



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 624 OF 2011

HELLEN JEPKOSIGEI KIPLAGAT.....PLAINTIFF/APPLICANT

VERSUS

THE COMMISSIONER OF LANDS1ST DEFENDANT/RESPONDENT

TITUS BARASA KHISA.....2ND DEFENANT/RESPONDENT

RULING

1. This is the Notice of Motion dated 27th June 2014 brought under Order 2 Rule 15(1) (c) and (d) of the Civil Procedure Rules
2. It seeks order:-

(1) That the Honorable court be pleased to strike out the 1st defendant's defence.

(2) That the Honourable court be pleased to direct the 1st defendant to cancel the registration of the 2nd defendant as proprietor of land parcel no Nairobi/Block 99/121 and register the said parcel in the plaintiff's name.

(3) That the costs of this application be provided for.

3. The grounds are on the face of the application and are listed as in paragraph a to e.
4. The application is supported by the affidavit of Hellen Jepkosgei Kiplagat, the plaintiff/applicant herein sworn on the 27th June 2014.
5. The application is opposed. There are grounds of opposition filed on behalf of the 1st defendant/respondent dated 18th February 2015.
6. The parties agreed that the application be disposed of by way of written submissions.

The plaintiff's/applicant's submissions

7. The 2nd defendant was served with summons to enter appearance but did not enter appearance nor did he file a defence. Interlocutory judgment was then entered against him. The 1st defendant's defence is a mere denial. Although the 1st defendant has denied the fraud alleged against it, which the architect the 2nd defendant has not denied, its denial is premised on the non-existent denial of the 2nd defendant. How does the 1st defendant treat the allegation that he discharged the charge without the input of the chargor? On the ground that the office of the 1st defendant, does not exist, this would be sufficient ground to strike out the 1st defendant's defence. She prays that the court finds the application to be well founded and be granted with costs.

The 1st defendant/respondent's submissions

8. The plaintiff/applicant has not demonstrated the grounds set out under Order 2 Rule 15 of the Civil Procedure Rules to warrant the 1st defendant's defence to be struck out. The 1st defendant has denied the particulars of fraud as alleged by the plaintiff. Fraud is triable issue

that must be proved at the trial and not at the interlocutory stage. They have relied on the case of **Summer Limited vs Kaka Wholesalers & 3 Others [2009] eKLR**. The right of a litigant to be heard is a fundamental right protected by the constitution and is also a principle of natural justice. If the court allows this application, it will infringe on the 1st defendant's right to answer to the allegations of fraud by the plaintiff.

9. I have considered the notice of motion, the affidavit in support and the annexures. I have considered the grounds of opposition, the written submissions of counsel and the authorities cited.

10. The issues for determination are:-

(i) Whether the 1st defendant's defence herein ought to be struck out and that the 1st defendant be directed to cancel the registration of the 2nd defendant as proprietor of Land Parcel No. Nairobi/Block 99/121 and register the said parcel in the plaintiff's name;

(ii) Who should bear costs.

11. It is not in doubt that the plaintiff is the owner of Land Parcel Number Nairobi/Block 99/121. She annexed the certificate of lease and charge entered into with respect to the suit property.

12. I have gone through the court record, it is not in doubt that the 2nd defendant was served with summons to enter appearance and copies of plaint. He did not enter appearance and/or file defence. Interlocutory judgment was then entered against him.

13. I have gone through the 1st defendant's defence dated 21st March 2012 and filed in court on 3rd April 2012. Paragraph 5 provides that:-

"The 1st defendant aver without prejudice that if any registration and/or transfer was effected on the suit parcel of land, then same was effected procedurally and after documents were presented at the Land Registry the same acted upon on good faith."

The 2nd defendant whose favour the suit property was registered has not come to this court. He was served but he neglected and/or refused to appear in this court and/or file a defence. In the absence of his defence, paragraph 5 of the 1st defendant's defence cannot stand.

14. Paragraph 6 of the 1st defendant's defence provides that:

"The 1st defendant denies the particulars of fraud as alleged against him and the plaintiff is put to strict proof thereof."

It is my humble view, that the 1st defendant's defence amounts to a mere denial. It raises no triable issues in the absence of the 2nd defendant's defence.

15. Order 2 rule 15(1) Provides that:

"At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-

(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."

16. I find that the 1st defendant if allowed to prosecute their defence may prejudice, and delay the fair trial of this case. I am guided by the case of **Kenindia Assurance Company Limited vs Commercial Bank of Africa Limited and 2 Others [2006] 2 KLR 250 where the court held that summary judgment was a procedure to be resorted to in the clearest of cases and that if the defendant shows a bona fide triable issue, he must be allowed to defend without conditions....."**

The opposite is true in the instant case, the 1st defendant's defence cannot stand in the absence of the 2nd defendant's case.

17. The plaintiff has demonstrated ownership of the suit property. I find that the 1st defendant's defence herein is a sham and amounts to mere denial. The court would still reach the same conclusion even if it were to allow the 1st defendant to prosecute his defence.

18. All in all I find merit in this application and grant the orders sought namely:-

(a) That the 1st defendant's defence is hereby struck out.

(b) That the 1st defendant is hereby directed to cancel the registration of the 2nd defendant, as proprietor of Land Parcel No. Nairobi/Block 99/121 and register the same parcel in the plaintiff's name.

(c) I make no orders as to costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 28TH day of NOVEMBER 2018

.....

L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for Plaintiff

.....Advocate for the 1st Defendant

.....Court Assistant