REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 115 OF 2014

STELLA NYAKIO NGUGI.....PLAINTIFF

VERSUS

1. WILBERFORCE NJENGA NDONGA

2. SIMON NAURU

3. MICHAEL MULWA

4. SWIFTWAY ENTERPRISES LTD

5. SIDIAN BANK LTD

6. THE REGISTRAR OF TITLES, MOMBASA

7. THE REGISTRAR OF TITLES, MERU

8. THE ATTORNEY GENERAL.....DEFENDANTS

RULING

1. By a Notice of Motion dated 29th June, 2018 made pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act, Order 2 Rules 15 (1) (d) of the Civil Procedure Rules and Sections 55 and 56 of the Advocates Act, the 5th Defendant/Applicant seeks orders:

1) Spent

2) This honorable court be and is hereby pleased to forthwith discharge and/or vacate the injunctive restraining orders pending suit made by the Court against the 5th Defendant Bank in favour of the Plaintiff on 27th November 2015.

3) This Honourable Court be and is hereby pleased to strike out the plaint dated 22nd May 2014 and filed in court on 22nd May 2014, as against the 5th Defendant Bank for being otherwise an abuse of the process of this court.

4) This Honourable court be and is hereby pleased to sanction the plaintiff herein, Stella Nyakio Ngugi, for deliberately deceiving and misleading the court into making the said orders and to recommend the institution of appropriate criminal proceedings against her for perjury.

5) That costs of this motion and of the suit be borne by the plaintiff.

2. The application is premised on the grounds on the face of the motion and supported by the affidavit of Daisy Ajima sworn on 29th June, 2018. It is deponed that on 22nd May, 2014 the plaintiff commenced this suit by a plaint of similar date. The plaintiff claimed to institute the suit in her capacity as the administrator of the estate of Michael Rukunga Mowesley who the Plaintiff alleged to be her deceased husband. In the plaint, the plaintiff pleaded that the applicant bank caused the suit properties, being **MOMBASA/MN/THATHINI BLOCK 4/395** and **NKUENE/TAITA/1633** all registered in the name of Michael Rukunga Moweseley to be fraudulently charged to the bank to secure financial advances aggregating to the principal sum of Kshs.10,000,000/= made available by the Bank to the 1st Defendant herein,

Wilberforce Njenga Ndonga t/a There Traders. That the central basis of the plaintiffs suit is that spousal consents to the banks charges are fraudulent because the spouse who purported to grant them, one Stella Wanjiku Mureithi, was not the spouse of the chargor. The Plaintiff alleged she was the chargor's spouse by virtue of a marriage ceremony celebrated between her and the chargor on 9th August 1997. In support of this allegation, the plaintiff produced in court a copy of certificate of marriage issued on 9th August, 1997.

3. The 5th Defendant contends that arising from the alleged lack of spousal consent to charge, the plaintiff requested the court to declare that the charges registered over the suit properties on 1st August 2013 were fraudulently, illegally and unlawfully created and consequently null and void. In addition, the Plaintiff also seeks general damages and the costs of the suit.

4. The 5th Defendant avers that simultaneously with the plaint, the Plaintiff also filed a notice of motion dated 14th October, 2014 by which she sought to restrain the bank from dealing in the suit properties in any way pending the hearing and determination of the suit. By the notice of motion application, the plaintiff restates the allegations in the plaint. By a ruling dated 27th November, 2015, the court noted that the plaintiff had in her documents tabled before the court presented a certificate of marriage to show that she was indeed the spouse of the deceased chargor. The court noted further that the question of the spousal consent would need to be resolved by way of evidence during the trial of the suit to ascertain who as between the plaintiff and the said Stella Wanjiru Mureithi was the spouse of the chargor. Primarily on that basis, the court granted an injunctive order restraining the bank from dealing in any way with the suit properties pending suit.

5. The 5th defendant avers that post that ruling, the bank has since established that the chargor had in fact already divorced the plaintiff vide divorce proceedings in **Mombasa High Court Divorce Cause No.52 of 2007, Michael Moweseley – vs- Stella Moweseley**. That arising from those proceedings, a decree Nisi was issued on 24th June, 2009 and a decree Absolute was issued on 28th March, 2011. Copies of the proceedings, judgment, Decree Nisi and Decree Absolute have been annexed and marked DA-4, DA-5, DA-6 and DA-7 respectively.

6. It is therefore the argument of the 5th Defendant that as at 1st August 2013 when the bank's charges were registered, the plaintiff was not the chargor's spouse as she claims, and that none of the suit properties could have been matrimonial properties owned by the deceased chargor and the plaintiff as at the date of the creation of the bank's charge. The 5th Defendant's contention is that since the plaintiff was not the chargor's spouse as at 1st August, 2013 when the charges were registered, the plaintiff had no *locus standi* to question the validity of any transaction between the chargor and the bank.

7. The 5th Defendant contends that in view of the concluded divorce proceedings, the plaintiff deliberately mislead and deceived the court that she was still the spouse of the chargor as at the date of the bank's charge. That from the court records in the divorce proceedings, it is clear that the law firm of Mogaka, Omwenga & Mabeya Advocates acted for the plaintiff in which the chargor was the petitioner, and therefore were aware of the fact that when the chargor charged the suit properties, their client, who is the plaintiff herein, was not his spouse as they claimed in court. That consequently they were aware that her consent was not required in respect of those charges.

