



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 119 OF 2014

ALUMARK INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

TOM OTIENO ANYANGO.....1ST DEFENDANT

GEORGE KARIUKI MOMANYI.....2ND DEFENDANT

PAUL NDEGWA NGATIA.....3RD DEFENDANT

HALIMA WANJIKU AZIZ.....4TH DEFENDANT

JOEL KIMUTAI BOSEK.....5TH DEFENDANT

RULING

1. There are two applications for determination before the court, both seeking orders striking out the suit. The first application is the Notice of Motion by the 1st, 2nd, 3rd and 4th defendants dated 29th January 2015 (1st application) seeking orders that the suit against them be struck out. The second application is the 5th defendant's Notice of Motion dated 30th January 2015 (the 2nd application") similarly seeking an order that the suit against the 5th defendant be struck out.

2. The grounds in support of the 1st application are detailed in an affidavit sworn by the 1st defendant on 30th January 2015 where the 1st-4th defendants contend that the orders sought in the plaint cannot stand because what used to be the suit property was subdivided into several plots and transferred by Ukulima Welfare Association (the association) to its members. The applicants contend that no reasonable cause of action has been disclosed against them and that in the amended plaint, the plaintiff has sought orders against the association yet the association is not party to this suit.

3. The application was canvassed by way of written submissions. Counsel for the applicants, in submissions dated 2nd June 2015 contended that the agreements subject matter of this suit were signed between the plaintiff and the officials of the association and that they had been wrongly sued since there was no privity of contract between them and the plaintiff. Counsel referred to Section 41(1) of the Societies Act and submitted that they cannot represent the society without authority.

4. The plaintiff opposed the application through an affidavit sworn by Joseah Kiplangat Kogo, the plaintiff's managing director, sworn on 2nd June 2015. The plaintiff opposed the application on the following main grounds:-

1. That there being no authority for the deponent to swear the affidavit on behalf of the 2nd,

3rd and 4th defendants, the application was defective and liable for striking out.

2. That a reasonable cause of action which raises triable issues had been established in that the transfer of Kajiado/Kitangela/2016(herein after the suit property) to the association was illegal, null and void.

3. That the defendants had been sued in their capacity as officials of the association which has no legal personality to be sued.

4. Lastly, that it has a right to access the court under Articles 48 and 50(1) and therefore required no leave to file this suit

5. The court was referred to the cases of **Agriculture Finance Corporation vs. Lengetia Ltd(1985) KLR 770**, **Muchendu vs. Wauta(2003)KLR** , **Alsafa Health Care Ltd vs. KAM Pharmacy & 2 others HCCC No. 261 of 2001**, **Mawji vs. International University & another (1976-1980)1KLR**, **Morgan vs. Stubenitisky, 1977) KLR 188**, **Kenya Airports Authority vs. Kiia(2012)eKLR**, **Aineah Liluyani Njirah vs. Aga Khan Health Services Civil Application no. 194 of 2009**, **Harlsbury's Laws of England, 4th and para 329 and Chitty on Contracts para 18-014** for the proposition that third parties cannot enforce contracts which only benefit them incidentally unless the contract expressly states that they may do so. Counsel submitted that the court cannot rewrite a contract for the parties as held in **National Bank of Kenya Ltd vs. Pipeplastic Sankolit(K) Ltd CA No. 95 of 1999**.

6. Counsel reiterated that the plaintiff had not established a cause of action against the applicants since the subject matter no longer exists, the same having been subdivided and sold to third parties. The applicants argued that the suit had been overtaken by events and that the court was being called to act in vain. Reliance was placed on the doctrine of estoppel and counsel submitted that the contract having been substantially performed, the plaintiff who waived his right to rescind the agreement was estopped from using the court to rescind the agreement. Lastly, the equity maxim to the effect that equity does not aid the indolent and delay defeats equity were relied upon and counsel submitted that the plaintiff who chose to sleep and waive its right to rescind the contract had filed this suit in abuse of the court process.

7. Counsel for the plaintiff filed submissions dated 24th June 2015. He referred to Order 1 Rule 13 of the Civil procedure Rules and relied on the case of **Kahindi Katana Mwango vs. Canon Assurance K Ltd (2013) eKLR**. He submitted that the application was fatally defective because no authority to depone on behalf of the 2nd, 3rd and 4th defendants had been annexed. The plaintiff also relied on the case of **Kennedy M. Kassamani vs. Khamisi Iddi Musungu & 2 others(2014)eKLR** for the submission that the application was fatally defective because it was premised on Order 2 rule 15 of the Civil procedure Rules which is not an omnibus provision and does not permit a party to base its application on sub rule 1(a)-(d). It was further submitted that no evidence was adduced in support of the grounds under Order 2 Rule 15 of the Civil Procedure Rules and reliance was placed on the case of **Luka Kipkorir Kigen vs. National Oil Corporation Ltd (2014)eKLR** and **Kennedy M. Kassamani vs. Khamisi Iddi Musungu & 2 others (supra)**

