



## REPUBLIC OF KENYA

### IN THE ENVIRONMENT AND LAND COURT

#### AT MALINDI

#### ELC CIVIL CASE NO.139 OF 2014

DAVIS AMATIKA WAODENYO.....PLAINTIFF/APPLICANT

VERSUS

1. ELIZA FATUMA NGOMA ABDULAZIZI
2. AFROZE OSMAN ABDULREHMAN ADAM
3. I & M BANK LIMITED.....DEFENDANTS/RESPONDENTS

#### RULING

1. I have before me for determination two similar applications seeking virtually the same orders. The first application is dated 21<sup>st</sup> January 2017 and was filed herein on 9<sup>th</sup> May 2017 by Afroze Osman Abdulrehman Adam (the 2<sup>nd</sup> Defendant). The said application prays for orders that:-

- 1. The Honourable Court be and is hereby pleased to strike out the Complaint dated 17/07.2014 as against the 2<sup>nd</sup> Defendant as the same discloses no reasonable cause of action; or in the alternative;*
- 2. The Honourable Court be and is hereby pleased to strike out the Complaint dated 17.07.2014 as against the 2<sup>nd</sup> Defendant for being scandalous, frivolous or vexatious.*
- 3. Consequent upon Order 1 or 2 above, as the case may be, the suit be and is hereby struck out with costs to the 2<sup>nd</sup> Defendant.*

2. The second application is dated 12<sup>th</sup> May 2017 and was filed herein by I &M Bank Ltd (the 3<sup>rd</sup> Defendant) on 15<sup>th</sup> May 2017. The orders sought are word-for- word similar to those sought in the first application. The grounds upon which the two applications are made are also similar, the same being that:-

- a) The Plaintiff instituted this suit by way of a Complaint dated 17.07.2014 in which he sought for a declaration that he is the beneficial owner of the parcel of land known as Kilifi/Kijipwa/222 (the suit property);*
- b) The Plaintiff also sought the Court to declare that the sale of the suit property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant and the subsequent charge over the same by the 3<sup>rd</sup> Defendant are void;*
- c) The Plaintiff alleges that the transactions between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant as well as between the 2<sup>nd</sup> Defendant and the 3<sup>rd</sup> Defendant were done contrary to the law for want of his consent as he alleges that the suit property was at the material time matrimonial property;*
- d) The Honourable court in its Ruling delivered on 13.11.2015 held that the Plaintiff has not demonstrated any spousal relationship with the 1<sup>st</sup> Defendant that would clothe him with the locus standi to raise the issue of whether the Land Control Board gave its consent before the suit property was sold to the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant and later on charged to the 3<sup>rd</sup> Defendant. This Ruling stands to date and no appeal has been preferred against it.*
- e) The 3<sup>rd</sup> Defendant holds a legal charge over the suit property. By a collateral charge dated 30<sup>th</sup> November, 2012 the 2<sup>nd</sup> Defendant as the legal and beneficial owner of the suit property charged the same to the 3<sup>rd</sup> Defendant to secure the*

*indebtedness of Flex Kenya Limited a maximum Principal amount of Kshs 25,000,000.00/-;*

*f) The 3<sup>rd</sup> Defendant did its due diligence and confirmed that the title to the suit property was registered in the name of the 2<sup>nd</sup> Defendant and that the title was unencumbered;*

*g) Both applicants are not privy to the dealings between the Plaintiff and the 1<sup>st</sup> Defendant. In any event, the Plaintiff has totally failed to demonstrate to this Court that there was any sort of marriage between him and the 1<sup>st</sup> Defendant at the material time;*

*h) In the circumstances, the Plaintiffs suit as against the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants discloses no reasonable cause of action and the Plaintiffs suit herein is for striking out. The Plaintiff has no locus standi to question the validity of the transaction between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant and the subsequent charge in favour of the 3<sup>rd</sup> Defendant.*

3. In his response to the two applications, Davis Amalika Wodenyo (the Plaintiff) swore and filed a Replying Affidavit herein on 10<sup>th</sup> July 2017. It is the Plaintiff's case that the ruling by this Court in respect of the injunction application should not be the basis for striking out or dismissing the suit before he is given an opportunity to call evidence.

4. The Plaintiff avers that the 1<sup>st</sup> Defendant was his 2<sup>nd</sup> wife and that the issue of whether or not she was his wife is a matter to be dealt with at the trial wherein both sides shall bring witnesses. It is his case that both the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are properly enjoined in this suit in that the sale to the 2<sup>nd</sup> Defendant and subsequent charge to the 3<sup>rd</sup> Defendant were not done in accordance with the law.

5. The Plaintiff contends that if the orders herein are granted, there is a likelihood of the suit property being alienated more so, where the 2<sup>nd</sup> Defendant fails to meet its obligations to the 3<sup>rd</sup> Defendant. The Plaintiff asserts that he is currently in occupation of the suit property together with his adult son from their said marriage with the 1<sup>st</sup> Defendant and striking out the suit without giving him an opportunity to be heard will greatly prejudice him and deny him a right to his property.

6. I have considered the two applications filed herein by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. I have equally considered the response by the Plaintiff.

