**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 256 OF 2014**

**HASHAM LALJI PROPERTIES LIMITED…….….**
**PLAINTIFF**

**VERSUS**

**PHILIP KIMAIYO KOMEN…….….1ST**
**DEFENDANT**

**LEONARD CHERUIYOT AKORI……..……..……2ND**
**DEFENDANT**

**THE NATIONAL LAND COMMISSION……..……3RD**
**DEFENDANT**

**RULING**

The application herein is dated 12th day of May, 2016 wherein the 1st and 2nd defendants pray that the suit herein be struck out on grounds that it was filed before the plaintiff was incorporated. The suit was filed on 18.4.2014 whereas the plaintiff was incorporated on 15.4.2016. According to the defendants, the suit was filed by a non-existent plaintiff and cannot be therefore, maintained by the court and that the suit herein was filed in breach of mandatory requirement of Order 4, Rule 1(4) 6 of the Civil Procedure Rules, 2010. The second defendant claims that the crux of the purported plaintiff's case is anchored on facts that accrued before the plaintiff came into existence. This is a legal fantasy as a non-existence entity cannot claim right which allegedly accrued when it did not exist. Therefore, the suit herein represents a flawed and illegal attempt by the purported plaintiff to renew a non-existent lease and is therefore an abuse of the process of the court.

According to the said defendant, the purported plaintiff is not and has never been the registered proprietor of the properties known as L.R. No. Eldoret Municipality Block 8/168 and L. R. No. Eldoret Municipality Block 9/169 and therefore does not have the locus standi to institute and maintain a suit over the subject land as it was not the previous lease holder. The suit properties were registered in the name of one Bahadurali Hasham Lalji ("the previous owner") whose 99 years' leasehold interest came to an end on 1st August, 2007. The previous owner did not renew his leasehold interest over the suit properties during the subsistence or pendency of the lease and the instant suit represents a flawed attempt to renew a lease contrary to statute.

It is alleged that despite being allotted the suit properties for 99 years from 1st August, 1908, the previous owner has never developed the suit properties. The claim that the previous owner is entitled to the renewal of the lease, let alone past the expiry of the lease is contrary to express conditions in the lease which required a lessee or previous owner to develop the suit properties. That the suit is therefore bad in

law and untenable as it is anchored on breach of express conditions that required the previous owner to develop the suit properties.

The 1st and 2nd defendants applied for an allotment of the suit properties by their letters dated 13th September, 2008 and addressed to the Ministry of Lands and Settlement. The 1st and 2nd defendants' applications for allotment were approved on 24th November, 2010 following which allotment letters were issued in their favour. The 1st and 2nd defendants met all conditions set out in the letters of allotment that included payment of standard premium and land rent. The leases for the suit properties in favour of the applicants were prepared and executed by the National Lands Commission and forwarded to the Chief Land Registrar for registration. The purported plaintiff in the circumstances is a stranger and has no proprietary interest on the suit properties. The interest of the purported plaintiff, if any over the suit property was extinguished when the previous owner's leasehold interest came to an end on 1st August, 2007.

That the suit does not disclose a reasonable cause of action known in law against the defendants. In particular;

(a) There is evidence that the purported plaintiff was non-existent and the previous allottee of the suit properties applied for renewal of the lease on 7th July, 2011 when their leasehold interest over the suit property expired on 1st August, 2007.

(b) The 1st and 2nd defendants applied to be allocated the suit properties on 13th September, 2008 which applications were approved on 24th November, 2010. This was before the previous allottee made his application for renewal.

(c) There is no evidence that the previous owner of the suit property applied for the renewal of the leasehold interest over the suit properties at all either before or after the expiry of the lease.

(d) There is no suggestion that conditions, if any that were contained in letters of allotment (which was not issued in the first instance) were complied with and no particulars of trust have been specifically pleaded.

