



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC SUIT NO. 840 OF 2016
(CONSOLIDATED WITH ELC SUIT NO.771 OF 2016)

UNITED STATES INTERNATIONAL UNIVERSITY.....PLAINTIFF

VERSUS

MAESTRO CONNECTIONS HEALTH SYSTEMS LTD.....1ST DEFENDANT

H. E. DANIEL TOROITICH ARAP MOI.....2ND DEFENDANT

CHIEF LAND REGISTRAR.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL.....4TH DEFENDANT

ICEA LION LIFE ASSURANCE COMPANY LIMITED.....5TH DEFENDANT

RULING

The plaintiff was granted leave on 18th January, 2017 to amend its amended plaint dated 29th July, 2016. In its further amended plaint dated 30th January, 2017, the plaintiff added among others, ICEA Lion Life Assurance Company Ltd. to the suit as the 5th defendant. In the said plaint, the plaintiff averred as follows. The plaintiff is the registered proprietor of all that parcel of land known as L.R No.15997/2(I.R No.106361) situated in the City of Nairobi measuring approximately 12.14 hectares (hereinafter referred to as “the suit property”). The suit property is a portion of L.R No. 12597(hereinafter referred to as “the original land”). The original land and another parcel of land known as L.R No. 12608 (hereinafter referred to as “Plot No. 12608”) were acquired by the plaintiff from the 5th defendant at a consideration of Kshs.90,000,000/- in the year 1999. The plaintiff purchased the original land and Plot No. 12608 in good faith and was duly registered as the owner thereof. The plaintiff took possession of the original land and Plot No. 12608 in the same year. In the year 2001, the plaintiff sub-divided the original land into two portions, namely,L.R No. 12597/1 and L.R No.12597/2(the suit property). Through an agreement dated 24th January, 2001, the plaintiff exchanged and transferred L.R No. 12597/1 to Balozzi Cooperative Society Limited (Balozzi) who transferred to the plaintiff L.R No.12422/550 that was before then owned by Balozzi. After the transfer of L.R No. 12597/1 to Balozzi as aforesaid, the plaintiff remained with L.R No. 12597/2(the suit property). The plaintiff had quiet possession, use and enjoyment of the suit property until on or about 9th July, 2016 when the 1st defendant entered the suit property forcefully and threatened to illegally occupy and take over the same thereby breaching the plaintiff’s proprietary rights. The 1st to 4th defendants have contended that the plaintiff’s title over the suit property was acquired fraudulently and illegally. The plaintiff purchased the suit property from the 5th defendant in good faith without any

notice of the alleged defect in its title or any claim over the same by third parties. The allegations and claims made by the 1st to 4th defendants imply that the 5th defendant had no title to pass to the plaintiff. The plaintiff would claim from among others, the 5th defendant compensation for such loss as the plaintiff may incur in relation to the suit property in the event that the court makes a finding that the 5th defendant had no title to pass to the plaintiff in respect of the suit property and proceeds to nullify the plaintiff's title over the suit property.

The plaintiff sought as alternative prayers in the further amended plaint, a declaration that the plaintiff was an innocent purchaser of the suit property from the 5th defendant without notice of any defect in its title and, an order directed at among others the 5th defendant to compensate the plaintiff for the loss of the suit property at the current market value of the suit property.

Upon being served with the further amended plaint, the 5th defendant filed an application by way of Notice of Motion dated 20th February, 2017 under Order 1 Rule 10, Order 2 Rule 15(1(a) and Order 3 Rule 6 of the Civil Procedure Rules, 2010 seeking an order that the name of the 5th defendant be struck out of the suit with costs. This is the application which is before me for determination. The application was not supported by an affidavit. It was based on the grounds which were set out on the face thereof. The 5th defendant contended that it was improperly joined in the suit and that the further amended plaint disclosed no reasonable cause of action against it. The 5th defendant averred that the plaintiff purchased the suit property from the 5th defendant on 5th May, 1999 and occupied the property peacefully until 9th July, 2016. The 5th defendant averred that the plaintiff's suit was in the circumstances time barred under section 4(1) of the Limitation of Actions Act. While the application was pending, the 5th defendant filed its statement of defence on 21st March, 2017 in which the 5th defendant reiterated that the further amended plaint disclosed no reasonable cause of action against it and that if there was any cause of action disclosed, the same was time barred.

