REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC 404 OF 2016

PETER WAHOME KAMWENGA.....PLAINTIFF

-VS-

THOMAS AMANI KALAMA.....1ST DEFENDANT

HENRY PAUL MAGANGA.....2ND DEFENDANT

RULING

1. The 1st Defendant, Thomas Amani Kalama vide a Notice of Motion dated 4th April 2017 brought under Order 2 Rule 15(d) of the Civil Procedure Rules is seeking to strike out the Plaint dated 16th December 2016 by the Plaintiff, Peter Wahome Kamwenga. The 1st Defendant is also urging the Court to award him the costs of the Suit and of the Application.

2. The 1st Defendant's Application is premised on the grounds on the face of the Application and as further stated in the Supporting Affidavit sworn by the 1st Defendant on 4th April 2017. The 1st Defendant deposes among others that in paragraph 6 of the Plaint, the Plaintiff avers that he purchased the Suit Property from the 2nd Defendant on 6th January 2004 and that even though that averment is partially correct, the contract dated 6th January 2004 only transferred to the Plaintiff the rights under a purported lease dated 28th July 2002 between the 2nd Defendant and one Cyprian N. Mrintuara. The 1st Defendant alleges that the lease dated 28th July 2002 and the subsequent contract transferring it to the Plaintiff on 6th April 2004 are void *ab initio* and cannot form any basis of any suit known in law because the Suit Property was then registered in the name of Mr. Henry Maganga aka Henry Paul Maganga who is the father of the 2nd Defendant and who passed away on 8th October 1994 and the Grant of Letters of Administration intestate of his estate was granted to the 2nd Defendant jointly with Lucy Eva Maganga on 27th April 2011 and confirmed on 2nd July 2013. That in light of these facts, the alleged lease and sale by the 2nd Defendant in 2002 and 2004 respectively were therefore in violation of Section 45 of the Law of Succession Act and is void *ab initio* by virtue of Section 80(2) of the Law of Succession Act. It is also the 1st Defendant's contention that even if the sale was not void *ab initio* the contract dated 6th January 2004 was not witnessed and no suit can therefore be entertained on the basis of that contract in light of Section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya.

3. The Application is opposed by the Plaintiff/Respondent through a Replying Affidavit sworn by himself on 11th May 2017 in which he deposes *inter alia* that he is the beneficial owner of the disputed parcel of land which was leased to him by the 2nd Defendant upon paying a sum of Kshs.350,000.00 the original

lessee, Cyprian Ntuara Mrintuara with the express consent of the 2nd Defendant on 6th January 2004 and that the plot has been in his possession and use since then. He deposes that the 2nd Defendant did not reveal to him that he was not the owner of the plot and or that he had not obtained any Letters of Administration for the estate of his late father who bears the same name as that of the 2nd Defendant. It is the Plaintiff's contention that he is a purchaser for value without notice and that the Application lacks merit and mischievous as the 2nd Defendant has not stated that he did not have capacity to deal with the land at the time it was leased to the Plaintiff.

4. The Application was canvassed by way of Written Submission which were duly filed and exchanged by the 1st Defendant and the Plaintiff's Advocates. Both outlined the facts as contained in their pleadings and also cited various authorities.

5. The 1st Defendant submitted that the Suit offends the law as the property was registered in the name of a deceased person and the transactions that gave rise to the Plaintiff's interest in it were entered into before Letters of Administration were issued. He cited Sections 45 and 80 of the Law of Succession Act and relied in the case of **Peter Ombui Nyangoto –vs- Elizabeth Matundura & Another (2013)eKLR** in which the Court of Appeal held that such properties *"……would only be alienated or distributed after Letters of Administration…is obtained and the grant confirmed…."*. It was further stated that *"……the Respondent active consent in the transaction that ended in complete violation of the Law of Succession Act did not and cannot make that transaction legal. It remains illegal and all who participated and/or could have participated in such illegality would still have taken part in an illegal activity….."*

6. The 1st Defendant further submitted that the agreement of 2004 which the Plaintiff relies on was not attested as required by Section 3(3) of the Law of Contract Act. He relied on the case of **Jane Catherine K. Karani –vs- Daniel Mureithi Wachira (2014) eKLR** and **Nyeri Teachers Investment Company Ltd –vs- Solio Ranch Limited & Another (2015)eKLR**. Finally, the 1st Defendant submitted that equity cannot be invoked to sustain the Plaintiff's suit which is in breach of the law and cited the cases of **Kenya Ports Authority –vs- Fadhili Juma Kisuwa (2018)eKLR**, **Mapis Investment (K) Limited –vs- Kenya Railways Corporation (2006)eKLR, David Sironga Ole Tukai –vs – Francis Arap Muge & 2 Others (2014)eKLR** and **Rose Wakanyi Karanja & 3 Others –vs- Geoffrey Chege Kirundi & Another (2016) eKLR.**

