



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**CIVIL SUIT NO.135 OF 2011**

**1. LUCY WANJIRU NDERI**

**2. JANE WANJIKU NDERI.....PLAINTIFF**

**-VS-**

**1. DOROTHY WANGARI NDERI**

**2. FRANCIS WAITHAKA KIRIU**

**3. ROSE NAFULA OKUMU**

**4. DABIDA INVESTMENTS LIMITED**

**5. SUNRISE HOMES LIMITED**

**6. NATIONAL BANK OF KENYA.....DEFENDANTS**

**RULING**

1. By a notice of motion dated 17<sup>th</sup> October, 2017 made pursuant to Order 2 Rule 15 (b), (c) and (d) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act, the 6<sup>th</sup> Defendants seeks orders:

**1. That the Honourable court be pleased to strike out the 6<sup>th</sup> Defendant from these proceedings.**

**2. That the costs of the application and the suit be borne by the Plaintiffs.**

2. The Application is supported by the Affidavit of Samwel Wanjohi Mundia sworn on 17<sup>th</sup> October, 2017. The 6<sup>th</sup> Defendant avers that the suit against it is bad in law and constitutes a flagrant abuse of the court process because it was a bona fide and registered holder of a legal charge, for value, free from any encumbrances, and validly procured without notice of any defect in the title of the 3<sup>rd</sup> and 5<sup>th</sup> Defendants whom the 6<sup>th</sup> Defendant had wholly financed in the acquisition of **LAND TITLE NO. KWALE/DIANI BEACH/1446**. That it conducted due diligence search before creation of its valid legal charge over the property and there was no mechanism available to it of knowing the Plaintiff's unregistered interests in the property in view of the subsequent multiple subdivision and creation of new titles and registers. That the Plaintiffs' unregistered interests were not reflected or shown at all in the register or records held at the relevant Land Registry/Departments and made available for inspection by the 6<sup>th</sup> Defendant. It is the 6<sup>th</sup> Defendant's contention that at all material times prior to and subsequent to the purchase, transfer and creation of the legal charge, the 3<sup>rd</sup> and 5<sup>th</sup> Defendants were in lawful, open and notorious occupation and possession of the property, acquired at a value, free from any encumbrances and carrying out a lawful enterprise in the hotel and tourism industry under the style and business name of "Sunrise" or "Rossys" Cottages. The 6<sup>th</sup> Defendant further contends that it has long discharged the property following a lawful exercise of its statutory power of sale in part recovery of the mortgage debt and consequently no longer holds any interest in the property capable of being subject of these proceedings, and any resulting order against it would be in vain contrary to public policy.

3. The 6<sup>th</sup> Defendant avers that it is a complete stranger to the Plaintiffs and to the circumstances surrounding the inheritance claim of the Plaintiffs belatedly brought before the court, having not at all dealt with or committed any actionable wrong against them capable of giving rise to a legitimate cause of action and being fairly and effectively adjudicated before the court. The 6<sup>th</sup> Defendant states that no actionable

wrong or fraud is attributable to it in the pleadings filed and capable of lawfully defeating its extinguished interest in the property. It further states that the amended Grant of letters held by the Plaintiffs has long been overtaken by events as the suit property is no longer part of the estate of the deceased having been validly transferred for value by the administrator of his estate and that the Plaintiffs' remedy lies against the 1<sup>st</sup> Defendant for monetary compensation without unnecessarily involving the 6<sup>th</sup> Defendant. The 6<sup>th</sup> Defendant further avers that it is apparent from the evidence submitted in these proceedings that the 2<sup>nd</sup> Defendant bought the suit land pursuant to a court order given on 18<sup>th</sup> September 2002 in **Succession Cause No. 212 of 1996** and that that order was not challenged and therefore re-opening of the decision in these proceedings is an afterthought, is res judicata and constitutes a flagrant abuse of the court process. It is the 6<sup>th</sup> Defendants' case that it has been unnecessarily vexed, annoyed, embarrassed and gravely prejudiced by the continued pendency of these proceedings in incurring substantial legal costs on defending a spurious and nefarious claim with little prospects of recovery of costs as the Plaintiffs have neglected, failed and/or refused to pay costs awarded on 26<sup>th</sup> March 2014. The 6<sup>th</sup> Defendant avers that it has been wrongly joined in these proceedings and that no useful purpose will be achieved by the misjoinder and therefore that it is in the interest of justice if the suit against it is struck out with costs.

