



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 407 OF 2013

JULIUS MACHARIA THUO

NANCY WANGUI MUGWE

(Suing as personal representatives

and Administrators of the Estate of the late

APHAXARD THUO MUGWE Alias

ALPHAXARD THUOMUGWE.....PLAINTIFFS

VERSUS

PENTECOSTAL EVANGELISTIC FELLOWSHIP

OF KENYA.....1ST DEFENDANT

GRACE NYOKABI THUO.....2ND DEFENDANT

SAMUEL MBUTHIA KAMAU.....3RD DEFENDANT

THE LAND REGISTRAR, MURANGA DISTRICT.....4TH DEFENDANT

RULING

What calls for my determination in this matter is the plaintiffs' Notice of Motion dated 16th July 2013 in which they seek the main prayer that the defences filed by the 2nd and 3rd defendants be struck out and judgment be entered for the plaintiff against them. The application which is premised under the provisions of **Order 2 Rule 15 (1) (a) of the Civil Procedure Rules** is based on the grounds set out therein which are:-

(a) "The defence filed by the 2nd and 3rd defendants are sham and only raises no defence known in law".

(b) "It is clear from the defence that the properties of the deceased were appropriated before any grant of administration was obtained or at all".

(c) "No person has powers to appropriate the properties of deceased persons before a grant of administration and confirmation thereof is obtained".

(d) “Any dealings on the deceased property was therefore illegal, null and void and no right could pass to any person in regard to the deceased’s Estate properties or at all”.

(e) “The 1st and 4th defendants have not filed any appearance or defence in this suit”.

According to the plaint filed herein on 2nd April 2013 in which the plaintiffs are suing as the personal representatives and administrators of the Estate of the late **APHAXARD THUO MUGWE Alias ALPHAXARD THUO MUGWE** (the deceased), died on 9th September 1991. The deceased was the owner of the following parcels of land:-

1. LOC 5/GITHUNGURI/19
2. MAKUYU/KIMORORI/BLOCK 111/906 and
3. MAKUYU/KIMORORI/BLOCK 111/2236 (hereinafter the suit properties).

However, following his death, the defendant jointly, fraudulently and illegally transferred the suit properties to themselves even before grant of Administration had been obtained. The plaintiffs therefore seek several remedies including a declaration that any dealings on the suit properties was fraudulent, null and void and that the same should revert to the Estate of the deceased, eviction of the 1st, 2nd and 3rd defendants from the suit land and a permanent injunction restraining the said defendants from dealing with the suit properties.

The 2nd defendant filed a defence denying those averments and pleading that upon the demise of the deceased, his late wife **SOPHIA WANJIKU THUO** who was the rightful heir was registered as the rightful owner of the suit properties with the full knowledge of the plaintiffs who are her children. That with regard to the land parcel No. MAKUYU/KIMORORI/3 (KAGAA) 236, the same was allocated to the 2nd defendant inter vivos by the registered owner and she became the absolute and exclusive proprietor thereof. That with regard to land parcel No. FORT HALL LOC 5/GITHUNGURI/19, it is the residential land where the families have always resided. That this suit is defective since the defendants acquired the suit properties from the then registered owners.

On his part, the 3rd defendant denied any allegations of fraud adding that he did not know that the property known a MAKUYU/KIMORORI/BLOCK 111/2236 belonged to the deceased adding that he was a bona fide purchaser who carried out due diligence and paid valuable consideration. He also pleaded that the plaint is bad in law for mis-joinder.

In opposition to the Notice of Motion, the 2nd defendant filed a replying affidavit in which she deponed, inter alia, that the application is devoid of merit and seeks a short cut to justice and should therefore be dismissed. That the suit properties were transferred by the then registered owner way back in 1996 and this suit is statute barred and therefore frivolous and a gross abuse of the Court process.

On his part, the 3rd defendant filed grounds of opposition to the said Notice of Motion stating that his defence raises triable issues and is therefore not a sham and such issues need to be determined in evidence.

Although it was agreed that counsel file their written submissions to the application, only the plaintiffs’ advocate did so.

I have considered the application, the replying affidavit by the 2nd defendant and the grounds of opposition by the 3rd defendant. I have of course also perused the plaint and the respective defences of the 2nd and 3rd defendants as well as the submissions filed by **R.M. NJIRAINI ADVOCATES** for the plaintiff.

As indicated above, this application is founded under the provisions of **Order 2 Rule 15 (1) (a) of the Civil Procedure Rules** which provides as follows:-

“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”.

No doubt therefore, the law donates to this Court the power to strike out pleadings. However, such power which invariably results in a party being deprived of the opportunity to present his case is a draconian measure which should be resorted to sparingly and only in the clearest of cases. Indeed following the promulgation of the 2010 Constitution as well as the enactment of ***Sections 1A and 1B of the Civil Procedure Act***, the Courts now place more premium on sustaining rather than striking out pleadings. But that is not to say that rules of procedure have been thrown out of the window. Each case must be treated on its own peculiar circumstances. As was held in the case of ***D.T DOBIE & COMPANY (KENYA) LTD VS MUCHINA (1982) K.L.R 1*** by the late **MADAN J.A** (as he then was):

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof 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 matters without discovery, without oral evidence tested by cross-examination in the ordinary way”.

