



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 406B OF 2014

JOYCE NYABOKE OKARA.....PLAINTIFF

VERSUS

CHARLES NYAMUNGA TAI1ST DEFENDANT

LAND REGISTRAR, NYAMIRA COUNTY.....2ND DEFENDANT

R U L I N G

1. The plaintiff commenced the instant suit by way of plaint dated 23rd October 2014 filed in court on the same date. The plaintiff’s claim was that she had purchased property from the 1st defendant but that the 1st defendant had failed and/or refused to surrender the original title to the 2nd defendant to facilitate the processing of title to **LR No. West Mugirango/Siamani/7595** a resultant subdivision out of **LR No. West Mugirango/Siamani/7386** in favour of the plaintiff. The plaintiff in the plaint sought the following substantive prayer:-

(i) An order directing the 2nd Defendant to dispense with both the delayance of the 1st defendant to surrender original title No. West Mugirango/Siamani/7386 as well as irregular caution lodged against the said title and proceed to process the documents and issue the plaintiff with her title deed No. West Mugirango/Siamani/7595.

(ii)

(iii)

2. Simultaneously with the plaint, the plaintiff filed a Notice of Motion application where she sought the following orders;

1. That the Honourable court be pleased to grant an order directing the land registrar to dispense with his requirement that the 1st Respondent surrenders the original title deed No. West Mugirango/Siamani/7386 and proceed to process and issue the applicant’s title deed No. West Mugirango/Siamani/7595.

2. That, the Honourable court be pleased to vacate and dispense with irregular caution lodged against title deed No. West Mugirango/Siamani/7386 and 7595 for having been overtaken by events and proceed to issue the applicant’s title deed.

3. The defendant in a replying affidavit sworn in response to the plaintiff’s application denied ever

entering into any agreement to sell land parcel **West Mugirango/Siamani/7386** to the plaintiff. The 1st defendant deposed that he was coerced to sign some agreement when he was under arrest at Nyamira Police Station on allegations of obtaining money from the plaintiff. He denied ever signing the application for land board consent stating that the signatures attributed to him were forgeries. The 1st defendant further filed a statement of defence dated 27th November 2015 where he denied all the allegations against him set out in the plaint and put the plaintiff to strict proof.

4. The court on 14th October 2015 considered the plaintiff's application and rendered itself thus:-

“The issues in this matter are highly in contention. The 1st defendant is disputing sale to the plaintiff of the suit property and he states he holds the original title but will not surrender it since he did not sell the land as alleged by the plaintiff. He states the execution of the transfer was under duress. The issues in contention in my view cannot be disposed off on affidavit evidence and viva voce evidence would be necessary. The application by the plaintiff seeks final orders so that if the same are granted the suit would be disposed off.

I do not think this is a suitable matter to dispose the suit on an interlocutory application and accordingly decline to grant the plaintiff's application.

I direct that the 1st defendant files his defence within the next 15 days and the parties make compliance with Order 11 Civil Procedure Rules within the next 60 days and thereafter the matter be fixed for pretrial directions, costs of application in the cause. Status quo to be maintained.”

5. I have given the foregoing background in this matter to contextualize the plaintiff's Notice of Motion application dated 20th July 2017 which is the subject of this ruling. The Notice of Motion is expressed to be brought under Sections 1A, 1B and 63(e) of the Civil Procedure Act and Orders 2 Rule 15, 13 and Article 159(2)(c) of the Constitution and seeks the following orders inter alia:-

1. That the court be pleased to strike out the 1st defendant's replying affidavit dated 2nd June 2015 and defence dated 27th November 2015 for being fatally defective, bad in law and an abuse to the court process and enter summary judgment in favour of the plaintiff as against the 1st defendant as prayed in the plaint.

