



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC 123 OF 2016**

**HASSAN SHEE SHEIKH ..... PLAINTIFF**

**-VS-**

**1. AMINA SHEE YUMBE**

**2. MOHAMED MAFUDH SHEKHER**

**3. SALIM SHAFI ..... DEFENDANTS**

**RULING**

1. The applications for determination are the Notice of Motion dated 29<sup>th</sup> September 2016 by the 2<sup>nd</sup> Defendant and the Notice of Motion dated 17<sup>th</sup> November 2016 by the 1<sup>st</sup> defendant. The Application dated 29<sup>th</sup> September 2016 seeks to have the Suit dismissed as against the 2<sup>nd</sup> defendant. The Motion is predicated on the grounds that the plaintiff's suit against the 2<sup>nd</sup> Defendant is scandalous, frivolous and/or vexatious and has no chance of success and is an abuse of the process of the court. The application is supported by the affidavit of Mohamed Mahfudh, the 2<sup>nd</sup> Defendant sworn on 30<sup>th</sup> September 2016 in which he has attached a copy of the agreement for sale between him and the 1<sup>st</sup> Defendant, receipts, a letter dated 19<sup>th</sup> July 2016 by the Chief Land Registration Officer regarding caveat registered on **PLOT NO. LR MN/2923(CR 21686)**, and an agreement for sale between the plaintiff and the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant has deponed that the agreement between the plaintiff and the 1<sup>st</sup> defendant is not stamped and therefore not admissible as evidence and further that the same is invalid because the 1<sup>st</sup> Defendant did not have confirmed grant o probate in her favour at the time they entered into the said agreement and therefore had no right to enter into an agreement for sale on behalf of the Estate. Further, the 2<sup>nd</sup> Defendant has deponed that the Plaintiff has not shown any evidence of payments made by him to the 1<sup>st</sup> Defendant. That the second defendant purchased the portion "A" of CR 2923 as shown on the subdivision plan attached and marked "E" which is not in the same vicinity or area as the portion occupied by the Plaintiff. It is the 2<sup>nd</sup> Defendant's contention that the Plaintiff has no case against him and his suit is frivolous and vexatious and has no chance of success at all.

2. The Application dated 17<sup>th</sup> November 2016 seeks to have the Plaint struck out for being scandalous, frivolous and /or vexatious and/or being an abuse of the process of the court on the grounds on the face of the motion namely:

**i. The plaintiff has not shown that he has complied with the terms of the sale agreement dated 31<sup>st</sup> March 2008.**

**ii. The plaintiff has not annexed anything to show that he has been threatened with eviction; his allegations are mere guess work.**

**iii. The Plaintiff has not demonstrated that he has properties on the suit property worthy to be protected by way of a valuation report.**

**iv. The plaintiff is seeking to protect what he calls his property on mere allegations of failure to give notice, prepare a valuation report which claim has no supporting documents.**

**v. The prayers sought of an injunction and a declaration that any allotment or lease or sale of the suit property is null and void is not supported with any document hence wild claims.**

**vi. The plaintiff has not paid the whole purchase price which was meant to be paid within 90 days form 31<sup>st</sup> March 2008 hence the suit is merely speculative and an abuse of the process of the court.**

**vii. The suit is bad in law since the parties herein the defendants have not common interest or joint interest in what is referred herein as a suit property.**

3. The application is supported by the affidavit of Amina Shee Yumbe, the 1<sup>st</sup> Defendant sworn on 17<sup>th</sup> November 2016. The 1<sup>st</sup> Defendant has deponed that the plaintiff has structures on the suit property which he is holding to date. She avers that the plaintiff requested her to sell him the suit plot and they entered into an agreement for sale dated 31<sup>st</sup> March 2008. That it was agreed that the plaintiff was to pay the balance of the purchase price of Kshs.125,000 within 90 days from 31<sup>st</sup> March 2008 but he never paid and the agreement lapsed on 1<sup>st</sup> July 2008.

The 1<sup>st</sup> Defendant states that she had agreed to make a transfer in favour of the Plaintiff upon payment of the agreed purchase price but the plaintiff never paid to date rendering the sale agreement incapable to be performed. The 1<sup>st</sup> defendant further states that the plaintiff has never asked her for notice to vacate and or to prepare a valuation report for his developments on the Suit Property. She adds that she knows very well that if the Plaintiff wants to vacate from her land, he should prepare a valuation report for his developments and serve the 1<sup>st</sup> defendant with a copy so that the 1<sup>st</sup> Defendant can make a decision on how to refund him, if any. She avers that the plaintiff has asked her to give him notice but has not done it formally. It is the 1<sup>st</sup> defendant's contention that the Plaintiff has been putting up structures on the suit property without her consent hence if the plaintiff wants to vacate he is free to carry them away or demolish it but not to file suit against her. The 1<sup>st</sup> defendant further contends that the plaintiff has not demonstrated in any way how the defendants have conspired to evict him from the suit property. The 1<sup>st</sup> defendant has deponed that the plaintiff has not annexed any documents to show that the 1<sup>st</sup> defendant has sold the suit property to the 2<sup>nd</sup> defendant and has not shown that the suit property has been transferred, or leased to the 1<sup>st</sup> defendant.