In this case, I am being asked to strike out the 2nd and 3rd defendants’ defences for disclosing no reasonable cause. However, the law is that before the Court strikes out any defence, it must be satisfied that it is a sham which raises no bona fide triable issues worth going to trial. A triable issue need not be one which must succeed at the trial. The test was laid down by **SHERIDAN J.** in ***PATEL VS E.A CARGO HANDLING SERVICES LTD 1974 E.A 75*** when he said:-

“.... a triable issue is an issue which raises a prima facie defence and which should go to trial for adjudication”

And as was held in the case of ***MOI UNIVERSITY VS VISHVA BUILDERS C.A CIVIL APPEAL No. 296 of 2007***, even one triable issue must entitle the defendant to pursue his defence. See also ***KENINDIA ASSURANCE COMPANY LTD VS COMMERCIAL BANK OF AFRICA LTD & OTHERS 2006 2 K.L.R 280*** where the Court held that the summary judgment procedure is to be resorted to only in the clearest of cases and if the defence shows a bona fide triable issue, then the defendant must be allowed to defend the claim. Finally, I may quote **DANCKWERTS LJ** in the case of ***WENLOCK VS MOLONEY 1965 1 W.L.R 1238*** where he said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading”. Emphasis added.

That explains why **Order 2 Rule 15 (1) of the Civil Procedure Rules** uses the word **“MAY”**.

In light of the above judicial principles and the law, are the defences of the 2nd and 3rd defendants herein clear candidates for striking out? I don’t think so. The plaintiffs’ claim is premised on the pleading that the suit properties were at all material times registered in the names of the deceased and after he died, and before the grant of Administration in respect of his Estate had been obtained, the defendants fraudulently transferred the said properties to themselves purporting that the transfer was done by the deceased during his life time. In her defence however, the 2nd defendant has pleaded that upon the demise of the deceased, the suit properties were registered in the names of his wife **SOPHIA WANJIKU THUO** with the full knowledge of the plaintiffs. And with regard to the property known as **MAKUYU/KIMORORI/3 (KAGAA) 2236**, the 2nd defendant pleads that it was transferred to her inter vivos by the then registered owner and is therefore her exclusive property.

On his part, the 3rd defendant has pleaded that he bought the property known as

MAKUYU/KIMORORI/BLOCK/111/236 from the 2nd defendant for valuable consideration after conducting a search and was not aware of the deceased's interest therein. He is therefore a bona fide purchaser without notice of any other claims. He therefore denies any fraud in the manner in which he acquired that property. Counsel for the plaintiffs, citing **Section 45 of the Succession Act** has rightly submitted that no party is permitted to intermeddle with the free property of a deceased person. That is correct. However, what I understand the 2nd and 3rd defendants to be pleading in their defences is that infact some of the suit properties i.e. MAKUYU/KIMORORI/3 KAGAA/2236 had already been transferred to the 2nd defendant during the deceased's life time and was therefore not part of his Estate. That by the time the 3rd defendant purchased it from the 2nd defendant, it was registered in the 2nd defendant's names. That pleading cannot be regarded as a sham defence that discloses no cause of action as envisaged under the provisions of **Order 2 Rule 15 (1) of the Civil Procedure Rules.**

Secondly, issues of limitation have been raised by the 2nd defendant in her replying affidavit in which she states that land parcel No. MAKUYU/KIMORORI/BLOCK 111 KAGAA/906 was transferred to the 1st defendant way back in 1996 and therefore this suit is statute barred. I do not see a plea as to limitation in the 2nd and 3rd defendant's defences but limitation is a matter of law that can be taken up by the Court even suo-moto. That is an issue that the trial Court will no doubt consider.

Other issues raised by the 3rd defendant's defence include mis-joinder and that the verifying affidavit offends the provisions of the ***Civil Procedure Rules*** and is therefore not an affidavit for purposes of filing suit. Those are no doubt serious triable issues that will obviously engage the trial Court at some stage.

The totality of all the above is that the 2nd and 3rd defendants defences cannot be described as a sham that raises no defence known in law. Those defences clearly raise bona fide triable issues which ought to be canvassed at trial. Whether or not they will succeed is not a matter to be considered at this stage. What is clear to me however is that this is not one of those clear cases where I can exercise my discretionary power to strike out the 2nd and 3rd defendant's defences.

The up-shot of the above is that the plaintiffs' Notice of Motion dated 16th July 2013 is dismissed with costs to the 2nd and 3rd defendants.

It is further directed that as the subject matter is situated in Muranga County where we now have an Environment and Land Court, this file is hereby transferred to that Court where it will be mentioned before Lady Justice **KEMEI** on 3rd April 2017 for further directions as to hearing.

It is so ordered.

B.N. OLAO

JUDGE

3RD MARCH, 2017

Ruling dated, delivered and signed in open Court this 3rd day of March 2017

Mr. Macharia holding brief for Mr. R.M. Njiraini for Plaintiffs present and also holding brief for Mr. Kanyi Kiruchi for the 2nd Defendant.

B.N. OLAO

JUDGE

3RD MARCH, 2017