According to the defendants, the purported plaintiff (who was non-existent) at the time when the defendants procedurally applied for allotment of the suit properties the lease for the previous allottee having expired, without any legal cause of action has purportedly filed the suit against the said defendants in a clear abuse of the court process. That the suit filed by the non-existing entity being the purported plaintiff is thus void in law and should be struck out by this Honourable Court. That the suit is therefore scandalous, frivolous, vexatious and contrary to public policy. That the suit herein is vexatious and only seeks to stifle the registration of the signed lease in favour of the defendant, has been brought for ulterior motives and is an abuse of the court process.

The plaintiff filed a replying affidavit stating that the plaintiff company was registered in on the 6th of August, 1952 and not the year 2016 as alleged by the applicants and that the plaintiff/respondent company has been filing its annual returns as required by the Registrar of Companies which clearly show the persons who are shareholders of the plaintiff/respondent Company. The subject parcels of land were held by Bahadurali Hashm Lalji in trust for the plaintiff Company which is a Lalji family Company. The said Bahadurali is clearly one of the shareholders of the plaintiff Company. That he has been advised by his lawyers on record that the issue of trust has been pleaded in the plaint and it is one of the issues that will have to be determined by this court at full hearing of the suit. That he has been advised by his lawyers on record that this Honourable court must determine whether the 3rd defendant acted within the law in the manner in which it allotted the 1st and 2nd defendant/applicants the suit parcels specifically Articles 40 and 47 of the Constitution of Kenya, Section 13 of the Land Act and Section 14 of the National Land Commission Act. That if the subject matter of litigation is not preserved then the plaintiff's suit will be rendered nugatory. That he believes that this Honourable Court acted judiciously in issuing injunctive

orders to preserve the suit properties pending hearing and determination of this suit. That the applicant's application has not met the legal threshold required in granting the orders sought and thus should be struck out with costs. The plaintiff has annexed the resolutions of the company that the suit herein be filed.

The defendants submit that the plaintiff does not have the locus standi to bring this suit. The defendants argue that the Registrar of Companies has confirmed that the plaintiff does not exist. Secondly, the defendants submit that the plaintiff does not have any interest in the suit property as it was registered in the name of Bahadurali Hasham Lalji on 1.10.1984 and a Certificate of Lease issued on 16.2.1988. No reason has been shown why the certificate of lease has not been produced.

Moreover, that no attempt has been made to join Bahadurali Hasham Lalji in the suit. The defendants further contend that the suit does not raise any cause of action. Moreover, the defendants submit that the suit is frivolous, vexatious and scandalous and an abuse of the court process.

The plaintiff in response submits that he has demonstrated by affidavit that the company was incorporated in the year 1952 and therefore, the plaintiff was existent during the filing of the suit. The plaintiff submits that this is an issue that should go for full hearing.

Moreover, the plaintiff submits that it has demonstrated that one Bahadurali Hasham Lalji who happens to be a Director of the Company was holding the property in trust for the plaintiff. He submits further that the issue of trust cannot be demonstrated at the interlocutory level. The respondent further submits that he has a reasonable cause of action as the suit question suspicious or fraudulent renewal of leases in favour of the applicant.

I have considered the application, supporting affidavits and replying affidavits with the rival submissions of both counsels and do find that the first issue for determination is whether the plaintiff has a cause of action against the defendants. To determine whether there exists a cause of action, I do pause to ask the question, has the plaintiff any property interest in the property?

In the case of **DT Dobie & Company (K) Ltd Vs Muchina (supra) Madam J** held: "*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 action for being otherwise as abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that function is solely received for the trial judge as the court itself is not usually fully informed so as to deal with the merits. No suits ought to be summarily dismissed unless it appears so hopeless that is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption… A court of justice ought not to act in darkness without the full facts of the case before it."***

In this matter, the suit property is registered in the names of Bahadurali Hasham Lalji and not in the names of the plaintiff. The nature of title is a leasehold. Eldoret Municipality Block 8/168 measures 0.1921 ha whilst 169 measures 0.1957 ha. Mr. Bahadurali Hasham Lalji was issued with certificate of lease in both parcels of land.

