

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL CASE NO 116 OF 2016

STEPHEN ODDIAGA.....PLANTIFF/APPLICANT

VERSUS

HON. ELIUD MWAMUNGA.....DEFENDANT/RESPONDENT

RULING

1. The Defendant moved the Court vide his Application dated 13th March 2017 under the provisions of Order 2 Rule 15 (1)(d) of the Civil Procedure Rules seeking the following prayers:

1) That the Complaint dated 20/5/2016 be and is hereby struck out for failing to disclose a reasonable cause of action or in the alternative for being otherwise an abuse of the court process.

2) Costs of the suit be borne by the Plaintiff

2. The Application is premised on the grounds on the face of it inter alia that the Plaintiff pleads the disputed plots are registered in the name of Voi Development Co. Ltd. That he entered into sale of the plots with the Defendant. The Application avers that Voi Development Co. Ltd is a different Legal Entity and its wrongs cannot be passed to its members. Further the Applicant avers that the property mentioned in the Complaint is no.83 and 84 while in the list of documents attached, the property mentioned is no 77 and 78. The Vendor is also mentioned as Tsavo Academy in place of the Plaintiff. That the Sale Agreement is not executed by either of the parties. Consequently no cause of action capable of enforcement by the Court is disclosed. For these reasons, the Applicant/Defendant urged the Court to strike out the Suit.

3. The Application is opposed by the Plaintiff/Respondent through a Replying Affidavit. The Plaintiff deposed that he is the one who paid to the Defendant the deposit of Kshs.180,000.00 as per copy annexed as “so-1” and entered into a handwritten Agreement. The Respondent deposed that he is the one who paid for survey as the Defendant confirmed to him the land was undergoing subdivision process and later paid the Defendant a sum of Kshs.50,000 vide his personal cheques. He annexed copies of these. The Respondent contended that it is the Defendant who gave him the details of ownership which he put in the handwritten Agreement. The Plaintiff pleaded that he personally dealt with the Defendant and accused the Defendant of fraudulent behavior in denying the transactions. The Plaintiff also deposed that he took possession and has developed the plot in excess of Kshs.100 million.

4. Parties filed Written Submissions supported by case law which I have read and considered. The Defendant introduced the issue of *locus standi* of the Plaintiff to commence the suit. This is not part of the grounds for striking out a suit under Order 2 Rule 15 (1)(d) neither did it form part of his grounds on the face of the Application. In support of this submissions, he quoted Mureithi J in the case of **Midland Finance and securities ltd and ANO vs KACC (2015) eKLR that**

“For court to be competent and have jurisdiction over a matter, proper parties must be identified”

In my understanding of the applicant’s complaint is that there is a mis-joinder of parties i.e. between the Defendant and Voi Development who ought to have been sued. However, the Plaintiff had rebutted the Defendant’s averment by annexing copies of cheques paid to the Defendant personally therefore linking

the Defendants to having engaged in a transaction with him

5. The Defendant avers that the property in dispute is in the name of Voi Development Co Ltd as pleaded by the Plaintiff. The Defendant refers to documents filed by the Plaintiff showing the disputed properties are in the name of the said company. The list of documents filed by the Plaintiff and filed in court 20th May 2016 on the face of it include demand letter and 4 other letters plus receipts of payment issued. The Defendant has only filed a statement of defence with no documents attached. Can the correspondences attached to the pleadings be said to constitute documents of ownership?

6. My answer is no. Therefore by the Defendants introducing that allegations that the property belongs to the company is asking this Court to conduct a mini trial to investigate the meaning attached to the documents filed. It becomes clear that the issue of whose name the property is held would require evidence and is best sorted out during a trial and not the implementation of Order 2 Rule 15 (1)(d).

7. In the case of **D. T. DOBIE & CO (KENYA) LTD VS MUCHAIA (1982) KLR** and several cases thereafter, the Court of Appeal has taken the position that the Court should be very cautious while exercising its power to strike out and should only do so where a case is so hopeless that even an amendment would not redeem the suit. However where a suit shows a mere semblance of a cause of action it ought to be allowed to go forward provided it can be injected with real life by an amendment. In the instant case, amendment of changing or addition of parties will definitely inject life to the suit. Consequently I decline to exercise my discretion in favour of the Defendant. Instead I find the Application as meritless and hereby dismiss it with an order that each party bears their respective costs

Ruling delivered, dated and signed at Mombasa this 26th day of September 2017

A. OMOLLO

JUDGE