4. In opposing the application, the Plaintiffs filed a Replying Affidavit sworn by Jane Wanjiku Nderi, the 2<sup>nd</sup> Plaintiff on 16<sup>th</sup> March 2018 in which she deposes that they have been negotiating with the 2<sup>nd</sup> Defendant to have the matter settled out of court but that the negotiations have broken down and no settlement is forceable. The Plaintiffs aver that if the 2<sup>nd</sup> Defendant pays them Kshs,3,000,000.00 they are agreeable to have the suit withdrawn. They further aver that they are poor people and may not raise the Kshs.54,000.00 ordered by the Court and urged the court to treat these as part of the eventual costs and disallow the application and allow the case to proceed to full hearing.

5. During the hearing, Mr. Odhiambo learned Counsel for the 6<sup>th</sup> Defendant made submissions in support of the application and mainly relied on the supporting affidavit while Mr. Muliro, who held brief for Mr. Muniyithya Counsel for the Plaintiffs made submissions in opposition to the application and relied on the replying affidavit.

6. I have carefully considered the application, the affidavit in support, the pleadings on record and the submissions made. In the case of **Yaya Limited –vs- 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.....it cannot be doubted that the court has inherent jurisdiction to dismiss that which is an abuse of the process of the court.....”**

7. In the case of **DT Dobie & Company (Kenya) Ltd –vs- Muchina (1982)KLR I**, the Court of Appeal stated:

**“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 ”**

8. In the case of **G. B. M Kariuki –vs- Nation Media Group Ltd & 4 Others (2012) eKLR** Odunga J had this to say:

**“In the exercise of its powers under Order 2 Rule 15 of the Civil Procedure Rules, 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 does not disclose a reasonable case of action or 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 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 legitimate use of the process, 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 oppose 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 courts resources while taking into account the need to allot resources to other cases.”**

9. The overriding principle therefore to be considered in an application for striking out of a pleading is whether it raises any triable issue. I have looked at the plaint dated 23<sup>rd</sup> November, 2011. In it, the Plaintiffs pleaded claim is that the title deed over the suit property was unlawfully cancelled and transferred. The Plaintiffs are seeking declaratory orders that the said cancellation and transfers were null and void and an order of cancellation of the subsequent titles and a mandatory order restoring the ownership of the suit property to the original owner. The Plaintiffs have also filed an application dated 26<sup>th</sup> April, 2017 seeking to amend the plaint to account for current circumstances of the matter. I note that in the proposed amended plaint, the Plaintiffs have pleaded that it has recently come to their attention that the 6<sup>th</sup> Defendant, in a purported exercise of its statutory power of sale, has sold the suit property to another party by the name Francis Ngigi Jason vide a sale agreement dated 29<sup>th</sup> August 2014. The said application for amendment has not been heard and is still pending. In my view, there are triable issues between the Plaintiffs and the 6<sup>th</sup> Defendant worth a trial by the court. I do not need to go into the merits of those issues. It suffices to state that from the pleadings, whether the issues are or are not triable issues in the sense of the law. I find that the pleadings raises triable issues between the Plaintiffs and the 6<sup>th</sup> Defendant.

10. The upshot is that the application dated 17<sup>th</sup> October 2017 is without merit and is dismissed.

Each party to bear their own costs.

**Delivered, signed and dated at Mombasa this 18<sup>th</sup> September, 2018.**

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**C. YANO**

**JUDGE**