



**THE REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO 813 OF 2017**

**PETAL INVESTMENTS LIMITED .....APPLICANT/RESPONDENT**

**VERSUS**

**TRIPPLE N CAR CLINIC LIMITED.....DEFENDANT/APPLICANT**

**RULING**

The matter herein for determination is a *Notice of Motion* application dated **13<sup>th</sup> December 2017**, which is filed by the Applicant herein under **Order 2 Rule 15 (1)(a)** of the *Civil Procedure Rules, Sections 1A, 1B, 3 and 3A* of the *Civil Procedure Act* and all enabling provisions of law and seeks for the following orders:-

- 1) That the Plaintiff's suit against the Defendant be struck out.**
- 2) That the costs of the suit be provided for.**

The application is supported by the grounds stated on the face of the application and on the *Supporting Affidavit* of **Steven Kimani Mithu**. These grounds are:-

- i. That the *Law of Contract Cap 23* of the Laws of Kenya expressly prohibits for disposition of an interest in land unless it is in writing, signed and attested to by a witness.**
- ii. That the suit herein concerns a Lease for 5 years and 3 months as seen from the first document on the Plaintiff's List of Documents filed on 31<sup>st</sup> October 2017 which was neither executed by the Plaintiff nor attested to as required by law.**
- iii. That the suit is thus prohibited by Law and there is no reasonable cause of action demonstrated.**

The application is opposed by the Defendant/Respondent vide a *Replying Affidavit* sworn by **Rohin Chandaria**, a Director of the Plaintiff herein dated **6<sup>th</sup> March 2018**. He averred that the Plaintiff and the Defendant had entered into a *Lease Agreement* to lease out one (1) Godown through a *Lease* dated **15<sup>th</sup> October 2016**. He argued that contrary to the Defendants claim that the Lease was not properly executed, the Lease was duly signed and attested by both the Plaintiff and the Defendant with a copy being produced as an exhibit in court. He contended that the Defendant had produced the wrong Lease in their list of documents. He further stated that they produced the cause of action and the eviction notice stem from the Defendants' breach of the terms of the Lease.

The Defendant urged the court to dismiss the application as the Plaintiff had no reasonable cause of action against the Defendant.

The Applications was canvassed by way of written submissions which this Court has carefully considered.

**Issues for Court's Determination**

- 1) Whether there was proper execution and attestation of the Lease Agreement.**
- 2) Whether the Plaintiff's suit should be struck out**
- 1) Whether there was proper execution and attestation of the Lease Agreement.**

The applicant relied on **Section 3** of the **Law of Contracts Act** which states that no suit shall be brought under any contract for the disposition of land unless the contract:-

**1. Is in writing,**

**2. Is signed by all the parties thereto,**

**3. The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.**

They further relied on **Section 44** of the **Land Registration Act** which provides that every instrument effecting any disposition shall be executed by each of the parties consenting to it **appending his/her signature** on it or **affixing the thumbprint** or **other mark as evidence of personal acceptance** of that instruction.

The Applicant contends that they had executed their part of the Lease but the Respondent had not, thus invalidating the lease.

The Respondent in their submissions reiterated that the Lease was duly signed by all parties and executed and that the Lease has been produced in the court on **page 4-41** of the **Replying Affidavit** and therefore meets the requirements of the **Law of Contracts Act**. It therefore contends that the suit has merit and the Application ought not to be allowed.

## **2) Whether the Plaintiff's suit should be struck out.**

The Applicant relied on the **Section 3(3)** of the **Law of Contracts Act** and the case of **Kukal Properties Development Limited...Vs.... Tafazzal H. Maloo & 3 Others (1993) eKLR**, where the Court of Appeal pronounced itself on a similar dispute where only one party had signed the agreement for sale of land. Commenting on the legal framework in **Section 3(3)** of the **Law of Contracts Act**, **Muli JA** held as follows:

***“With the greatest respect, the learned trial judge misdirected himself. In the first place it matters not what the parties or one of them believed or was made to believe. The real issue was whether the agreement was duly executed by the parties, and if not, was the agreement binding and enforceable against any of the parties?”***

***It is trite law on this point and is made beyond doubt under Section 3(3) of the Law (Cap 23 Laws of Kenya)***

***I hold that the intended agreement between the appellant and the Porbundarwallas was inoperative and therefore unenforceable for lack of execution by the appellant; the sum total was that there was no valid agreement enforceable in law”***

The Applicant also relied on the case of **Silverbird Kenya Limited...vs... Junction Limited and 3 others (2013) eKLR**, where the Court held:-

***“...plaintiff did not have a contract that satisfied the mandatory provisions of the Law of Contract Act. In my view it matters not that the plaintiff had been let into possession of the premises if the Contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19<sup>th</sup> August 2009 in my view does not satisfy the requirement of Section 3(3) of the Law of Contract Act to be the foundation of the Plaintiff's claim against the Defendants. Section 3(3) of the Law of Contract Act is indeed couched in mandatory terms and does infact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff's suit must fail for being in contravention of section 3 (3) of the Law of Contract Act, Cap 23 Laws of Kenya”.***

The Applicant reiterated that the Lease had not met the threshold under the Law of Contract Act and that therefore the suit was pointless and should be dismissed.

