



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI MILIMANI LAW COURTS

ELC NO. 230 OF 2015

THERESA OJIAMBO.....PLAINTIFF/APPLICANT

VERSUS

FRANCIS MWAURA IKINU.....DEFENDANT/RESPONDENT

RULING

The matter for determination is the Plaintiff's Notice of Motion dated **18th June 2015**, brought under **Order 2 Rule 15, Rule 10, Rule 3, Orders 26 & 51 Rule 1 of the Civil Procedure Rules 2010**, and all other enabling provisions of the Law. The applicant has sought for the following prayers:-

1. Spent

2. Spent

3. That this Court do declare that the Defence dated 24th April 2015, is not properly on record as having been filed out of time and order that the same be struck off the record.

4. That in alternative to prayer 2 above, that the Honourable Court do strike out the Defendant's Defence dated 24th April 2015, as the same is scandalous, vexatious and is only intended to prejudice, delay or embarrass the fair trial of this suit.

5. That this Honourable Court do enter judgement in favour of the Plaintiff as prayed for in the Plaint.

6. That pending the hearing and determination of this application and of this suit, the Defendant be ordered to deposit in Court, or in a joint interest earning account in the names of the Advocates on record Kshs,2,500,000/=as security towards the mesne rent that the plaintiff is entitled to for the months of September 2014, November 2014, December 2014, January 2015, February 2015, March 2015, April 2015, May 2015 and June 2015.

7. That pending the hearing and determination of this application/ hearing of this suit, the Defendant be ordered to deposit in Court Kshs.250,000/= every subsequent month during the pendency of this suit as security for mesne rent in respect to the suit property.

8. Any other Orders that this Court deems fit including but not limited to Security of Costs.

9. The costs of this application be provided for.

The application is premised on the grounds stated on the face of the application and on the supporting affidavit of **Theresia Ojiambo** the Plaintiff/Applicant herein .These grounds are;-

a. That the Plaintiff is the registered owner of all that piece of land situate in Nairobi area of the Republic of Kenya comprising by measurements 0.02096 of a hectare or thereabouts known as land reference number 14598 ,being premises comprised in the grant registered in the land titles registry in Nairobi as I.R 68101/1 which said piece of land with the dimensions abutments and boundaries thereof is delineated and described on the plan annexed to the said GRANT and more particularly on land survey records office at Nairobi held for a term of 99 years from the 1st day of November 1994, subject to the payment in advance on the 1st day of January in each year and the annual revisable rent of Kshs.12,200(Suit Property).

b. That the Defendant has been residing in the suit property rent free since September 2014, and has refused to grant vacant possession to the plaintiff forcing the Plaintiff to file the current suit seeking inter alia, eviction orders against the Defendant.

c. That despite the fact that ownership of the suit property is not in contention, the Defendant has entered an appearance and filed a Defence out of time.

d. That the Defence is a mere sham, full of material non-disclosure, an abuse of the Courts process ,scandalous, frivolous, vexatious and an obvious delay tactic to avoid being evicted from the suit premises as all Civil Procedure processes are followed. The sham Defence is and only meant to delay and or embarrass the expeditious, just, and fair conclusion of this suit.

e. That the Defence raises issues only on the process of auction which can be fully determined in ELC 477 of 2011 ,in which the Defendant herein is the 2nd plaintiff and has sued Standard Chartered Bank, the Chargee with a view of stopping the aforesaid sale. Furthermore any issues raised or Claim by the Defendant in the Defence can only lie against the Chargee and not the Plaintiff in accordance with Land Act of 2012.

f. That during the pendency of this suit, the plaintiff continues to lose out on the mesne rent that she would be receiving had she had a tenant and in the event that the adjudication over the matter is in favour of the plaintiff, the same may be rendered nugatory as the Defendant may be unable to pay the total of mesne rent for the duration of the period that he has lived in the house and during the pendency of the suit owing to this previous conduct in ELC 477 of 2011.

g. That by depositing the security on account of the mesne rent that would have been due from the time is the best way of protecting both parties interests as they await the conclusion of the Application and suit.

