



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 43 OF 2015

ETHICS & ANTI – CORRUPTION COMISSION.....PLAINTIFF/RESPONDENT

-VERSUS-

EDWARD MWANGI IRUNGU.....1ST DEFENDANT/RESPONDENT

MINALOVE HOTEL & RESTAURANT LIMITED.....2ND DEFENDANT/RESPONDENT

EQUITY BANK LIMITED.....3RD DEFENDANT/RESPONDENT

WILSON GACANJA.....4TH DEFENDANT/RESPONDENT

RULING

1. The application for determination is the Notice of Motion dated 7th April 2016 brought under sections 1A, 1B and 3A of the Civil Procedure Act, Order 1 Rule 10 (2), Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules. The 3rd Defendant/applicant is seeking an order that the plaintiff's claim against the applicant be struck out with costs;

2. The notice of motion is predicated on the grounds on the face of the application namely that:

(a) The 3rd defendant has been wrongfully and improperly named in this suit yet it has no interest in any claim or reliefs sought by the plaintiff in this suit;

(b) The plaint does not illustrate any cause of action as against the 3rd Defendant as the particulars of fraud, illegality and breach of public trust set out therein are based on actions of the 1st, 2nd and 4th Defendants but not the 3rd Defendant.

(c) The Honourable Court lacks jurisdiction to entertain this suit against the 3rd Defendant as the plaintiff has not disclosed any reasonable cause of action against the 3rd Defendant.

(d) The 3rd Defendant was a mere financier and in any event, it subsequently discharged the suit property;

(e) The plaintiff's suit is therefore incurably defective, bad in law and ought to be struck out;

(f) The 3rd Defendant will suffer gross prejudice if the application herein and the orders sought are not granted;

(g) It is in the interests of administration of justice that the prayers sought be granted.

3. The application is also supported by the affidavit of Henry Wambugu, the 3rd Defendant's credit manager sworn on 7th April 2016. Mr Wambugu deposes that sometime in May 2013, the 2nd Defendant approached the 3rd Defendant and requested to be advanced a credit facility of Kshs.10,000,000/=. That upon financial assessment of the 2nd Defendant, on or about 17th May, 2013, the 3rd Defendant approved the loan facility of Kshs.10,000,000/= to be repaid in 120 monthly instalments of Kshs.186,673.00. He deposes further that it was a term of the letter of offer that the facility will be secured by a legal charge over the suit property herein registered in the name of the 2nd Defendant. Mr Wambugu further deposes that sometime in August 2013, the 2nd Defendant requested the 3rd Defendant for variation of the terms of the letter of offer dated 17th May, 2013 to the effect that the security for the loan facility be substituted and the 3rd defendant approved the request for substitution via its letter dated 22nd August 2013 and subsequently discharged the suit property and replaced it with property Title No. I. R Subdivision Number 2702 (original No. 1469/234) Section 1 Mainland North. Mr Wambugu deposes that it is clear from the foregoing that the 3rd defendant being a mere financier and the suit property having been used as security for a loan advanced by the 3rd Defendant, it could not have any knowledge of fraud involving the suit property as alleged by the plaintiff, and that when it was made aware of the allegations of illegality involving the suit property, the 3rd Defendant discharged it. He deposes that the 3rd defendant has no interest, whether legal or equitable in the suit property and is not involved in the dispute at all hence its presence is not necessary.

4. In opposing the motion, the plaintiff filed grounds of opposition dated 22nd June 2016 in which the plaintiff contends that the application is vexatious and intended to defeat justice and that the 3rd defendant was properly named in the suit as it had charged the suit property and there was no evidence of discharge. The plaintiff is apprehensive that in the event of a default by the 2nd Defendant, the 3rd defendant may resort to exercising a power of sale over the suit property to the plaintiff's detriment.

5. The advocates for the plaintiff and the 3rd defendant filed written submissions. Both outlined the facts as contained in their pleadings. The applicant added that it is not properly joined and does not form a proper party to warrant the suit against it as the plaintiff's claim does not disclose any rights or obligations against the 3rd defendant. The applicant's counsel relied in the cases of **Football Kenya Federation Limited –vs- Kenya Premier League Limited & 4 others [2015] eKLR** and **Apex International Ltd & Anglo Leasing & Finance International Ltd –vs- Kenya Anti-corruption Commission [2012] eKLR**. It was also submitted that that was no cause of action disclosed against the 3rd defendant by the plaintiff and the applicant relied on the definition of a cause of action in the **Black's Law Dictionary, 9th Edition** which defines a cause of action as ***“a group of operative facts giving rise to one or more bases for a factual situation that entitles one person to obtain a remedy in Court from another person.”***

The applicant also relied in the definition of a cause of action in **Drummond Jackson -v- British Medical Association [1970] WLR 688** as an action on the part of the Defendant which gives the plaintiff his cause of complaint, and submitted that the 3rd defendant's action of charging (and later varying the security) is not an act which gives the plaintiff his complaint (being fraud and breach of public trust).

While relying in the case of **Blake -vs- Albion Life Assurance Society [1876] LJQB**, the Applicant submitted that the suit against it is scandalous as the issue of the charge of the suit property was immaterial and unnecessary in the determination of the case. It was further submitted on behalf of the applicant that the suit against the 3rd defendant tends to obscure the real question in issue which is whether the other defendants are guilty of fraud and breach of public trust as there is no nexus between the particulars of fraud and the applicant. It was therefore the applicant's submission that the claim

against it is merely to enlarge the issues and obscure the real issue in question as its interest is the repayment of the loan advanced to the 2nd defendant and which loan is now secured by a different property and the 3rd defendant no longer has interest in the suit property.