***Section 24 (a) of Land Registration (Act No.3 of 2012)*** provides that: - "*The Registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.*"

The registration of Mr. Bahadurali Hasham Lalji as proprietor of the suit land, gave him absolute proprietorship for those parcels. Such absolute proprietorship can only be subject to certain rights and privileges as are known to law. That is why Section 25 of the Act provides as follows;

> S.25 (i) "The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by this Act, and shall be held by the proprietor, together with all privileges and appurtenances

belonging thereto, free from all other interests and claims whatsoever, subject;

(a) to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by Section 28 not to require noting on the register, unless the contrary is expressed in the register.

The plaintiff has come forward to say that his claim is based on trust. The plaintiff has produced the certificate of lease and the lease documentation duly registered in the names of Mr. Bahadurali Hasham Lalji as evidence of ownership and in terms of Section 26 (1) of the Act;

"The Certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer, or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained and endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –

a. On the ground of fraud or miss-representation to which the person is proved to be a party to;

b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

The above sections presuppose that for one to seek to enforce any right in property he must be a registered owner. plaintiff is not the registered owner of the suit land and therefore has no right over the property. The implication of the above is that the only person who is entitled to claim under a title is the registered owner and for trust to exist, the same ought to be shown in the title. I have not seen such evidence of registration.

I do find that the argument by the plaintiff that Mr. Bahadurali Hasham Lalji was a trustee could have made legal impact if Mr. Bahadurali was a party in this suit. However, he was not made a party and that there appear to be no intention to make him a party. I do find that the plaintiff has failed to disclose a cause of action against the defendants as he is not the proprietor of the suit parcels of land. Moreover, Mr. Bahadurali has not stated by affidavit that he held the property in trust for the plaintiff. On the issue of the non-existence of the plaintiff, the defendant has annexed a letter date 22nd October 2014 from the Registrar of Companies on which he relies to argue that the plaintiff is nonexistent, the plaintiff has on his part has shown a certificate of registration and memorandum of Association and Articles of Association. It was incumbent upon the plaintiff to write to the Registrar of Companies also seeking the same clarification. However, since I am in doubt as to the status of the Company, I will not make a finding on the status of the plaintiff.

On whether the suit is frivolous, vexatious and abuse of the process of court, I do find that It has not been shown to the satisfaction of this court that the pleadings hereto are scandalous, frivolous, vexatious, tending to prejudice, embarrass or delay fair trial; or abuse of the process of court.

It has been held in **Blake vs. Albion Life Ass. Society (1876) LJQB 663; Marham vs. Werner, Beit & Company (1902) 18 TLR 763; Christie vs. Christie (1973) LR 8 Ch 499 that a** pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details.

However, the word "scandalous" for the purposes of striking out a pleading under **Order 2 rule 15** of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous.

A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court's time; or (v) when it is not capable of reasoned argument. See **Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. GoldsMid (1894) 1 QBD 186.**

A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See **Bullen & Leake and Jacobs Precedents of Pleading (12th Edn.) at 145.**

A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party's pleading should have some fanciful advantage; or (v) where it can really lead to no possible good. See **Willis Vs. Earl Beauchamp (1886) 11 PD 59**.

A Pleading tends to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies. (Emphasis mine). See **Strokes Vs. Grant (1878) AC 345; Hardnbord vs. Monk (1876) 1 Ex. D. 367; Preston vs. Lamont (1876).**

A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process. A pleading is an abuse of the process where it is frivolous or vexatious or both. However, in **The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999** the Court of Appeal stated as follows:

> ***"The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did".***

In **Yaya Towers, Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000** the same court expressed itself thus:

> ***"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the***

***Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment".***

Considering the above definitions authorities, I do not find any basis for finding that the suit is an abuse of the process of court. However, I do find that the plaintiff has not established any reasonable cause of action against the defendants and therefore the suit is struck out with costs.

**DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF JUNE, 2017.**

**A. OMBWAYO**

**JUDGE**