8. The 5th defendant application was argued by way of written submissions. The 5th defendant in submissions dated 14th July 2015 made reference to section 41 of the Societies Act and submitted that although it represented the plaintiff and the association in the sale and purchase agreement, he was never instructed to act for the plaintiff and 1st-4th defendants. The 5th defendant relied on **Harlsbury's Laws of England, 3rd Edn Vol 8** and submitted that he was a stranger to any sale agreement entered between the plaintiff and 1st-4th defendants and therefore, that the suit against him had no merit. Reliance was placed on the case of **Kamande vs. Vanguard Electrical Services Ltd** as cited in **Jane Wairimu Turanta vs. Githae Hohn Vickery & another(2013)eKLR** and it was argued that summary procedure was applicable in this case which was unsustainable since the parties sued were not privy to the contract and that the suit property had been subdivided and new titles issued to members who were not parties to this suit.

9. The plaintiff opposed the 5th defendant's application through a replying affidavit sworn by Joseah

Kiplangat Kogo on 2nd June 2015 in which he averred that the suit raised a reasonable cause of action since the transfer of the suit property was unprocedural, illegal, null and void. The plaintiff stated that the 5th defendant was the advocate for the vendor and purchaser and was therefore a necessary party who would explain to the court the procedures used in the process.

10. The plaintiff's submissions dated 24th June 2015 on the 5th defendant's application are a replica of its submissions on the 1st-4th defendants application which have already been outlined elsewhere.

Determination

11. The issue for determination is whether the suit herein should be struck out for failing to disclose a reasonable cause of action. Both applications have been brought under the provisions of order 2 rule 15 of the Civil Procedure Rules which provides as follows:-

“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; or

b) it is scandalous, frivolous or vexatious; or

c) it may prejudice, embarrass or delay the fair trial of the action; or

d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be. “

12. Order 2 Rule 15(2) of the Civil Procedure Rules provides that no evidence is admissible on an application under sub rule (1) (a) and therefore, it should be evident from the pleadings sought to be struck out that no reasonable cause of action has been disclosed without reference to further evidence.

13. It is settled law that the court's power to strike out pleadings is to be exercised sparingly and cautiously, because the court exercises the power without being fully informed on the merits of the case through discovery and oral evidence. This was the finding in the case of **D.T. Dobie & Company (Kenya) Ltd. vs. Muchina (1982)KLR 1 at p. 9** where it was stated 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.”

14. The overriding principle to be considered in an application for striking out a pleading therefore is, whether triable issues have been raised. In its amended plaint dated 28th April 2014, the plaintiff has sought, *inter alia*, an order invalidating and cancelling the subdivision of the suit property and in the alternative, an order canceling titles excised from the suit property. The plaintiff's case is that the agreement of sale entered between it and the association is unenforceable and secondly, that consent of the Land Control Board was not granted within 6 months of the execution of the agreement. In my view, these are triable issues which can only be determined at trial.

15. The 1st-4th defendants have been sued in their capacity as the officials of the association. This can be discerned from paragraph 2 of the Amended Plaint. It has been held that a society under the Societies Act is not a legal person with capacity to sue or be sued and that, as such, a society can only sue or be sued through its officials. See **Trustees Kenya Redeemed Church & Another v. Samuel M'Obuya (2011)eKLR**. The 1st-4th defendants have not denied that they are the office bearers of the association. They have therefore been properly sued on behalf of the association and their application to have the suit struck out is, in my view, devoid of merit.

16. In respect to the application by the 5th defendant, the plaintiff contended that he had been sued in his capacity as the advocate who represented it and the association in the sale and purchase of the subject matter of this suit. The plaintiff has however not sought any order against the 5th defendant. According to the plaintiff, the 5th defendant was a necessary party because he would explain to the court the procedures used in the transfer of the suit property. In my view, the 5th defendant can explain the procedures as a witness without necessarily being a party to this suit. Order 1 rule 3 provides for who may be joined as defendants as follows:-

“3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

17. In view of the fact that no prayer is sought against the 5th defendant, I do not find him to be a necessary party whose presence will enable the court to effectively and completely adjudicate upon and settle all the questions involved in the suit. In my view, the 5th defendant can properly be summoned as a witness at the instance of either party.

18. The upshot of this Ruling is that the Notice of Motion by the 1st-4th defendants dated 29/1/2015 is dismissed.

The Notice of Motion by the 5th Defendant dated 30/1/2015 is allowed as prayed.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 16TH DAY OF FEBRUARY 2018.

B M EBOSO

JUDGE

In the presence of:-

Gachuba Advocate for the Plaintiff

No appearance for the Defendant

Halima - Court clerk