In her supporting affidavit, the Plaintiff **Theresia Ojiambo** averred that she purchased the suit property via auction after the Defendant had defaulted on paying a loan he had borrowed from Standard Chartered Bank. Further that on or about **27th October 2014** , she instructed her legal representative to issue a **Vacation Notice** to the Defendant to vacate the suit property on or before the **30th day of November 2014**, but the Defendant had failed or ignored or refused to vacate the suit premises as per annexure "**TO-2**". She also averred that despite the fact that the Defendant was served with the Notice, he has refused to grant her vacant possession of the premises and had through his legal representatives insisted that he did not want to vacate the premises but instead wanted to purchase back the suit property at **Ksh.38,000,000/=** as per annexure "**TO-3**".

The applicant has further averred that her advocate on record had then forwarded her a copy of the Defendant's Memorandum of Appearance that was filed on **9th April 2015**, and only served on her Advocates on **15th April 2015** ,as per annexure "**TO-5**" served 7 days after it was filed. She also

deposed that she had been informed by her advocate on record which information she believed to be true, that the Defence was a mere sham, full of material non-disclosure and falsehoods, an abuse of the court process and an *obvious delay tactic* to avoid being evicted from the suit premises to ensure that all civil procedure processes were followed as the same was scandalous, frivolous and vexatious and only meant to delay and or embarrass the expeditious, **just** and **fair** conclusion of this suit.

The applicant further averred that she has been informed by her advocate on record, which information she verily believed to be true that the Defence only sought to challenge the auction process solely on the allegation that she and Standard Chartered Bank (Chargee) fraudulently undervalued the suit property in the sale by Auction, which Defence is baseless and incompetent as the Defendant's only relief on an allegation of this nature is against the Chargee and not the Plaintiff.

She also alleged that she continue to suffer financially as she pays rent of **Kshs.220,000/-** while she would be entitled to **mesne profits** during the pendency of the suit even after using her hard earned savings to purchase the suit property which she was yet to enjoy 10 months after she had successfully purchased it. She also alleged that owing to the fact that the Defendant was unable to pay his loans to the Chargee, and owing to the fact that the Defendant refused to grant her vacant possession of the property, then he would not be able to pay the **mesne rent** should this matter be adjudicated in her favour. It was her further contention that the Defendant was trying to steal a march by staying in her premises **rent free** during pendency of this matter as the Defendant had during the pendency of the **ELC case 477 of 2011** continued to file numerous frivolous applications with a view of delaying the intended sale of the suit property. It was her further disposition that from the conduct of the Defendant, he did not seek further redress or seek any further relief against the Chargee. Furthermore that she has been informed by her advocate on record that any allegation in respect of the sale can only lie against the Chargee who is not party to the suit and the Defendant has not commenced any third party Proceedings against them. If the Defendant had a claim against her, he would have filed a counter claim which he has not. Therefore it was in the interest of justice that proprietary interests be protected as is provided for under the Constitution.

The application is opposed and **Francis Mwaura Ikinu** swore a Replying Affidavit on **30th June 2015**, and averred that he believed that his defence had triable issues that ought to proceed to trial. The Defence should be accepted by the Plaintiff who could have applied for interlocutory Judgement but she did not. That the averment that the Plaintiff purchased the suit property at the auction was partially correct but not accurate as there was no lawful tendered purchase price. She contended that the said suit was thus tainted with illegality. Further that as averred in his defence, the sale was fraudulent, particulars of which are captured as herein below and highlighted:-

- a. Purporting to enter into a secret sale of the suit property with the Standard Chartered Bank while purporting that the entire transaction is under public auction as between the Plaintiff and the said Bank.***
- b. Failing to secure the market Value of the Defendant's property.***
- c. Acting in breach of the Auctioneers Act to disclose the actual sale and remit to the Defendant the balance of the sale price based on the market value of the property.***
- d. Failing to remit the full purchase price on the purported "fall of the hammer".***

He also alleged that as a result of the said fraudulent sale, the suit property was transferred to the Plaintiff and it is imperative the Court adjudicates on all the issues raised in his Defence before he was deprived of the suit property which was fraudulently transferred to the Plaintiff. It was his disposition that on the issue of his Defence being struck out, he was informed by his advocate on record which information he believed to be true that the applicable Law demands that where the Plaintiff is satisfied that no defence had been filed within the stipulated time, then she/he was entitled to make an application for Judgement in default.

