REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO. 39 OF 2019

DOPP INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

RULING

1. The Application for determination is the Notice of Motion dated 22nd May, 2019 by the Plaintiff/Applicant seeking orders that the 1st Defendant's statement of defence dated 26th March 2019 be struck out and judgment be entered for the Plaintiff in terms of prayers 3 and 4 of the Plaint. The Plaintiff abandoned prayer 3 of the Motion. The motion is brought under the provisions of Order 2 Rule 15 (1), (a), (b), (c) and (d), Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3 and 3A of the Civil Procedure Act and is premised on the following grounds:

> **1. The statement of defence discloses no reasonable cause of action or defence in law; that is, the 1st Defendant has no credible or reasonable defence disputing the monies owed as compensation, yet that is the core of the Plaintiff's gravamen, which has not been paid to date.**
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> **2. The statement of defence is scandalous, frivolous or vexatious; rather than engage the Plaintiff on its claim, the statement of defence alleges that:**
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> > **iii) The Plaintiff is exposed to 'a string of cases facing the Plaintiff's ownership of the Suit property'.**
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> > **iv) The 1st Defendant under Section 24 of the Kenya Railways Corporation Act Cap 397 to ensure that it conducts its business according to commercial principles and to perform its functions in such a manner as to secure that its gross revenue is not less than sufficient to meet its outgoings. Its pleadings is scandalous, frivolous and vexatious for reasons that:**
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> > > **iii. The Plaintiff has pleaded that the 1st Defendant was involved at each and every juncture of the several litigations, which were dismissed in favour of the Plaintiff, and supported the Plaintiff's right to the suit property in addition the Plaintiff's contention that none of the parties in those cases have appealed against the decisions.**
> > >
> > > **iv. The 2nd Defendant could not have compulsorily acquired property to undertake a project that it knew was not budgeted. This contention contradicts the 2nd Defendant's pleadings that it has a statutory duty to conducting its business according to commercial principles- the 2nd Defendant cannot be allowed to approbate and reprobate.**
>
> **3. It is otherwise an abuse of the process of the court.**
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> **4. The 1st Defendant has acted in breach of the constitutional law relating to sanctity of property and the constitutional principle of prompt payment of compensation through compulsory acquisition.**
>
> **5. That it is just and meet (sic) that this Application be allowed as prayed.**

2. The Application is supported by the affidavit of Harshil Patel sworn on 22nd May, 2019 in which he depones *inter alia* that the 2nd

Defendant conducted an inquiry into the acquisition and ownership of PLOT NO. MN/VI/1040/2 and in its determination dated 12th February 2016 found the Plaintiff as the rightful owners and based on the findings, the 2nd Defendant published Gazette Notice No. CXIX-NO.167 dated 10th November 2017 and issued orders for implementation. He depones after concluding inquiry into acquisition of the suit property, the 2nd Defendant vide an award dated 11th October 2017 awarded the Plaintiff the sum of Kshs.667,903,887/= which the Plaintiff accepted on 6th March, 2018. That on 3rd January 2019 the 2nd Defendant advised the 1st Defendant to make the requisite payment due and owing to the Plaintiff. The Plaintiff has annexed various correspondences and other relevant documents.

3. In opposing the Application, the 1st Defendant filed Grounds of Opposition dated 3rd June, 2019 stating that the Application is fatally defective and that its statement of defence discloses several triable issues including but not limited to the following:

a) Whether the 1st Defendant should be compelled to pay compensation to the Plaintiff notwithstanding the admitted string of cases that have been filed to challenge the Plaintiff's ownership of the suit property.

b) Whether the 1st Defendant has supported the Plaintiff's title in those cases and if so, the consequences of that support.

c) The legal effect, if any, of the suit property, in light of the pending court cases.

The 1st Defendant contends that it is in the interests of justice that the draconian step of striking out be rejected in favour of a hearing on the merits especially given the huge sums of money in contestation.

4. Mr. Agimba, learned counsel for the Plaintiff submitted that the 2nd Defendant settled the validity and credibility of the Plaintiff's suit property and found it worthy of acquisition. That under Article 67 of the Constitution, the 2nd Defendant is mandated to lead the process of inquiry and eventual determination of the said validity and credibility and it did that and confirmed the same and there was no objection by the 1st Defendant. He further submitted that all cases or proceedings brought against the Plaintiff have been dismissed in favour of the Plaintiff, adding that the 2nd Defendant was privy to those legal proceedings and in each instance, supported the Plaintiff's position. That previously, the Defendant had not indicated that those cases barred it from disbursing compensation to the Plaintiff. Mr. Agimba submitted that the 1st Defendant's defence is a sham, and it is prejudicing the Plaintiff by denying it its rightful dues and just compensation. He relied on the cases of **Kivanga Estates Limited –v- National Bank of Kenya Ltd (2017)eKLR; Margaret Njeri Mbugua –v- Kirk Mweya Nyaga (2016)eKLR** and **Ecobank Kenya Limited –v- Bobbin Limited & 2 Others (2014)eKLR.**

5. Mr. Kongere, learned counsel for the 1st Defendant submitted that the power to strike out should not be exercised lightly. It was his submission that the 1st Defendant does not need to succeed on the defence, but it is enough to show that there is a triable issue. He submitted that the 1st Defendant's defence raises numerous triable issues, adding that unless evidence is produced to show that the cases challenging the Plaintiff's title have been decided in the Plaintiff's favour, it would be reckless for the Defendants to pay the Plaintiff millions of public funds.