7. Order 2 Rule 15 of the Civil Procedure Rules provides as follows:-

***“15. (1) 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.”***

8. As the Court of Appeal stated in *Kiranga Estates Ltd –vs- National Bank of Kenya Ltd* (2017) eKLR:-

***“It is not for nothing that the jurisdiction of the Court to strike out pleadings has been described variously as draconian, drastic, and discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the Court must not drive away any litigant from the seat of justice, without a hearing however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two vital considerations.”***

9. The principles guiding the Court when considering an application for the striking out of a pleading were long stated by Madan J. A. (as he then was) in *DT Dobie & Company (Kenya) Ltd –vs- Muchina* (1982) KLR 1 where the Court held inter alia as follows:-

***“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”***

10. The facts leading to the two applications before me are rather straightforward. The Plaintiff brought this suit seeking a declaration that he is the beneficial owner of the suit property. The Plaintiff also sought a declaration that the sale of the suit property by the 1<sup>st</sup> Defendant to the 2<sup>nd</sup> Defendant and the subsequent charge registered in favour of the 3<sup>rd</sup> Defendant are void. The gist of the Plaintiff's case is his contention that he was married to the 1<sup>st</sup> Defendant and that the suit property was by dint of the said marriage matrimonial property whose sale required his consent as the 1<sup>st</sup> Defendant's spouse pursuant to Section 93(3) of the Land Registration Act.

11. It is however the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants case that in a Ruling delivered herein on 13<sup>th</sup> November 2015, the Court found that the Plaintiff

has not demonstrated any spousal relationship with the 1<sup>st</sup> Defendant that would clothe him with the locus standi to raise the claim herein. That Ruling was neither appealed nor reviewed.

12. It is further the Defendant's case that by a Charge dated 30<sup>th</sup> November 2012, the 2<sup>nd</sup> Defendant as the legal and beneficial owner of the suit property charged the same to the 3<sup>rd</sup> Defendant to secure a loan. The 3<sup>rd</sup> Defendant thus holds a legal charge over the suit property and the suit as filed discloses no reasonable cause of action against the two Defendants and thus should be struck out.

13. In their oral submissions before me both Mr. Mugambi and Ms Onyango, Learned Counsels respectively for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants herein placed great emphasis on the said Ruling delivered by the Honourable Angote J on 13<sup>th</sup> November 2015 in regard to the Plaintiff's application for injunction. Nothing much was put before me in support of the grounds stated in their respective applications to the effect that the suit discloses no reasonable cause of action and/or that the same is scandalous, frivolous or vexatious.

14. I am however not convinced that the decision of the Learned Judge delivered on 13<sup>th</sup> November 2015 should be construed to preclude the Plaintiff's case from proceeding to trial. As the Learned Judge explains at paragraphs 14 to 16 of the said Ruling, there was no material that was placed before him as at the time the application was made to demonstrate that the 1<sup>st</sup> Defendant was the Plaintiff's wife. It was accordingly the Learned Judge's view that a prima facie case had not been established to warrant the grant of the orders sought by the Plaintiff. As it were, I did not hear the Learned Judge state that the suit itself was without basis and/or that it was scandalous. If that were so, nothing would have precluded the Learned Judge from striking out the suit at that stage. That he did not do so is in my view testimony of the fact that he did not share the sentiments of the Applicants' herein.

15. In his reply to the two applications, the Plaintiff avers that he is in possession of and occupies the suit property with one of his sons from the marriage he claims to have had with the 1<sup>st</sup> Defendant. From the documents, including pleadings in Mombasa High Court Civil Case No. 34 of 2012, attached to his Replying Affidavit, it is evident that the 1<sup>st</sup> Defendant had at some point sued the Plaintiff seeking to have him evicted from the suit property. That suit appears to be pending and the sale of the suit property to the 2<sup>nd</sup> Defendant appears to have occurred during its existence.

16. Again the Replying Affidavit has attached the pleadings in Kilifi Senior Resident Magistrate's Court Civil Case No. 252 of 2011 which was apparently filed by the Plaintiff's son with the 1<sup>st</sup> Defendant one Moses Alushula Amatika against the 1<sup>st</sup> Defendant. That suit sought to restrain the 1<sup>st</sup> Defendant from selling the suit property and from an order attached thereto the Court apparently issued an order on 14<sup>th</sup> October 2011 restraining the 1<sup>st</sup> Defendant from selling the suit property.

17. I did not find anywhere where the Defendants controverted those assertions by the Plaintiff. The circumstances surrounding these suits and the fact that the Plaintiff has somehow remained in occupation of the suit property despite the sale of the property to the 2<sup>nd</sup> Defendant and even the subsequent Charge to the 3<sup>rd</sup> Defendant Bank are matters that can only be unraveled at the full trial of the dispute herein.

18. Arising from the foregoing, I did not find any merit in the two applications respectively dated 21<sup>st</sup> January 2017 and 12<sup>th</sup> May 2017. Both applications are accordingly dismissed with costs to the Plaintiff.

**Dated, signed and delivered at Malindi this 31<sup>st</sup> day of October, 2018.**

**J.O. OLOLA**

**JUDGE**