



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 442 OF 2017

THOMAS SCHIERING.....PLAINTIFF

VERSUS

NEREAH MICHAEL SAID.....1ST DEFENDANT

GERHARD HEIDUK.....2ND DEFENDANT

WOLFGANG GEROG JOHANN EHGARTNER..... 3RD DEFENDANT

RULING

1. By a Notice of Motion dated 30th April 2018 made pursuant to Order 2 Rule 15(1)(a), (b) & (d) and Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act, the 1st Defendant seeks Orders that the Plaintiff and the Notice of Motion both dated 31st October 2017 and filed on 7th December, 2017 be struck out with costs. The Application is premised on the grounds:

a. That the Plaintiff has admitted that:

i. The 1st Defendant got the property from a limited liability company known as Rising Eagle Limited.

ii. At all times material to this case the 1st Defendant was the registered owner of property known as KWALE/KINONDO/755.

iii. The process of transfer from Rising Eagle to the 1st Defendant has not been impeached.

iv. The property known as KWALE/KINONDO/2460 was duly registered in the name of the 1st Defendant prior to the transfer to the 2nd and 3rd Defendants.

b. That the plaintiff never transferred the property KWALE/KINONDO/755 to the 1st Defendant as it was then in the name of Rising Eagle Limited, a limited liability company.

c. That the plaintiff purports to indirectly act on behalf of Rising Eagle Limited contrary to the principle that a company is distinct entity from its shareholders and directors.

d. That the plaintiff lacks *locus standi* to challenge the sale of property known as KWALE/KINONDO/2460 as the same was transferred by the 1st Defendant the registered owner to the 2nd and 3rd Defendants.

e. That the Environment and Land Court lacks jurisdiction to handle the disputes related to electricity pursuant to the provisions of the Energy Act No.12 of the 2012.

f. That the whole suit is scandalous and an attempt by the Plaintiff to embarrass the 1st Defendant.

g. That the plaintiff is abusing the court process by making frivolous claims which contravene the laws of Kenya.

h. That it is just and fair that the orders sought herein be granted as prayed.

2. The Application is supported by the affidavit of Nereah Michael Said, the Applicant sworn on 30th April 2018, and further affidavit sworn on 28th January 2019. The Applicant avers that she got the property from Rising Eagle Limited in 2012, a fact she argues is not disputed by the Plaintiff. That the Plaintiff has misrepresented to the court that he is the legal, registered and/or beneficial owner of the property known as **KWALE/KINONGO/755** or its sub-divisions. Relying on advise, the Applicant states that the Plaintiff's interests, if any, got extinguished in 2009 when he sold the same to Rising Eagle Limited. That the Plaintiff has not explained the capacity in which he alleges he was entitled to the value of property **KWALE/KINONDO/2460**. It is the Applicants contention that the Plaintiff has no *locus standi* to proceed with this case as it is an attempt to sue indirectly on behalf of Rising Eagle Limited, adding that the Plaintiff's request that the names of the 2nd and 3rd Defendants be deleted from the register of property **KWALE/KINONDO/2460** means that it will revert back to the Applicant thus the Plaintiff is invoking the court's jurisdiction in vain.

3. The 2nd and 3rd Defendants filed a Notice of Motion of Preliminary Objection dated 30th April 2018 also seeking the dismissal of the suit on the grounds that the Plaintiff lacks *locus standi* to commence and/or proceed with the suit; that the Plaintiff is indirectly suing on behalf of Rising Eagle Limited contrary to the principles in **George Musila Mbiti, Reuben Mutuma Ngumi & 72 Others –v- Tropical Farm Management Kenya Ltd & 4 Others (2010)eKLR**, and that this court lacks jurisdiction to handle the matter as the dispute is a preserve of the Energy Regulatory Commission pursuant to the Energy Act No.12 of 2012.

4. The Application is opposed by the Plaintiff through a replying affidavit sworn by himself on 18th September, 2018 in which he depones inter alia that the transfer to the said company and subsequently to the 1st Defendant was due to misrepresentation on the part of the 1st Defendant. That the 1st Defendant never paid any consideration for the alleged purchase of **PLOT KWALE/KINONDO/755** or its subdivisions and that the transfer was merely in good faith and based on trust that the 1st Defendant would hold the property in trust for the Plaintiff. The Plaintiff avers that the 1st Defendant deregistered the company Rising Eagle Limited in which they were the only directors in 2016 without the Plaintiff's knowledge and/or consent, hence the company no longer exists. The Plaintiff further avers that he has been in active and sole possession of the suit property all this while to the exclusion of the Defendants. The Plaintiff states that he is entitled to the proceeds of the sale of **PLOT KWALE/KINONDO/2460** as the owner and that the 1st Defendant was to get a commission of 12% of the purchase price. The Plaintiff avers that he has instituted the suit on his own behalf since he, and not the company, is the aggrieved party.

5. Mr. Abidha, learned counsel for the Defendants submitted that the Plaintiff did not have capacity to file and does not have capacity to proceed with the suit. He relied on the case **Christopher Michael Lockkley-v- Juletabi African Adventures Limited & 2 Others (2013) eKLR**, that the suit property was transferred by the Plaintiff and one Fricke Meike to Rising Eagle Limited who in turn transferred it to the 1st Defendant. Counsel submitted that the Plaintiff cannot claim on behalf of the company. He also relied on the case of **George Musila Mbiti, Reuben Mutuma Ngumi & 72 Others –v Tropical Farm Management Kenya Ltd & 4 Others (supra)**.

6. Ms. Mugoya, learned counsel for the Plaintiff submitted that the Plaintiff has not brought the suit on behalf of the company but is claiming his own interest in the suit property. Counsel also relied on the case of **Juletabi African Adventures Limited and Another –v- Christopher Michael Lockkley (2017) eKLR**.

7. I have considered the Application and the Notice of Preliminary Objection, the affidavits in support and against, the rival submissions and the case law cited by the parties. The issue of jurisdiction was determined by this court vide the ruling dated 23rd January 2019. Therefore, the only issue left for determination is whether the Plaintiff's suit should be struck out or not.

8. 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 tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a mini-trial thereof before finding that a case is otherwise an abuse of the court process.

9. In the case of **DT Dobie & Company (Kenya) Limited –v- Muchina (1982) KLR**, Madan JA stated:

“...The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merit 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. The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is beyond redemption and incredible by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”

That court further expressed itself 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 a 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 Plaintiff's suit on the grounds inter alia, that the Plaintiff lacks *locus standi* to challenge the sale of the suit property which was in the name of a limited liability company in which the plaintiff was a director. I have perused the Plaintiff's pleadings. The Plaintiff has pleaded inter alia, that in good faith and before subdivision of the property, he transferred it to the 1st Defendant in trust to hold and deal in the property on behalf of the Plaintiff. The Plaintiff has pleaded trust against the 1st Defendant. In my view, the said Plaintiff raises triable issues. One of the triable issues is whether or not there was any trust between the plaintiff and the 1st Defendant as pleaded.

Whereas the Defendants have submitted that the Plaintiff has brought the suit on behalf of Rising Eagle Limited, the Plaintiff maintains that he has brought the suit for his own interest and not for the company. In my view, evidence is necessary to established these contested facts.

12. Taking all the circumstances of this case into consideration, and being guided by the decisions referred to hereinabove, I am not satisfied that the justice of the case will be attained by striking out the Plaintiff's suit. 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 30th April 2018 is without merit and is dismissed with costs.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 16th day of September 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Mugoya for Plaintiff

Abidha for Defendant

Yumna Court Assistant

C.K. YANO

JUDGE