The 2nd defendant also filed amended defence and counter-claim in response to the further amended plaint. In its defence, the 2nd defendant contended that 5th defendant had acquired the title to the suit property unlawfully and as such the 5th defendant had no valid title that it could transfer to the plaintiff. The 2nd defendant averred that since the 5th defendant had no title which it could pass to the plaintiff, the plaintiff's title is similarly invalid. In his counter-claim the 2nd defendant joined the 5th defendant as a defendant and sought among others an order nullifying the transfer of the suit property to the 5th defendant and the subsequent transfer of the said property by the 5th defendant to the plaintiff.

The 5th Defendant's application was opposed by the Plaintiff and the 1st and 2nd Defendants. The plaintiff opposed the application through a replying affidavit sworn by Helen P. Ambasa on 20th April, 2017. The plaintiff averred that the joinder of the 5th defendant to the suit herein was proper and regular and that the 5th defendant's contention that it was improperly joined to the suit had no basis. The plaintiff averred further that the root of its title has been attacked in the suit herein and as such it was necessary for the 5th defendant who sold the suit property to the plaintiff and to which the purchase price was paid to be made a party to the suit as it was from it that the plaintiff acquired the title under attack. The plaintiff averred that it has a cause of action against the 5th defendant which has been demonstrated and that in any event, the 5th defendant is a necessary party to the proceedings. The plaintiff denied that its claim against the 5th defendant is time barred contending that the claim is based on fraud whose cause of action does not arise until the fraud has come to the knowledge of the claimant.

The 5th defendant's application was argued before me on 14th June, 2017. I have considered the application together with the replying affidavit which was filed by the plaintiff in opposition thereto. I have also considered the submissions which were made before me by the advocate for the 5th defendant in support of the application and the advocates for the plaintiff and the advocates for 1st, 2nd and 4th defendants in opposition thereto. The 5th defendant has attacked the further amended plaint on two fronts

which are intertwined. First, the 5th defendant has contended that the further amended plaint discloses no reasonable cause of action against it. Secondly, the 5th defendant has claimed that it was wrongly joined in the suit. As I have stated earlier, the 5th defendant's application was brought under among others, Order 1 Rule 10 and Order 2 Rules 15 (1) (a) of the Civil Procedure Rules. Under Order 2 Rules 15 (1) (a) of the Civil Procedure Rules, the court has a discretion to strike out a pleading on the grounds that it discloses no reasonable cause of action or defence. In view of the draconian nature of this remedy, it is now settled that the court's power to strike out pleadings should be exercised with great circumspection and only in clearest of cases. In the case of, D.T. Dobie & Company (K) Ltd. vs. Joseph Mbaria Muchina & Another, Civil Appeal No. 37 of 1978[1982]KLR 1, Madan J.A stated as follows regarding the exercise of the power to strike out pleadings:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.”

In the case of, J.P. Machira vs. Wangeth iMwangi, Court of Appeal, Civil Appeal No. 179 of 1997(unreported), Omolo J.A, stated as follows:

“I do not think the unfettered power in the courts to allow amendments at any stage is to be used to enable the parties to create all sorts of fanciful defences in the course of litigation. Nor do I understand the decision of this court, particularly that of Madan J.A in the case of D.T. Dobie & Company (Kenya) Ltd. vs. Joseph Mbaria Muchina & another, Civil Appeal, No. 37 of 1978(unreported) to mean that no pleading could ever be struck out even where it is patently clear that no useful purpose could ever be served by a trial on merits.....I agree that these powers are drastic and as the court said.....the powers are to be exercised with great caution and only in clearest of cases. But once such caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on the merits, the court is perfectly entitled to strike out a pleading for as I have said, there is no magic in holding a trial on the merits particularly where it is obvious to everyone that no useful purpose would be served by it.”