4. In opposing the two applications, the plaintiff filed a Replying Affidavits on 25<sup>th</sup> January 2017 and 3<sup>rd</sup> February 2017 in which he deposed inter alia that he is the owner of the suit plot having purchased it from one Shee Yumbe, now deceased. That after the demise of the said Shee Yumbe, he agreed with her daughter to enter into the agreement dated 31<sup>st</sup> March 2008. The Plaintiff deposes that he proceed to construct a house in the said plot which he completed in the year 2012. That when the house was constructed and as he was constructing a toilet and stairs, the 2<sup>nd</sup> defendant prevented him from completing them claiming that he had bought the said plot from the 1<sup>st</sup> defendant in December 2012. The Plaintiff avers that the defendants are attempting to deprive him of the suit property which he has already built and is occupying and belongs to him. The plaintiff further states that feeling aggrieved, he filed a suit being **CMCC No.1436 of 2014** which was later struck out on grounds of jurisdiction.

5. The advocate for the 2<sup>nd</sup> defendant filed written submissions which she also highlighted during the hearing of the applications. Mrs. Moolraj, learned counsel for the 2<sup>nd</sup> defendant submitted that the plaintiff is relying on an agreement for sale dated 31.3.2008 in which no stamp duty has been paid hence cannot be taken as evidence before court. Counsel further submitted that the suit is time barred and that no proof of payment has been shown and therefore the agreement is null and void. In addition, learned counsel submitted that the vendor had no authority to sell the land as the Grant had not been confirmed and the court cannot condone an illegal contract. Counsel relied on the case of **Termcotank Kenya Limited –v- Nyoro Construction CO. Ltd (2004) eKLR** and urged the Court to strike out the plaintiff's suit against the 2<sup>nd</sup> defendant and allow the counter-claim.

6. On his part, Mr. Gekonde, learned counsel for the 1<sup>st</sup> defendant associated himself with the submissions of the 2<sup>nd</sup> defendant's counsel and added that there is no dispute that the plaintiff was on part of the suit property before 2008. He submitted that the agreement dated 31/3/2008 is futuristic in nature, hence not binding. Referring to paragraph 9 of the amended plaint, learned counsel submitted that the plaintiff is kicking himself out of the land as no notice has been served on him.

7. While opposing the two applications, Mr. Khatete, learned counsel for the plaintiff submitted that without any evidence having been given, the court cannot clearly state that the plaintiff's case is frivolous. He further submitted that striking out a suit is a draconian action and the court can only do so if it is clear in its mind. He added that the parties must be heard and pointed out that the two applications were filed before an amended plaint was filed and therefore were based on a plaint which has since been amended. It was counsel's submissions that the applications have been overtaken by events and pointed out that the plaintiff is in occupation of the suit land. He urged the court to dismiss the two applications and have the matter heard on merit.

8. In a brief response to the plaintiff's submissions, Mrs. Moolraj, learned counsel for the 2<sup>nd</sup> defendant submitted that the applications seek to dismiss the suit which includes the amended plaint. She further submitted that the Plaintiff had the opportunity to put evidence which he did not and the onus is on him to show why the suit should not be dismissed. Learned counsel added that the amendment of the plaint did not change the circumstances regarding limitation and the fact that the vendor had no authority to sell.

9. I have considered all the issues raised in the two applications, the affidavits in support and against, the rival submissions and the case law cited by counsel for the 2<sup>nd</sup> defendant. The applications are brought under Order 2, Rule 15(1) (b)(c) and (d) of the Civil Procedure Rules and Sections 3, 3A and 63(e) of the Civil Procedure Act. In the exercise of its power under Order 2 Rule 15, 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 mini-trial thereof before finding that a case or defence is otherwise an abuse of the court process.

10. In the case of Yaya Towers Limited –v- Trade Bank Limited (in Liquidation)(2000)eKLR the Court of Appeal expressed itself as follows:

***“A plaintiff is entitled to pursue a claim in our courts 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 Court, it must be allowed to proceed to trial....”***

The overriding principle therefore to be considered in an application for striking out a pleading is whether it raises any triable issues. The power to strike out pleadings must be sparingly exercised and 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 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 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. 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 affidavits, it is not plain and obvious case on its face. In this case, the court is urged to find that the agreement dated 31/3/2008 is not stamped and therefore not admissible and further that the sale was invalid because the vendor did not have a confirmed grant of probate at the time. In addition, the 2<sup>nd</sup> defendant alleges that the plaintiff has not shown any evidence of payments made. 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 contract that is void. It must be noted that the plaintiff is in occupation of the suit property and in the amended plaint the plaintiff is seeking both prohibitory and mandatory injunction against the defendants. The 2<sup>nd</sup> defendant has filed a counter-claim. 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 plaintiff's 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 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 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 applications are without merit and are dismissed with costs to the plaintiff.

**Ruling dated, signed and delivered at Mombasa this 16<sup>th</sup> day of July 2018.**

**C. YANO**

**JUDGE**