The Respondent argued that the Application was an afterthought, devoid of merit and bad in law. They further argue that the advocate for the applicant obtained and produced the wrong copy of the lease in their list of documents.

They sought to rely on the case of **D.T. Dobie & Company (Kenya) Limited...Vs....Joseph Mbaria Muchina & another [1980] eKLR**, where the Court held that:-

***“If an action is explainable as a likely happening which is not plainly and obviously court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.”***

The Respondent further pointed out that the Applicant and the Respondent had exchanged **correspondence** dated **13<sup>th</sup> September 2016** to enter into the Lease and that should the court find the lease deficient in any form, then the correspondence can for a basis for the suit.

They further quoted the case of **D.T. Dobie & Company (Kenya) Limited.....Vs.... Joseph Mbaria Muchina & another [1980] eKLR**, stating:-

***“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly 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.”***

The Respondent asked the court to dismiss the Application for the reasons given.

The Court has now carefully considered the pleadings in general, the written submissions, cited authorities and the relevant provisions of law and makes the following findings:-

There is no doubt that ***Order 2 Rule 15*** upon which this application is anchored gives the court discretion to strike out pleadings when such pleadings disclose no reasonable cause of action or defence in law, it is ***scandalous, frivolous or vexatious*** or it may ***prejudice, embarrass or delay*** the fair trial of the action or it is otherwise ***an abuse*** of the process of the court. [***See Order 2 Rule 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.”***

In this application the Applicant has based its application on ***Order 2 Rule 15(1)(a)*** on the ground that the suit herein discloses no reasonable cause of action.

The Applicant averred that the Lease that is being relied upon by the Plaintiff was neither executed nor attested to as required by the law and that is against ***Section 3(3)*** of the ***Law of Contract Act*** and further ***Section 44*** of the ***Land Registration Act***. ***Section 3(3)*** of the ***Law of Contract Act*** provides:-

***“No suit shall be brought upon a contract for the disposition of an interest in land unless—***

***(a) the contract upon which the suit is founded—***

***(i) is in writing;***

***(ii) is signed by all the parties thereto; and***

***(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party;***

However, in its ***Replying Affidavit***, the Plaintiff/Respondent annexed a ***signed and attested Lease Agreement*** and averred that its advocate forgot to attach the ***executed and attested Lease Agreement*** while filing the ***Plaint*** but annexed the wrong Lease. The issue of whether the Lease was executed or attested is a contested issue. That is not an issue that can be decided through affidavit evidence. The parties have to call evidence through the main hearing and produce the disputed document and then test the evidence through the usual manner of cross-examination. That is the only time the court would be in a position to adequately conclude whether the Lease in dispute was executed and/or attested or not.

Further, the Court finds that pleadings are ordinarily struck out in very clear cases. See the case of ***Trivedi and Trivedi...Vs..Njeri Ngiru, Civil Appeal No.129 of 1984***, where it was held that:-

***“Pleadings can be struck out in clear cases and where there are no triable issues. That this is not a plain case and the Court should exercise its discretion with extreme caution. She referred the Court to Supreme Civil Practice 1997 at page 329 paragraph 18.”***

Further, it is also very clear that no suit should be struck out unless the said case is ***hopeless*** and cannot be ***salvaged by amendment***. Further the said jurisdiction should be exercised with ***extreme caution***. See the case of ***D. T. Dobie & Co. (Kenya) Ltd (supra)***.

The Applicant alleges that the suit herein discloses no cause of action as the Lease relied upon was not executed nor attested to as required by law. However, the Plaintiff/Respondent averred that the same was attested to. It is trite that a court should aim at sustaining a suit rather than terminating it by summary dismissal. If a suit shows a semblance of a cause of action, it ought to go for hearing so that a litigant is not removed from the seat of justice without according it an opportunity to be heard. See the case of ***Prafula Enterprises Ltd...Vs...Norlake Investment Ltd & Another, Kisumu High Court, Civil Case No.145 of 1997***, where the Court held ***that:-***

***“Striking out a pleading should be done with tremendous caution because a litigant should not be driven from the seat of justice without being heard”.***

Having found that the issue of whether the Lease in issue was executed and/or attested to is in dispute, then the Court finds that this is not a case which is hopeless and plainly obvious that it discloses no cause of action and that it is so weak as to be beyond redemption and incurable by amendments.

For the above reasons, the Court finds that the Defendant’s/ Applicant’s ***Notice of Motion*** application dated ***13<sup>th</sup> December 2017*** is ***not merited and the same is dismissed entirely with costs to the Plaintiff/Respondent.***

It is so ordered.

***Dated, Signed and Delivered at Thika this 16<sup>th</sup> day of November 2018.***

**L. GACHERU**

**JUDGE**

**16/11/2018**

In the presence of

Mr. Githui holding brief M/S Mochu for Plaintiff/Respondent

No appearance for Defendant/Applicant

Lucy - Court clerk

**Court** – Ruling read in open court in the presence of the above stated advocate.

**L. GACHERU**

**JUDGE**

**16/11/2018**