



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 167 OF 2016

SZAREDO INVESTMENTS LIMITED..... PLAINTIFF

VERSUS

CHIEF LAND REGISTRAR 1ST DEFENDANT

MINISTRY OF LANDS, HOUSING

AND URBAN DEVELOPMENT 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

RULING

(Preliminary objection to the effect that suit should be struck out for noncompliance with provisions of Order 4 rule 1(4) of the Civil Procedure Rules 2010 to the extent that the deponent of the affidavit verifying the plaint has not exhibited any authority under seal to do so; though court found that no authority under seal was annexed, plaintiff given time to file and serve a fresh verifying affidavit which complies with Order 4 rule 1(4); in default suit to stand struck out)

1. This suit was commenced on 11th May 2016 pursuant to plaint dated the same date. The plaintiff seeks judgment against the defendants for:

- a) *Payment of the sum of KShs. 122,650,000.00 by the Defendants to the plaintiff for compensation for loss occasioned by rectification of the Register;*
- b) *Payment of special damages amounting to KShs. 4,138,566.00 being the total purchase price of the subject properties and Mesne profits paid to Josphat Muthui Mwangi by the plaintiff;*
- c) *Costs of this suit, and*
- d) *Any other or further relief that this honourable court may deem fit and just to grant in the circumstances.*

2. The defendants responded to the suit through statement of defence filed on 27th July 2017 and Notice of Preliminary Objection dated 23rd June 2017. The objection is stated in the following terms:

That the plaint as drafted and filed offends the mandatory provisions of Order 4 rule 1(4) and Order 4 Rule 1(6) of the Civil Procedure Rules

3 Parties agreed and it was ordered that the preliminary objection be argued by written submissions. In that regard, the defendants filed their submissions on 16th August 2017 while the plaintiff filed its submissions on 5th September 2017.

4. For the defendants it was submitted that the verifying affidavit to the plaint was sworn incompetently and therefore the plaint filed is fatally defective as it offends the mandatory provisions of Order 4 Rule 1(4) and (6) of the Civil Procedure Rules, 2010. The defendants added that the provisions of Order 4 Rule 1(4) and Order 4 Rule 1(6) are clear and are couched in mandatory terms and that the plaintiff provided no evidence to prove that the person who purported to swear the affidavit on their behalf had their authority under the company seal to do so.

5. Accordingly, the defendants submitted that the plaintiff's suit is incompetent and fatally defective and urged the court to strike it out with costs. The defendants cited the cases of **Bugerere Coffee Growers Ltd –vs- Sebduka (1970) EA 147, Bactlab Limited –vs- Bactlabs East Africa Limited & 5 others [2002] eKLR** and **Affordable Homes Africa Ltd –vs- Henderson & 2 others [2003] eKLR**.

6. For the plaintiff, it was submitted that there is no requirement under Order 4 Rule 1(4) of the Civil Procedure Rules for it to provide any proof, at the time of filing its suit, that the deponent of the verifying affidavit is authorized to swear the affidavit on behalf of the plaintiff and that an authority or a resolution can be filed at any time during the proceedings on condition that the same is filed before a suit is set for hearing. The plaintiff thus submitted that its suit is fully compliant with Order 4 Rule 1 (4) of the Civil Procedure Rules.

7. The plaintiff added that even if an authority or resolution was not filed, that does not warrant striking out a suit. The plaintiff cited among others the case of **Mulgold Limited vs Maimuna Abdullahi Mohamed & 5 others (2014) eKLR** and the case of **Defined Property Management Ltd & 11 others vs Hassan Said Omar & another [2015] eKLR**.

8. I have considered the preliminary objection, the submissions and the authorities cited. The defendants seek striking out of the suit. I bear in mind that striking out is a draconian remedy that should only be resorted to in the clearest of cases. I am alive to the wise counsel of Madan JA in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR** that:

A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

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.

9. In the present case, the reason advanced by the defendants for seeking striking out is that there is noncompliance with mandatory provisions of Order 4 rule 1(4) of the Civil Procedure Rules 2010 to the extent that the deponent of the affidavit verifying the plaint has not exhibited any authority under seal to do so and that the plaint is therefore for striking out under Order 4 rule 1 (6).

10. I have perused the plaint and the verifying affidavit sworn by Peter Szapary. The plaintiff describes itself as a limited liability company. Therefore, the deponent of the verifying affidavit was required to exhibit an authority under seal of the plaintiff company pursuant to Order 4 rule 1(4). I see no such authority annexed to the verifying affidavit and the deponent does not depose that he obtained an authority under seal.

11. Order 4 rule 1(4) states:

Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the

company duly authorized under the seal of the company to do so.

12. Order 4 rule 1(6) states:

The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.

13. Though the portion of the rule requiring filing of an authority under seal is couched in mandatory terms, the portion on consequences of noncompliance is not. The court therefore has discretion on whether or not to order striking out of any pleading that is non-compliant. In exercising that discretion, the court must be alive to its obligations under **Article 159 of the Constitution of Kenya, 2010** to see to it that justice is administered without undue regard to procedural technicalities. In that regard, I note that save for **Bactlab Limited –vs- Bactlabs East Africa Limited & 5 others [2002] eKLR**, all the authorities cited by the defendants pre-date Constitution of Kenya, 2010.

14. I do not consider that failure to exhibit an authority under seal should result, in the present dispensation, to striking out of a plaint or counterclaim in the first instance. The court should give the litigant a chance to comply with the rules. It is only after failure to comply that such drastic consequences as striking out should come into operation.

15. In the end, I make the following orders:

- a) The plaintiff shall within 30 (thirty) days from the date of delivery of this ruling, file and serve a fresh verifying affidavit which complies with Order 4 rule 1(4) of the Civil Procedure Rules, 2010.
- b) In default of compliance with (a) above, the suit shall stand struck out with costs to the defendants.
- c) Costs of this application are awarded to the defendants.

Dated, signed and delivered in open court at Nakuru this 15th day of February 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms. Nasimiyu holding brief for Mr. Njogu for the plaintiff

No appearance for the defendants

Court Assistants: Gichaba & Lotkomoi