



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1142 OF 2016

SUCHAN INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

DIPA PULLING.....DEFENDANT

RULING

1. On 20/12/2016, the Plaintiff, Suchan Investments Limited, brought a Notice of Motion dated 6/12/2016 seeking an order striking out the defendant's statement of defence on four grounds:

- a) it discloses no reasonable cause of action 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.*

2. The applicant contends that together with the respondent and one Sandeep Rajni Desai, they own shares in Land Reference No. 209/19106 (hereinafter referred to as "**the suit property**"). The applicant further contends that in the year 2008, the Respondent, Dipa Pulling, instituted Nairobi ELC Case No. 200 of 2008 against the plaintiff seeking, *inter alia*, a permanent injunction against the plaintiff. As a result, the respondent was granted an interim injunctive order on condition that she executed and filed a personal undertaking to pay damages arising out of the issuance of the said injunction. The respondent proceeded to issue and file the personal undertaking.

3. Prior to the institution of Nairobi ELC Case No. 200 of 2008, the suit property had been gazetted as a national monument vide Gazette Notice No. 3204 of 2008. This gazettement triggered a different suit, Nairobi High Court Judicial Review Civil Application No. 129 of 2009 which culminated in Nairobi Court of Appeal Civil Appeal No. 46 of 2012 in which the Court of Appeal quashed that gazette notice and the property reverted to the original proprietors.

4. The plaintiff contends that by its Judgment, the Court of Appeal discharged the injunction hitherto enjoyed by the defendant in Nairobi ELC Case No. 200 of 2008 with the result that the defendant's personal undertaking became operative.

5. The defendant opposes the Notice of Motion on three grounds:

- (a) the application and suit are premature because the suit in which the personal undertaking was given is yet to be determined;*

(b) the judgment delivered by the Court of Appeal in Civil Appeal No. 46 of 2012 arose from Judicial Review Case No. 129 of 2009 and did not discharge the interim orders granted in Nairobi ELC Case No. 200 of 2008; and

(c) the orders granted in Nairobi ELC Case No. 200 of 2008 are still in force hence the cause of action herein has not arisen.

6. The issue to be determined in the present Application is whether the Application satisfies the criteria for striking out a defence within the framework of **Order 2 Rule 15 (1) of the Civil Procedure Rules**.

7. I have considered the grounds upon which the Application is predicated, the affidavit sworn by Kamal Chandulal Shah in support of the Application, the annexures to the affidavit, the defendant's grounds of opposition and the parties' rival submissions. I have also considered the relevant legal framework and the guiding jurisprudential principles on the broad subject of striking out pleadings.

8. The applicant has invited the court to exercise its jurisdiction under **Order 15 (1)** in its entirety. It is trite law that a party moving the court to strike out pleadings under **Order 15 (1)** must elect to either move the court under **Sub-rule (1) (a)** alone or under the provisions of any of the other **Sub-rules in Order 15(1)**. The rationale for this is found in **Order 15 (2)** which provides as follows:

“No evidence shall be admissible on an application under sub-rule (1) (a) but the application shall state concisely the grounds on which it is made.”

The legal ramification of **Sub-rule 15(2)** is that no evidence is admissible on an application brought under **Sub-rule (1) (a)** or premised upon the ground that the pleading sought to be struck out discloses no reasonable cause of action or defence in law. Given that evidence is inadmissible on an application under **Sub-rule 1 (a)**, it automatically follows that any affidavit attached to an application brought either under **Sub-rule 1 (a)** alone or under **Sub-rule 1 (a)** in combination with other rules is inadmissible.

9. The present application is brought under **sub-rules (1) (a) (b) (c) and (d)** all combined together. Similarly, the Applicant has invoked all the grounds set out in **Order 15 (1) (a) (b) (c) and (d)**. In view of the fact that no evidence is admissible in an Application under **Sub-rule 1 (a)**, the affidavit of Kamal Chandulal Shah is inadmissible and would stand struck out because the law so demands. That is the legal fate that does inevitably befall that particular affidavit.

