

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 1180 OF 2013

KIYOGA LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

PETER NGURE KIMINGI.....DEFENDANT/APPLICANT

RULING

1. The Defendant/Applicant filed a notice of motion dated 12th February 2015 in which he seeks striking out of the plaintiff's suit with costs for failing to disclose any cause of action against him. The Applicant contends that on 1st November 2000, he leased the suit property to a company known as Three Sixty Investments Limited for a period of 12 years. The lease expired on 1st October 2012 and was not renewed.

2. The Applicant subsequently sub-divided the suit property and sold it to various companies and surrendered one portion thereof to the Government in exchange of subdivision scheme. The Applicant contends that the subject matter of the plaintiff's claim being **LR No. 20517/19 (Original number 20517/7/6)** was transferred to Redhill Waterfront Limited on 31st October 2012. The Applicant therefore argues that since he does not have any proprietary interest in the property which is the subject of the plaintiff's claim, there is no suit which can be maintained against him.

3. The Plaintiff/Respondent has opposed the Applicant's application based on a replying affidavit sworn on 27th February 2015. The Respondent argues that before a formal lease was signed, a proposal was made to the Applicant for renewal of a lease. The proposal was accepted by the Applicant. A formal lease was thereafter signed which lease was to expire on 31st July 2017. The Respondent paid the required amount to the Applicant as agreed.

4. On 24th July 2013 the Applicant in breach of the lease agreement wrongfully issued a notice to vacate despite knowing that the Respondent had paid rent as agreed. The Respondent contends that it did not know that the suit property had been sold to Redhill Waterfront Limited. That the said Redhill Waterfront Limited is a family company as the director is the wife of the Applicant. The Respondent further contends that Redhill Waterfront Limited being the successor of the Applicant is bound by the terms of the lease agreement. That an amendment can be made to include Redhill Waterfront Company Limited and therefore the Respondent's suit should not be struck out.

5. I have considered the Applicant's application as well as the opposition thereto by the Respondent. I have also considered the submissions by the parties in this case. The power to strike out a pleading ought to be exercised very cautiously. **Madan JA in D.T. Dobie & Company (Kenya) Ltd. – vs- Muchina (1982) KLR 1** expounded on the approach to be adopted in exercising the power to strike our pleadings 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 to deal with the 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 oral evidence tested by cross-examination in the ordinary way”

6. The principles in the D.T. Dobie Case (supra) have been reiterated in a number of decisions pronounced recently. All these cases emphasize the fact that in considering whether to strike out a pleading, a court ought not to examine in details or go into the merits of the case. As long as there is semblance of a triable issue, a litigant ought to be left to ventilate his case in a full trial. A pleading can only be struck out if it is plainly obvious that it is so hopeless that not even an amendment can breathe life into it.

7. In the instant case, the Plaintiff/Respondent has demonstrated that there was a lease between it and the Applicant. Payments were made which payments were acknowledged by the Applicant. The lease had not expired yet the Applicant gave notice to vacate. The Respondent is seeking specific performance of the lease agreement and damages for breach of contract. It is not for this court to examine the documents at this stage or determine whether there was a valid contract or not. A look at the pleadings reveal that the Respondent has a cause of action against the Applicant. The Respondent's suit is not so hopeless as to call for its striking out. I therefore find that the Applicant's application lacks merit. The same is hereby dismissed with costs to the Respondent.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 21st day of June 2017

E. OBAGA

JUDGE

In the presence of:

Mr. Shah for Plaintiff/ Respondent

Court Assistant - Hilda