



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO. 230 OF 2013

TOM OTIENO OMBOYA.....PLAINTIFF

VERSUS

ZUM ZAM INVESTMENT LTD.....1ST DEFENDANT

HABITAT AND HOUSING IN AFRICA

SHELTER AFRIQUE.....2ND DEFENDANT

PURITY ACHIENG OUKO.....3RD DEFENDANT

RULING

1. By a Notice of Motion dated 18th April, 2017 and amended on 21st June, 2017, made under Sections 1A and 3A of the Civil Procedure Act; Order 51 Rule 15, Order 2 Rule 15(1) (b) and (d) of the Civil Procedure Rules, the 3rd Defendant/Applicant seeks orders;-

a) Spent

b) That this Honourable court be pleased to set aside the injunctive orders of 4th June, 2014 extant herein for having been obtained irregularly and/or in abuse of the court process.

c) That the Court do set aside all other proceedings as against the 3rd Defendant and the Defendant be allowed to file defence as per copy exhibited.

d) That the suit filed herein against the 3rd Defendant/Applicant be struck out with costs as being frivolous, vexatious and or an abuse of the court process.

e) That the costs of this application be proved for.

2. The application is premised on the grounds on the face of the Motion and as further stated in the supporting affidavit of Purity Achieng Ouko, the 1st Defendant sworn on 11th April, 2017. Briefly, the Applicant states that she has never been served with the pleadings and summons herein. She further states that the affidavits of service filed on record be speaking service upon her of various documents relative to the suit including summons to enter appearance contain falsehoods. The 3rd Defendant denies having a residence or a place of abode in Kiembeni, Mombasa nor does she know the person referred to as Kilo in the affidavit of 1.11.2013. She further states that in May, 2014, she was in Germany and only returned to Kenya on 29.2.2016, and therefore any alleged service on her on 31st May, 2014, 4.3.2015 and 6.10.15 are false. The 3rd Defendant avers that the orders extant in these proceedings were fraudulently obtained, a nullity and ought to be set aside.

3. The 3rd Defendant states that she has a defence on merits which ought to be allowed to see the light of day and added that she has never been privy to an agreement for the sale of land between herself and the Plaintiff nor has she received any money to that end.

4. The 3rd Defendant avers that she is the registered proprietor of the property known as Plot No.7446/Section II/MN Mombasa and that sometime in the year 2016 she entered into an agreement for sale of the property to one Michael Okach Omondi and in furtherance thereof duly executed a transfer to that effect, but later learnt that the transfer could not be registered and title issued on account of a court order served upon the land Registrar at Mombasa.

5. The Plaintiff/Respondent filed an affidavit sworn by himself on 20th June, 2017 in which he deposes inter alia, that he believes that the 3rd

Defendant was within Kenya when the service was effected in May, 2014, hence contends that the 3rd Defendant is misleading the court by alleging that she was away in Germany. The Plaintiff, however avers that he has no objection for the 3rd Defendant to be granted leave to file her defence as prayed in paragraph 3 of the application but wants the preservative orders issued on 4th June, 2014 to remain in force pending the hearing and determination of the suit. It is the Plaintiff's contention that if the preservative orders are set aside, the Defendants, and in particular the 3rd Defendant may transfer the property to a third party thereby rendering the case an academic exercise.

6. On 21st June, 2017, the Plaintiff and the 3rd Defendant recorded a consent in which the 3rd Defendant was allowed to file and serve her defence. What was left for determination by the court is prayer 2 of the motion in which the 3rd Defendant urges the court to set aside the injunctive orders of 4th June, 2014 for having been obtained irregularly and/or in abuse of the court process.

7. The court gave directions for the application to be canvassed by way of written submissions. Only the 3rd Defendant filed her written submissions in support of the application.

8. I have considered the application and the submissions filed. In this suit, both the Plaintiff and the 3rd Defendant are claiming the suit property. The ownership of the suit property is therefore contested. The court notes that the 3rd Defendant admits that she has sold and transferred the suit property to a third party, one Michael Okach Omondi although the transfer has not been registered because of the preservative orders granted by the court on 4th June, 2014. It is apparent that both the Plaintiff and the 3rd Defendant claim the suit property. Whereas it should be noted that it is difficult at this stage for the court to ascertain the correct position from the disputed affidavits and documents, it is my belief that that does not preclude the court from making a determination on the application before court.

9. The crucial issue for determination is whether the court should set aside the injunctive orders of 4th June, 2014 given the circumstances of this case. To my mind, the injunctive orders granted by the court on 4th June, 2014 were for purposes of maintaining the respective parties positions in the suit properties until the dispute is determined. In my considered view, it is only fair to make orders that safeguard and maintain the status quo until the suit is heard and determined for a greater justice than to let the status quo be disrupted by setting aside the injunctive orders.

I therefore exercise my discretion not to set aside the injunctive Orders of 4th June 2014 if only to preserve the suit property pending the hearing and determination of the suit.

10. The 3rd defendant has also applied to have the suit against her struck out for being frivolous, vexatious and or an abuse of the court process. In the exercise of its powers to strike out pleadings, there are certain well established principles that a court of law must adhere to. It 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 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 interior 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 fides 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.

11. In the case of D.T 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 affidavit 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 documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to 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 a 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...”

12. In *Yaya Towers Limited –vs- trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000*, the court of Appeal expresses 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 it so weak as to be beyond redemption and incurable by amendment..."

13. 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.

14. In this case, the plaintiff alleges that he purchased the suit property from the 3rd defendant. The 3rd defendant on the other hand, denies entering into any agreement to sell the land to the plaintiff. I would have to make a finding as to which party between the plaintiff and the 3rd defendant is to be believed. Taking all the circumstances of this case into consideration, I am not satisfied that the justice of the case will be attained by terminating the suit against the 3rd defendant 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 the 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 in clear and plain cases. I am not satisfied that the present case can be termed as clear and plain case.

15. The upshot of the foregoing is that the court makes the following orders with regard to the 3rd Defendant's Notice of Motion dated 18th April 2017 and amended on 21st June 2017:

1) That the 3rd defendant is granted leave to file and serve her defence as already agreed by consent of the parties.

2) Prayers 2 and 3A of the application are disallowed.

3) Each party to bear their own costs.

It is so ordered.

Dated, signed and delivered at Mombasa this 18th April, 2018

C. YANO

JUDGE