8. The 5th defendant avers that the plaint dated 22nd May, 2014 is premised on deliberate non-disclosure of material facts and actual deception of both the plaintiff and her advocates. That consequently, any advantage obtained by the plaintiff as a direct consequence of the deliberate non-disclosure of material facts and outright deception of the court in the form of the existing injunctive orders pending suit should be lost and that existing restrictive injunctive orders should therefore be discharged forthwith as a matter of right. In addition, that the plaint itself given the fact that it primarily rests on the unsustainable allegation that the plaintiff was the spouse of the chargor as at the date of the creation of the bank's charge, which allegation has been shown to be totally and deliberately false, leaves the plaint standing on stilts and that it should be struck out for being an otherwise an abuse of the process of this court.

9. The plaintiff opposes the application and filed grounds of opposition dated 9th July, 2018 on the following grounds:

a. That the application is an afterthought, bad in law ingeniously crafty, devoid of any triable issues and only designed to evade the full trial of this matter.

b. That the application is bad in law, scandalous, evasive, inept, self defeating, hollow and an abuse of the court process as the issues raised therein can be raised during the pre-trial conference.

c. That the application is bad in law for being subversive to this court' overriding objective and the just and fair determination of disputes.

d. That the application is bad in law since all the issues raised in the present application can only be established in a full hearing through perusal of the plaintiff's claim supporting documents and examination of the plaintiff's witnesses.

e. That the 5th defendant is running away from the full hearing of this matter since the 5th defendant has no plausible defence or counter- claim.

f. That the law is well settled that the main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given by the rules.

g. That the law is settled that the principle which guides the court in the administration of justice when adjudicating on any disputes should be heard on their own merit.

h. The courts have severally held that the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuits of

his rights. The spirit of the law is that as far as possible in the exercise of judicial discretion, the court ought to hear and consider the case of both parties in any dispute in the absence of any good reason for it not to do so.

i. The courts have severally held that as far as possible the courts should encourage the resolution of disputes by hearing both sides on merit, without undue regard to technicalities.

10. Mr. Mugambi, learned Counsel for the 5th Defendant made submissions in support of the application and mainly relied on the grounds in the face of the motion and the supporting affidavit. He relied on the case of **Uhuru Highway Development Limited – v- Cetnral bank of Kenya & 2 Others (1995) eKLR**.

11. Mr. Nyabicha, learned Counsel for the plaintiff in opposing the application submitted that this case has got complex issues which can only be addressed by examination of witnesses and documents filed by the parties.

12. I have considered the application, the affidavit in support, the grounds of opposition and the submissions made. I have also considered the pleadings on record. As already indicated, the application is brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 2 Rule 15 (1) (d) of the Civil Procedure Rules. 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/her right to have his/her 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 or defence is otherwise an abuse of the court process.

13. 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….. 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 is so weak as to be beyond redemption and incurable by amendment….. "

14. In the case of DT Dobie & Company (Kenya) Ltd –v- Muchina (1982) KLR 1, 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 act in darkness without the full facts of a case before it."

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

"In the exercise of its powers under Order 2 Rules 15 of the Civil Procedure Rules, there are certain well established principles that 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 cause 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 issues 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, 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 courts resources while taking into account the need to allot resources to other cases. "

16. 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. 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.

17. 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 shall 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 plain and obvious case on its face.

18. I have looked at the plaint dated 22nd May, 2015. In the plaint, the plaintiff is challenging the bank's charges over the suit properties which are registered in the name of the deceased. The loan facilities were made available by the bank to the 1st defendant and were guaranteed by the bank's charges over the suit properties registered in the name of Michael Rukunga Mowesely. In the plaint, the plaintiff

seeks mainly a declaration that the purported charge of the suit properties by the 5th Defendant bank is fraudulent, illegal, unlawful and hence null and void. The plaintiff pleaded that she was the wife of the deceased chargor and that she never gave spousal consent to charge the suit properties as required by law. That the spousal consent used was fraudulent.

19. In the application herein, the 5th Defendant herein has availed documentary evidence to show that contrary to the plaintiff's averments in the plaint, the plaintiff was not the widow of the deceased chargor. This is because the plaintiff had been divorced by the deceased long before the plaintiff filed this suit. The plaintiff has not filed any replying affidavit to rebut the averments in the affidavit in support of the application. There was no evidence to contradict the 5th defendant's averments. The facts as presented by the 5th defendant have therefore not been controverted. The suit properties herein were charged when the plaintiff was no longer a wife to the chargor, hence spousal consent from the plaintiff was not necessary.

20. The suit properties were charged to the 5th defendant in the year 2013. The plaintiff had been divorced in 2009 and a certificate of decree absolute issued on 16th March, 2010. The plaintiff filed this suit in the year 2014. The Plaintiff, despite having been aware of the divorce cause, filed this suit and pleaded lack of spousal consent on the charges the subject of the suit properties. In my view the plaintiff has abused the court process by filing suit and obtaining orders based on falsehoods. The plaintiff attached a certificate of marriage but not the Divorce cause proceedings and decree. This was being selective.

21. A pleading which is an abuse of the court process really means in brief a pleading which is a misuse of the court machinery or process. In my view, the plaintiff's suit has no foundation or chance of succeeding. No doubt her pleading was brought and drafted to have some fanciful advantage. It lacked bona fides and was meant to cause the 5th Defendant unnecessary anxiety, trouble and expense.

22. It is my view that the plaint filed by the plaintiff herein is an abuse of the court process and the plaintiff has no case at all against the 5th defendant either as disclosed in the plaint or in the affidavits. I think this is a plain and obvious case that ought to be struck out.

23. In the result, the notice of motion dated 29th June 2108 is merited and is hereby allowed in terms of prayers 2, 3 and 5 thereof.

It is so ordered.

DATED, DELIVERED and SIGNED at MOMBASA this 17TH day of October, 2018

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C. YANO

JUDGE