2. That the 1st defendant be condemned to pay the costs of this application and the suit.

6. The application was supported on the annexed affidavit, dated 19th July 2017 sworn by Samson Mauti Sagwe advocate for the plaintiff/applicant. The advocate deposes that the 1st defendant's defence is just a mere denial and raises no triable issue and the same ought to be struck out and judgment entered in favour of the plaintiff. He further deposes that the 1st defendant having executed all the necessary documents to effectuate the transfer to the plaintiff, he effectively ceded all rights over the suit property, the subject of the transfer to the plaintiff and therefore cannot have any defence to the present action.

7. The 1st defendant filed a replying affidavit in opposition to the plaintiff's application dated 18th September 2017. He deposed that the application was incompetent, frivolous and vexatious and was an abuse of the process of the court. He averred that his defence raises triable issues that necessitate the matter to proceed to full trial so that the issues may be interrogated. The 1st defendant further stated that he never entered into a sale agreement to sell a portion of land parcel **West Mugirango/7386** but for parcel **7384**. He further averred that the changes in the consent letter obtained were unlawful and that he objected to the same and was coerced to execute the resultant transfer while he was under arrest at Nyamira Police Station.

8. The parties argued the application by way of written submissions. I have reviewed the pleadings and

considered the parties filed written submissions and the single issue for the court to determine is whether there is a triable issue raised by the defendant's defence to warrant the court to allow the 1st defendant to defend the suit. In my earlier ruling on the interlocutory application, I declined to grant the orders sought in the application on the basis that there were contested issues that required to be subjected to a full trial where viva voce evidence would be adduced and tested under cross examination. The 1st defendant has vide his defence denied the several allegations leveled against him in the plaint by the plaintiff and has put the plaintiff to strict proof. The effect of the 1st defendant's denial though generalized is to join issue with the plaintiff in her averments which in a sense invites proof of those allegations.

9. The documents submitted by the plaintiff in support of her case invite scrutiny which can only be done at the trial. For instance, the sale agreement dated 10th May 2014 which the plaintiff relies upon indicates the property the subject of the sale to be **West Mugirango/ Siamani/7384**. The application for consent for subdivision to the Nyamira Township land control board also shows this to be the land in respect of which consent was sought. The area of this land as per the application is shown to be 2.35Ha. The mutation form attached is for land parcel **West Mugirango/Siamani/7386** and it shows this land to be 0.6Ha. This, no doubt invites the question whether the sale was in regard to parcel **7384** or **7386**. The letter of consent dated 8th May 2014 for subdivision clearly shows parcel **7384** was amended to read **7386**. The consent for transfer of parcel **West Mugirango/Siamani/ 7595** was also given on the same date (8th May 2014). Noting that the sale agreement was entered into on 10th May 2014 after the consents were allegedly given, there is necessity for the apparent anomalies to be explained. The only opportunity that would be available for the explanation would be at the trial.

10. In the Court of Appeal case of **D. T Dobie and Company (Kenya) Ltd -vs- Joseph Mbaria Muchina & Another [1980] eKLR** the court observed as follows:-

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross examination in the ordinary way.”

11. The court went on to state 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.”

12. Although the court made comments in relation to the striking out a suit in regard to a plaint, the same comments/observation would apply with equal force to an application to strike out a defence as in the instant case. The court, has before it can strike out a defence, on the basis that it discloses no reasonable defence to the plaintiff's claim, to satisfy itself that no triable issue arises. The court has to satisfy itself that the defence is so hopeless or weak that it would be a travesty of justice to allow the defendant to defend the suit and that not even amendment would salvage the defence. I am not able in the instant case, to hold there is no triable issue considering the discrepancies highlighted earlier in relation to the documents relied on by the plaintiff. The plaintiff's suit cannot be said to be plain and obvious incapable of being assailed by the defence set up by the 1st defendant.

13. Striking out the 1st defendant's pleading would be a draconian act that would effectively drive the 1st defendant from the seat of justice. I disallow the plaintiff/applicant's Notice of Motion dated 20th July 2017 and the same is dismissed with costs to the 1st defendant.

14. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 26TH DAY of JANUARY, 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Ayienda for Sagul for the plaintiff

N/A for the 1st and 2nd defendants

Ruth court assistan

J. M. MUTUNGI

JUDGE