He further deposed that he was further informed by the said advocate on record that at the time of

filing his Defence herein, there was no regular Judgement on record in favour of the Plaintiff and absence of such Judgement the Defence herein was properly on record. He refuted that filing a Defence to the suit cannot be a delay tactic but it is making applications such as this instant application that serves to delay justice. It was his further contention that his Defence raised quite a number of triable issues that could only be properly adjudicated at the full trial of the suit herein. He alleged that as to the alleged rent payment, he could not be held liable for rent as he has been in occupation of the premises even before the applicant purchased the same. He further alleged that with his family resident in the property, the Plaintiff was aware her plea was made without justification. She was not a bonafide purchaser for value without Notice of his presence. The Respondent urged the Court to dismiss the instant application with costs.

The application was canvassed by way of written submissions. The Law Firm of **LJA Associates** for the applicant filed their written submissions on **16th July 2015**, and urged the Court to allow the instant application. It was submitted that the Defendant's Defence is a mere **sham, scandalous, and vexatious** and the Court was urged to strike it off with costs. They relied on the case of **Saudi Arabia Airlines Corporation Vs Premium Petroleum Co.Ltd** where the Court stated that;-

“ I need not re-invent the wheel on the subject of striking out a defence .A great number of judicial decisions have now settled the legal principles which should guide the court in determining whether to strike out a pleading . Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the constitution especially in article 47,50 and 159.

The first guiding principle is that, every court of law should pay homage to its core duty of serving substantive justice in any judicial proceedings before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating suit. That position applies mutatis Mutandis to a statement of defence and counter –claim. Secondly, and directly related to the foregoing constitutional principle and policy ,courts should recognize the act of striking out a pleading (Plaint or defence) completely divests a party of a hearing ,thus driving such party away from the judgement seat; which is a draconian act comparable only to the proverbial drawing of the ‘ Sword of Damocles’.

Therefore the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is ‘demurer or something worse than a demurer’ beyond redemption and not curable by even an amendment. Thirdly in case of a defence, the court must be convinced upon looking at the defence, that it is a sham; it raises no bona fide triable issues worth a trial by the Court. And a triable issue need not to be one which will succeed but one that passes the SHERIDAN J Test PATEL v E.A CARGO HANDLING SERVICES LTD [1974] E.A 75 at P.76(Duffus P)that “..a triable issue .. is an issue which raises a prima facie defence and which should go to trial for adjudication”.Therefore,on applying the test a defence which is a sham should be struck out straight away”.

The applicants further relied on the case of **Ecobank Kenya ltd vs Bobbin Limited & 2 Others (2014) eKLR** whereby the Court stated that;-

“ The Policy considerations of the above approach are that: 1) on one hand a plaintiff should not be kept away from his Judgement by unscrupulous Defendant who has filed a Defence which is a sham for the purpose only of temporizing on the case as long as possible; and 2) on the other hand, a defendant who has bona fide issue worth of trail should not be denied the opportunity to be heard on his defence on merit to enable the Court determine the real issues in controversy completely; that is serving substantive justice on consideration of all facts of the case”.

It was also submitted that no life can be injected into the sham of a defence as the same is beyond redemption and not curable by even an amendment. That it contains material non-disclosure and falsehoods and is frivolous and baseless with no legs to stand on. Further that the Defendant has no intention of defending the suit and has no bonafide issues to raise. It was further submitted that the defence filed is simply a tool designed to prevent and delay the plaintiff from reaching her just claim and

it is therefore an abuse of the court process.

