15 (1)(a) of the Civil Procedure Rules which 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. ”**

**Order 2 Rule 15 (2) provides as follows:**

**“No evidence shall be admissible on an application under subrule(1) (a)**

**but the application shall state concisely the grounds on which it is made.**

11. In the present Application, the Applicant has annexed a supporting affidavit in support of the Application. In my view, this makes the Application incurably defective as it contravenes the clear provisions of Order 2 Rule 15 (2) of the Civil Procedure Rules which is couched in mandatory terms.

12. The upshot is that the Notice of Motion dated 17<sup>th</sup> July, 2018 is without merit and is hereby dismissed with costs.

**DATED, SIGNED and DELIVERED at MOMBASA this 20<sup>th</sup> day of May 2019.**

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**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Wafula for plaintiff

Mungai for 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants and holding brief for Ms. Oketch for 1<sup>st</sup> Defendant.

No appearance for 4<sup>th</sup> Defendant

Yumna Court Assistant

**C.K. YANO**

**JUDGE**