6. The Plaintiff/Respondent on their part reiterated the grounds of opposition filed herein and submitted that the 3rd defendant is a proper party to the suit as the suit property is still charged to it and there was no evidence of alleged discharge.

7. I have carefully considered the application, the affidavit in support, the grounds of opposition, the pleadings on record and the submissions made as well as the authorities cited.

In the plaint dated 11th March 2015 and filed on 13th March, 2015, the plaintiff prays for judgment against the Defendant jointly and severally for:

a) A declaration that the lease issued on or about 27th April 1998 in favour of the 1st defendant over the parcel of land described as Mombasa/Block XXVI/1010 was issued ultra vires the 4th Defendant's statutory powers is illegal, null and void ab initio;

b) Further to (a) above, a declaration that the said issuance of lease was incapable of vesting an interest in land or proper title to land to the 1st defendant and, by extension the 2nd & 3rd Defendants herein;

c) An order directed to the Land Registrar, Mombasa District Registry, to rectify the register by cancellation of the entries relating to the issuance of the lease dated 27th April 1998 and registered on the same date in favour of the 1st Defendant over the parcel of land described as Mombasa Island/Block XXVI/1010;

d) As against the 2nd Defendant, an order for vacant possession of the parcel of land described as Mombasa Island/Block XXVI/1010;

e) As against the 2nd & 3rd Defendants, an order for a permanent injunction to restrain them, their agents, servants employees and/or assigns from trespassing upon, transferring, leasing, wasting and/or dealing in any manner whatsoever described with the parcel of land described as Mombasa Island Block XXVI/1010, other than by way of a surrender to the Government of Kenya;

f) As against the 1st, 2nd and 3rd defendants jointly and severally, compensation for loss of use of the suit properties from 27th April 1998 to the date of cancellation of the grant;

g) Costs of and incidental to this suit;

h) Interest at Court rates on (f) and (g) above.

8. In its statement of defence dated 3rd February 2016 and filed on 3rd March 2016, the 3rd defendant denied the plaintiff's claim but admitted that 2nd defendant had obtained a loan of Ksh.10,000,000/= from the 3rd defendant and used the suit property as security. The 3rd defendant however stated that it has since discharged the suit property and replaced it with another, and therefore no longer has interest in the suit property. According to the 3rd defendant, it was wrongly sued.

9. Order 1 Rule 10 (2) of the Civil Procedure Rules provides that:

"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party

improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

On the other hand, Order 2 Rule 15 provides that:

“(i) 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.”

10. It follows therefore that the Court may on its own motion or on application of any party to the proceedings order the striking out of a party who the Court finds improperly joined. However, the Court can only do so on such terms as may appear to it to be just. In other words, while exercising its discretion, the Court must act reasonably, equitably and fairly and not according to shims and caprice.

The power to strike out pleadings or a party from a suit has been held over the years to be a draconian measure which ought to be employed only as a last resort and even then only in clearest of cases.

In the case of **DT Dobie & Company (Kenya) Limited -v- Joseph Macharia & Another (1980) eKLR, Madan J A (as he then was) quoting Sellers, L.J. in Wedlockk -vs- Maloney (1965) IWLR 1238** stated as follows:

“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 deal with any merits of the case for that is a function solely reserved for the Judge at the trial as Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross – examination in the ordinary way.” The learned Judge added that:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously 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 the case before it.”

11. The question that arises is whether the plaintiff has shown that he has a prima facie case against the 3rd defendant or whether the 3rd defendant has demonstrated that there is no prima facie case against it.

In its statement of defence as well as in the affidavit in support of the motion, the 3rd defendant admits that it granted the 2nd defendant a loan of Kshs.10,000,000/= which was secured by a legal charge over the suit property. The 3rd defendant however, states that it has since substituted the suit property with another property as security and that it has subsequently discharged the suit property and therefore no longer has interest in it.

12. I have looked at the 3rd defendant’s statement of defence, and the application as well as the affidavit in support thereof. The 3rd defendant has wholly failed to tender any evidence to support its assertion that

the suit property has been discharged. Because of that failure, what the 3rd defendant states in its statement of defence, and the application as well as the supporting affidavit amounts to more than empty and bare assertions without substance. The 3rd defendant's basis for seeking the striking out of the suit against it is that it has discharged and no longer have interest in the suit property. As already noted, there is no evidence that has been shown to support this assertion. In the event the plaintiff succeeds in his claim against the 1st, 2nd, and 4th defendants and it turns out the suit property has not been discharged, there would still be required an order compelling the 3rd defendant to discharge it.

In my view, it can be safely stated that a cause of action still exists entitling the plaintiff to claim or maintain against the 3rd defendant. From my perusal of the pleadings filed, it is evident that there exists a triable issue touching on the 3rd defendant which cannot be ignored, and in particular whether or not the suit property has been discharged by the 3rd defendant. It is my considered view that the 3rd defendant is a necessary party in these proceedings and its presence before the Court is necessary for the Court to effectually and completely determine all the issues. I am not satisfied that from the facts of this case that the 3rd defendant has been wrongfully and improperly named in the suit, considering that the suit property was charged to the 3rd defendant.

13. Accordingly, I find that this application is without merit and is hereby dismissed with costs.

Dated, signed and delivered at Mombasa this 22nd day of June, 2017.

C. YANO

JUDGE