6. Mr. Mbuthia, learned counsel for the 2nd Defendant supported the Application and submitted that the 1st Defendant's defence consists of mere denials and does not address the real issues. He submitted that the 2nd Defendant has exercised its mandate under the law and what is left is for the 1st Defendant to avail the funds to pay the Plaintiff.

7. I have considered all the issues raised in the Application, the affidavit in support, the grounds of opposition, the rival submissions made and the authorities cited. The Application is brought under Order 2 Rule 15 of the Civil Procedure Rules. In the exercise of its power under Order 2 Rule 15, there are certain well established principles that a court of law must adhere to. Whereas the essence of the said provision is the striking out of a pleading, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit or defence tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon min-trial thereof before finding that a case or defence is otherwise an abuse of the court process.

8. In **Delphis Bank Limited –v- Caneland Limited (2014)eKLR**, the Court of Appeal outlined the cases dealing with Applications for striking out and summary judgment as follows:

"The leading local case on interpretation of Rule 13 of Order VI of the Civil Procedure Rules on which Application for striking out the defences was based is perhaps D.T. Dobie & Company (Kenya) Ltd –v- Muchina which counsel for the Appellant referred to us. In the case, Madan, JA, as he then was, opined in an Obiter dictum that;

The power to strike out should be exercised only after the court has considered all the 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 the fair trial and would restrict the freedom of the trial judge in disposing of the case.

In Kenindia Assurance Co. Ltd –v- Commercial Bank of Africa Ltd & 2 Others (Nbi CA Civil Appeal No.11 of 2000) this court (differently constituted) stated;

'The law on summary judgment procedure is now well settled. This is a procedure to be resorted to in the clearest of cases. In Dhanjal Investments Ltd –v- Shabaha Investment Ltd Civil Appeal No.232 of 1997, (unreported) this court stated,

> **'The law on summary judgment procedure has been settled for so many years now. It was held as early as 1952 in the case of Kandulal Restaurant –v- Devshi & Co (1952) EACA 77 and followed by the Court of Appeal for Eastern African in the case of Sonza Figuerido & Co Ltd –v- Mooring Hotel Limited (1952)EA 425 that if the Defendant shows a bona fide triable issue he must be allowed to defend without conditions… "**

9. In **D. T. Dobie & Company (K)Ltd –v- Muchina (supra)** Madan JA, further expressed himself thus:

> ***"As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case, through discovery and oral evidence, it should be used sparingly and cautiously**. "*

10. The overriding objective therefore to be considered in an Application for striking out pleading is whether it raises any triable issues. If a pleading raises a triable issue even if at the end of the day it may not succeed, then the suit ought to go to trial.

11. In this case the court is urged to strike out the 1st Defendant's statement of defence and judgment be entered for the Plaintiff in the sum of Kshs.667,903,887/= being just compensation awarded to the Plaintiff for the acquisitions of its property. I have perused the 1st Defendant's statement of defence. In my view, the said defence raises triable issues. One of the triable issues is whether or not there are still pending cases contesting the ownership of the suit property. The 1st Defendant has pleaded inter alia that it cannot make payment to the Plaintiff because the Plaintiff is exposed to string of cases over the Plaintiff's ownership of the property that was acquired by the Defendants. Whereas the Plaintiff avers that all those cases have been decided in its favour, in my view evidence is necessary to establish that contested fact.

12. Taking all the circumstances of this case into consideration, and being guided by the above decisions, I am not satisfied that the justice of the case will be attained by striking out the 1st Defendant's defence. Whereas I agree that the form of hearing does not necessarily connote adducing oral evidence and that in appropriate cases hearing may take the form of affidavit evidence, to determine a suit by way of affidavit evidence ought to be resorted to in clear and plain cases. I am not satisfied that the present case can be termed as clear and plain.

13. The upshot is that the Notice of Motion dated 22nd May 2019 is without merit and is dismissed. Considering the circumstances of this case, I order that each party bear their own costs.

DATED, SIGNED and DELIVERED at MOMBASA this 31st day of July 2019.

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C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Gitari holding brief for Agimba for Plaintiff

Kongere for 1st Defendant

Mbuthia for 2nd Defendant

Esther Court Assistant

C.K. YANO

JUDGE