The Law Firm of *J.Harrison Kinyanjui & Co. Advocates* for the Defendant filed their written submissions on **29th August 2015**, and urged the Court to dismiss the instant application. They relied on the case of **Ramji Megji Gudka Ltd Vs Alfred Morfat Omundi Michira & 2 Others (2005) eKLR** where the Court held that:-

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT Dobie & Company (Kenya) Ltd V Muchina (1982) KLR 1 in which Madan J A at P.9 said:-

“ The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial therefore before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits” without discovery , without LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right”.

The Defendant further relied on the case of **Olympic Escort International Co.Ltd & 2 Others – Vs- Parminder Singh Sandhu & Another (2009) eKLR** where the Court of Appeal held that:-

“ It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on . It need only be bona fide”.

Finally the Defendant also relied on the case of **Dev Surinder Kumar Bji Vs Aqility Logistics Ltd 2014 (eKLR)** where it was held :-

“ For a pleading to be dismissed pursuant to the provisions of order 2 Rule 15(1),it should be made clear and obvious that the issues raised by the Plaintiff can neither be substantiated, nor disclose any reasonable or justifiable an action as against the Defendant”.

This Court has now carefully examined the instant Notice of Motion, the annexures thereto, the pleadings in general and the relevant provisions of law and the Court makes the following findings.

There is no doubt that the Plaintiff herein purchased the suit property herein **LR No. 14598 IR 68101/1** through a Public Auction conducted on **12th November 2013**, pursuant to Standard Chartered Bank, (the charge) exercise of its Statutory Power of Sale. There is no doubt that the Defendant had charged the suit property in favour of Standard Chartered Bank vide a Charge registered on **30th March 2009**.

It is also evident that the suit property got registered in favour of the plaintiff on **28th August 2014**. The plaintiff claims that the Defendant has failed to give vacant possession even after issuing him with a vacation Notice dated **27th October 2014**. The plaintiff thereafter filed this suit seeking for various Orders among them eviction order against the Defendant. This suit was filed on **18th March 2015**, and vide an affidavit of service filed on **9th April 2015**, sworn by one **Silvester M Kitheka** , a process server , it is evident that the Defendant was served with summons to enter appearance on **26th Mach 2015**. From the Court’s records it is also evident that the Defendant did enter appearance on **9th April 2015**, through the Law Firm of *J.Harrison Kinyanjui & Co. Advocates* who filed a Memo of Appearance. However the Defence was filed on **8th May 2015**, in which a witness statement is attached. Though the plaintiff filed a request for Judgement on **8th May 2015**, the said request was not granted as a Defence was also filed on the same day. The applicant thereafter filed the instant application and the Court is called upon to

determine its merit.

There are two issues to be determined herein.

- 1. Whether the Defence on record should be struck out**
- 2. Whether the Defendant should be ordered to deposit security.**

The application is anchored under **Order 2 Rule 15** of the **Civil Procedure Rules** which states 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.**

It is also anchored under **Order 26** which provides:-

“In any suit the court may order that security for the whole or any part of the costs of any defendant or third or subsequent party be given by any other party”.

From the above provisions of law, it is evident that the Court has discretions to allow the prayers sought but as usual, the said discretion must be exercised judiciously.

The applicant has urged the Court to strike out the Defence as it is a mere sham, full of material non-disclosure an abuse of the Court's process, *scandalous, frivolous, vexatious* and an *obvious delay tactic*. However the Defendant has alleged that he has a bonafide Defence which should be considered.

The Court in the case of **Moi University Vs Vishua Builders Ltd , Civil Appeal No. 296 of 2004 (Unreported)** held that :-

“ The law is now settled that if the Defence raises even one bonafide triable issues then the Defendant must be given leave to defend”.