10. Even if I were wrong in my interpretation of the framework in **Order 15 of the Civil Procedure Rules**, this Application would still fail on the ground that it does not satisfy the jurisprudential criteria for striking out pleadings. The guiding principle on striking out pleadings was laid down by the Court of Appeal in the case of **D.T. DOBIE & COMPANY (KENYA) LTD V JOSEPH MBARIA MUCHINA & ANOTHER**, in which Madan, JA stated:

“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 live by amendments, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

11. In the more recent case of **NURU CHEMIST LIMITED & ANOTHER V NATIONAL BANK OF KENYA**, (2008) eKLR, the Court of Appeal, commenting on the framework in **Order V1 Rule 13(1)** which is replicated in **Order 2 Rule 15(1)** of our current **Civil Procedure Rules** observed as follows:

“An applicant who brings an application seeking an order to strike out a pleading on this ground must demonstrate to the court either that the pleading, in this case the defence, is scandalous, or it is frivolous or vexatious or that it may prejudice embarrass or delay the fair trial of the case.”

12. Commenting on the same framework in **YAYA TOWERS LIMITED V TRADE BANK LIMITED (IN LIQUIDATION), (2000) eKLR**, Lakha, JA quoting verbatim the Court of Appeal in **PAOLA MURI V GIAN BATISTA MURI & ANOTHER, CA No. 59 of 1999** observed as follows:

“the power to strike out was one which should be exercised only in plain cases.”

13. One key question to be answered in determining whether the respondent’s statement of defence is devoid of any defence is the question as to whether or not the personal undertaking filed in Nairobi ELC Case No. 200 of 2008 (formerly HCCC No. 200 of 2008) has crystallized and is now operative. Ground No. 11 of the Applicant’s grounds states as follows:

“11. By its judgment the Court of Appeal discharged the injunction hitherto enjoyed by the respondent with the result that the respondent’s personal undertaking became operative and the applicant is thus entitled to seek damages arising out of the discharge of the said injunction.”

14. I have examined the plaint and the bundle of documents accompanying the plaint. Nairobi Civil Appeal No. 46 of 2012 was an appeal from the Ruling and orders of the High Court of Kenya at Nairobi (Musinga, J) delivered on 21 July 2011 in **Judicial Review Misc Civil Case No. 129 of 2009**. It was not an appeal against a decision made in Nairobi ELC Civil Case No. 200 of 2008 (formerly High Court Civil Case No. 200 of 2008). The verdict of the Court of Appeal was captured in Paragraph 61 of its Judgment as follows:

“In totality, our re-evaluation of the evidence on record and applicable law leads us to come to the conclusion and make a finding that this appeal has merit and is hereby allowed. We set aside the ruling of the High Court dated 21st July 2011 and all consequential orders. We hereby issue an order of certiorari as prayed for in the appellant’s Amended Notice of Motion dated 8th February 2011. For avoidance of doubt, Legal Notice No. 128 dated 17th September 2008 declaring the suit property as a National Monument be and is hereby quashed. The 1st, 2nd and 3rd respondents shall bear the appellant’s costs in this appeal and at the High Court. No order as to costs against the 4th and 5th respondents.”

15. It is clear from the judgment of the Court of Appeal that the judicial review suit and the resultant appeal were in respect of the gazette notice declaring the suit property a national monument. The judgment quashed the legal notice. The judgment did not in any way terminate or determine the proceedings in Nairobi ELC Case No. 200 of 2008. Neither did it discharge the interim injunctive orders issued in Nairobi ELC Case No. 200 of 2008.

16. The defendant contends in her defence that the undertaking given in Nairobi ELC No. 200 of 2008 has not crystallized. In my view, that averment cannot be said to be a frivolous averment devoid of any defence. I have deliberately restrained myself against making more comments delving deeper into this aspect of the defendant’s defence because to do so at this stage would be inappropriate.

17. In light of the foregoing, I have come to the conclusion that the plaintiff’s Notice of Motion dated 6/12/2016 lacks merit and should be dismissed. The Application is hereby dismissed. The defendant shall have costs of the Application.

Dated, signed and delivered at Nairobi on this 22nd day of September, 2017.

B. M. EBOSO

JUDGE

In the presence of:

Kali h/b for Kemunto: Advocate for the Plaintiff

Muthee h/b for Shaw: Advocate for the Defendant

Halima: Court Clerk