7. In his opposing Submissions, it was submitted on behalf of the Plaintiff that there was no doubt that the names of the 2nd Defendant's father Henry Maganga aka Henry Paul Majaliwa Maganga is the same as that of the 2nd Defendant and that the 2nd Defendant has not pleaded in his defence and the Replying Affidavit that he did not have the capacity to deal with the Suit Plot nor has he denied ever transacting over the same. It was also submitted the 2nd Defendant has not denied being a beneficiary of the estate of his late father. It is the Plaintiff's contention that as a result of the 2nd Defendant's representations to the Plaintiff, the Plaintiff paid out the sum of Kshs.380,000 on 6th January 2004 to one Cyprian Ntuara Mrintuara for a portion of the disputed land. It is therefore the Plaintiff's argument that the Suit should be allowed to go to full hearing in order to establish the circumstances under which the 2nd Defendant caused the Plaintiff to enter into the transaction in which he paid out his monies. He further submits that he is a purchaser for value without notice from the original lessee and entitled to protection under Section 25 of the Land Registration Act. Relying on the case of **Twin Buffalo Safaris Limited –vs- Business Partners International Limited (2015)eKLR**, the Plaintiff urged the Court not to dismiss the case summarily.

8. The Plaintiff has also submitted that the 1st Defendant's Application should be dismissed as the title deed to the Suit Land exhibited by the 1st Defendant is suspect and could have been obtained through fraud as the same was issued on 12th November 2007 to Henry Paul Majaliwa Maganga which was 13 years after his demise and Letters of Administration were issued on 27th April 2011 and confirmed in the year 2013. It is also the Plaintiff's submissions that the 1st Defendant had no propriety interest in the Suit Land as the transaction through which he acquired it was only signed by two administrators and not

signed by the 2nd Defendant. He urged the Court to dismiss the 1st Defendant's Application and allow the Suit to go to full hearing.

9. I have considered all the issues raised in the Application, the Affidavits in support and against, the rival Submissions and the case law cited by the parties. As already indicated the Application is brought under Order 2 Rule 15(d) of the Civil Procedure Rules. In the exercise of its powers under the said provision 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 a mini-trial thereof before finding that a case or defence is otherwise an abuse of the process of the Court. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. 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. However where the suit is without substance or groundless or fanciful and/or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as a legitimate use of the process, the Court will not allow its process to be used as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fide with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the Court to allot appropriate share of the Court's resources while taking into account the need to allot resources to other cases.

10. In the case of **DT Dobie & Company Kenya Limited –vs- Muchina (1980)KLR** the Court of Appeal stated as follows:

> ***"…A cause of action is an act on the part of the Defendant, which gives the Plaintiff his cause of complaint….A pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The Court must see that the Plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments and must not dismiss an action merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved….it is not the practice in civil administration of the Courts to have preliminary hearing as in crime. If it involves parties in the trial of the action by affidavits it is not a plain and obvious case on its face…the summary jurisdiction is not intended to be exercised by minute and a protracted examination of the documents and the facts of the case in order to see whether the Plaintiff really has a cause of action. To do that is not usurp the position of the trial Judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to be an abuse of the inherent power of the Court and not a proper exercise of power… Whereas no evidence is permitted in the case of Order 6 Rule 13(1) (a), it is permitted in the case where there is an allegation that it is an abuse of the Court process…A Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal….If a suit shows a semblance of a cause of action, provided that it can be injected with real life by amendment, it ought to go forward to hearing for a Court of justice ought not act in darkness without the full facts before it.."***

In **Yaya Towers Limited –vs- Trade Bank Limited (in liquidation) Civil Appeal No.35 of 2000** the same Court expressed itself thus:

> "***A Plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the Defendant can demonstrate shortly and conclusively that the Plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial…. It cannot be doubted that the Court has inherent jurisdiction which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was***

highly improbable, and one, which was difficult to believe, could be proved… No suit should 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.."

11. Whereas the Court retains the jurisdiction to strike out pleadings in deserving cases, each case must be viewed on its own peculiar facts and circumstances. The law is that a statement of claim should not be struck out and the Plaintiff driven from the judgment seat unless the case is unarguable and where the hearing involves the parties in a trial of the action by affidavits, it is not plain and obvious case on its face. In this case the Court is urged to find that the lease transferring the Suit Property to the Plaintiff was void *ab initio* and cannot form the basis of the suit and that the contract being relied on was not witnessed as required by law. To do so, I am afraid, would amount to making a determination of this case based on affidavit evidence. I would have to make a finding that the Plaintiff's action is based on a lease that is void and a contract that is not witnessed. It must be noted that the Plaintiff's cause of action is based on a transaction he entered into with the 2nd Defendant and another person who is not a party to this suit, and not the 1st Defendant. Taking all the circumstances of this case into consideration I am not satisfied that the justice of the case will be attained by terminating this suit at this stage. Under Article 50 (1) of the Constitution, every person has the right to have any dispute that can be resolved by the Application of law decided in a fair and public hearing before a Court or if appropriate, another independent and impartial Tribunal or body. Under Article 25 that right cannot be limited. Whereas I agree that the form of a 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 only in clear and plain cases. I am not satisfied that the present case can be termed as clear and plain case.

12. The upshot is that the Notice of Motion dated 4th April 2017 is without merit and is dismissed with costs to the Plaintiff.

Delivered, signed and dated at Mombasa this 24TH day of January 2018.

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C. YANO

JUDGE