Further in the case of **Patel Vs EA Cargo Handling Services ltd (1974) EA 75** , the Court held that:-

“ In this respect , Defence on merit does not mean in my view a Defence that must succeed, it means as SHERIDAN J put it “ a triable issue that is an issue which raises a prima facie Defence and which should go to trial for adjudication”.

The applicant's main bone of contention is that the Defendant filed his Defence way out of the stipulated period of **14 days** after entering appearance. It is indeed correct that the Defendant filed his Defence on **8th May 2015**, a period of **29 days** after entering appearance. However there was no Judgement entered against the Defendant in default of filing the Defence. Further the Court is enjoined by **Article 159(2)** of the Constitution to do justice without undue regard to technicalities. The Defendant has filed Defence and the same has raised some triable issues. The Court has a duty to ensure that justice is done to all parties in the suit. This is the Court's calling as provided by **Sections 1A and 1B of the Civil Procedure Act**. The Court is also bound by **Section 3A of the Civil Procedure Act** to make orders that

are just and necessary to ensure that justice is met.

The Courts finds that the best order herein is to find that the Defence filed herein is properly on record and suit should be allowed to proceed for hearing and be decided on merit.

I have perused the Defence as filed and I find that it raises triable issues and the court cannot hold that it is a mere *sham*, *frivolous* and an abuse of the Court process. The Court finds that the Defence should be allowed to stand and the Defendant be given an opportunity to advance his case. As has been held in various judicial decisions striking out a Defence is a draconian act as it removes the Defendant from the seat of justice. See the case of **DT Dobie (supra)**.

The applicant needed to satisfy this Court that the Defence filed by the Defendant herein does not raise triable issues; it is *scandalous* and is *frivolous*. However, this Court finds that the said Defence has triable issues and the Court should therefore allow the parties herein to ventilate their issues and decide the whole case on merit. For the above reasons, the Court declines to allow **prayers no.3,4, and 5** of the Notice of Motion dated **18th June 2015**.

On **prayer no. 6** and **7** the Court finds that **Order 26(1)** of the Civil Procedure Rules grants the Court discretion to order that the Defendant do give security of costs

From the analysis of facts earlier, it is evident that the plaintiff herein purchased the suit property through a public auction. The Defendant has refused to move out of the suit property on allegations that the public auction was carried out fraudulently. That is an issue to be determined after calling of evidence. However the Court finds that this is a case that is fit for the Defendant to be ordered to deposit security of costs given the circumstances of the matter herein. The Court finds that the Defendant herein should deposit **Kshs.3 million** in a joint interest earning account in the names of both Advocates on record as security of costs within a period of **30 days** from the date of this Ruling , in default, then the Defence as filed by the Defendant will stand dismissed .

On **prayer no,7** it is evident that the Plaintiff herein is the registered owner of the suit property and the said sale has not been cancelled. The Defendant is in occupation of the suit property. The Court finds that as proposed by the Defendant in the email marked as '**TO3**', the Defendant is also directed to deposit **Kshs.100,000/=** every subsequent month in Court during the pendency of this suit as security for *mesne rent* in respect to the suit property. On costs, the applicant is entitled to costs of this application.

From the foregoing, the Court finds that in the Instant Notice of Motion the applicant's **prayers No. 3,4,& 5** are not merited and the same are disallowed. However the Court further directs that the Defendant to deposit **Kshs. 3 Million** as security of costs and the same to be deposited in a joint interest earning account in the name of the advocates on record within a period of **30 days** from the date of this Ruling. In default, the Defence on record will stand dismissed and a monthly deposit of kshs.100,000/= every subsequent month in court during the pendency of this suit as security for mesne rent. Costs to the applicant.

It is so ordered.

Dated, signed and delivered this **20th** day of **January, 2017**.

L.GACHERU

JUDGE

In the presence of :-

Mr Maina holding brief for Mr Kimathi for the Plaintiff/Applicant

Mr Macharia holding brief for Mr Kinyanjui for the Defendant/Respondent

Court Clerk : Hilda

L.GACHERU

JUDGE