



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. 100 OF 2007

SAMVO LIMITEDPLAINTIFF

=VERSUS=

DELTA HAULAGE SERVICES LIMITED.....1ST DEFENDANT

CATHAM PROPERTIES LIMITED.....2ND DEFENDANT

RULING

1. This is a Ruling in respect of a Notice of Motion dated 30th November 2015. The application is expressed to be brought under the provisions of Order 2 Rule 15 (c) and (d) Order 11 Rule 7 (2) and (b), Order 7 Rule 13, order 17 Rule 14 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya as well as Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.

2. The application seeks the following reliefs:-

1. That the Honourable Court be pleased to strike out the original Plaintiff's claim on record against the first defendant in the original action together with all the documents affidavits filed by it and accordingly all of them be struck out from the record.

2. That the Honourable Court be pleased to order that the statement of defence of the first defendant in the original action and the counter claim on record do proceed to hearing.

3. That the plaintiff in the original action be condemned to pay the costs of this application and of the suit.

3. The applicant contends that after Samvo limited filed its claim against it, it filed a defence and raised a counter-claim. There was a reply to the defence and defence to counter-claim. Other parties were enjoined in the proceedings. All parties except Samvo limited have filed their list of documents and witness statements but that Samvo Limited have not filed their list of witnesses and documents.

4. The applicant further contends that it has been unable to fix the suit for hearing because Samvo Limited has not complied with pre-trial directions given by the Court. That it has been expensive for the applicant to keep this litigation in court because of the reluctance of Samvo Limited to comply with court

directions. The applicant therefore prays that the original claim by Samvo be struck out and that the applicant be allowed to proceed with its counter-claim.

5. The applicant's application is opposed by a replying affidavit of Stephen Musalia Mwenesi counsel for Samvo Limited. Mr Mwenesi has explained the reasons for non-compliance with the directions of the Court. One of the explanations given is that it has been difficult to get documents from the relevant offices of the lands ministry and partly because of the actions of the applicant who has filed other suits. He contends that striking out pleadings is a drastic step which should only be resorted to as a last step. That Samvo Limited is entitled to be heard in court on this dispute and that Samvo Limited is ready to undergo a trial conference and have this case fixed for hearing.

6. I have gone through the applicant's applications as well as the opposition thereto by the Respondents. I have also gone through the submissions filed. The applicant is mainly seeking to have Samvo Limited's original claim dismissed on grounds of delay and non-compliance with the directions of the court. The applicant contends that Samvo Limited has been responsible for delaying prosecution of its case.

7. There is no doubt that this case was filed in 2007. The applicant herein filed two subsequent suits that in ELC No. 326 of 2012 and ELC 615 of 2014. These two suits have in a way contributed to delay in prosecution of the current suit. Samvo Limited had to apply to be enjoined in ELC No. 326 of 2012. It was brought in as the fourth defendant. Samvo Limited also filed an application to be enjoined in ELC 615 of 2014. This application has not been determined. In the intervening period, ELC 100 of 2007 was consolidated with ELC 326 of 2012. An application was also made to consolidate the two cases with ELC 615 of 2014. This application for consolidation has been allowed in a separate Ruling to be delivered on the same date as this one.

8. Besides the applicant contending that Samvo Limited has not complied with pre-trial directions, they too contend that Samvo Limited's suit may prejudice, embarrass or delay the fair trial and that it is an abuse of the process of court. This litigation involves a disputed property where three parties are claiming the same property. The applicant has not demonstrated that Samvo Limited's claim is so hopeless that not even an amendment can breathe life into it.

9. Samvo Limited has explained through its counsel why there was delay in filing its documents. There have been three separate suits touching on the same property. As I have alluded to herein above, there is a Ruling to be delivered today as in this present one where consolidation of the three suits has been allowed. It would therefore not be in order to strike out the claim by Samvo Limited when it is clear that the applicant has been part of the delay in concluding this case because it filed two subsequent suits without naming Samvo Limited and Samvo Limited has sought to join those subsequent suits.

10. Striking out a pleading is a drastic step which can only be resorted to in the clearest of cases. In the present case, there is no evidence that Samvo Limited's claim is so hopeless that it cannot be cured by amendment. In fact there is a pending application by Samvo Limited which seeks leave of the court to make further amendments to the Plaintiff.

11. Samvo Limited claim is not an abuse of the process of Court. The term an abuse of the process of the court " has been defined in **Bullen Leak and Jacob's precedents of pleadings 12th Edition** as follows;-

"The term abuse of the process of the Court" is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith, and it means that the court will not allow its function as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation".

12. I have looked at the pleadings of Samvo Limited and I cannot see in them any intention to delay the court process or abuse of the court process as to call for striking out of its pleadings. The failure by Samvo Limited not to comply with the directions of the court has been amply explained. The company is ready and willing to have the matter undergo pre-trial as shown in the affidavits of Mr Mwenesi in

opposition to the applicant's application and that in support of the application for consolidation.

13. Even though there were directions given pursuant to the provisions of Order 11 of the Civil Procedure Rules which were not complied with by Samvo Limited that, cannot be taken against it in view of the new developments in this matter. I therefore find that the applicant's Notice of Motion dated 30th November 2015, lacks merit. The same is hereby dismissed with costs to the Respondents.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* this *15th* day of *March 2017*.

E.O .OBAGA

JUDGE

In the presence of ;-

Mr Mwenesi for the Plaintiff/Respondent

Mr Owang for the 1st Defendant/Applicant

Mr Karanja for Dr Kuria for the 2nd Defendant/Respondent

Court Assistant :Kevin

E.O .OBAGA

JUDGE