Order 1 rule 3 of the Civil Procedure Rules provides as follows:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

Order 1 rule 10 (1) to (2) of the Civil Procedure Rules on the other hand provide as follows:

(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) 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.

In the case of Deported Asians property Custodian Board vs. Jaffer Brothers Limited (1999)1E.A 55 (SCU) which was cited with approval in the case of Pravin Bowry vs. John Ward and another (2015) eKLR, the court stated among others that:

“For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the Plaintiff seek in the suit, would legally affect the interest of that person, and that it is desirable, for avoidance of multiplicity of suits to have such person joined so that he is bound by the decision of the court in that suit.”

In the case of Werrot and Company Ltd. and others vs. Andrew Douglas Gregory and others, Nairobi (Milimani) HCCC No. 2363 of 1998(1998)LLR2848(CCK), Ringera J.(as he then was) stated that:

“For determining the question who is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and, (ii) It should not be possible to pass an effective decree in the absence of the party”.

It is on the foregoing principles that the 5th defendant’s application falls for consideration. On the material before me, I am not persuaded that this is a proper case in which the court should exercise its discretion to strike out a plaint. What is in dispute between all the parties to this consolidated suit is the ownership of the suit property. The plaintiff acquired its title to the suit property from the 5th defendant. The 5th defendant acquired its title to the property from a company known as D.P.S International Limited which in turn is alleged to have acquired its title to the suit property from the 2nd defendant. The 2nd defendant has denied selling the suit property to D.P.S International Limited. The 2nd defendant has contended that he is still the owner of the suit property which he has referred to in these proceedings as L.R No. 12422/19. As I have stated earlier, the 2nd defendant has claimed that the purported instrument of transfer pursuant to which the suit property was alleged to have been transferred by the 2nd defendant to D.P.S International Limited was forged and as such the same was invalid and incapable of passing a valid title in the suit property to D.P.S International Limited. The 2nd defendant has claimed further that the title which the 5th defendant acquired from the said D.P.S International Limited and which it passed to the plaintiff was tainted with fraud and as such the plaintiff’s title is invalid. It is clear from the foregoing that the root of the plaintiff’s title has been brought to question.

In the case of George Mbiti Kiebia & Another vs. IsayaTheuri M’lintari & Another (2014) eKLR the Court of Appeal stated that:

“Under Section 112 of the Evidence Act, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him. How the appellant got registered as proprietor of Land Parcel No. 70 is a fact within the knowledge of the appellant and it was incumbent upon the appellant to dislodge the notion that Land Parcel No. 70 was ancestral clan land and refute that he was not registered as proprietor as a representative of the family of the late M’Kiebia.”

In the same case the court stated further as follows;

“We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title which is in challenge and the registered proprietor must go beyond the instrument and rebut the notion that the property is not free from any encumbrances including any and all interests which need not be noted in the register.”

I am of the view that there was no better way for the plaintiff to prove that the root of its title to the suit property was clean than to bring on board the 5th defendant who passed the title to it to tell the court how it acquired the title. I am in agreement with the decision of Rawal J.(as she then was) in the case of Safi Petroleum Products Ltd. vs. Abdirahiman Abdi [2007]eKLR which was cited by the plaintiff in which she held that a company which sold a property which was in dispute in a suit was a necessary party to the suit. I am satisfied that the 5th defendant is a necessary party to this suit and was properly added to the suit by the plaintiff. The 5th defendant sold the suit property to the plaintiff. The plaintiff’s title has been

challenged by the 1st and 2nd defendant. The 5th defendant has been mentioned adversely in the pleadings. The 2nd defendant has brought a counter-claim against both the plaintiff and the 5th defendant seeking to nullify the transfer of the suit property by the 5th defendant to the plaintiff on account forgery and illegality. I am satisfied that in the circumstances of this case, the presence of the 5th defendant before the court is necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in this consolidated suit.

I am also satisfied that the plaintiff has a reasonable cause of action against the 5th defendant. As I have stated earlier, the plaintiff has sought as an alternative prayer as against among others the 5th defendant, compensation for the loss of the suit property in the event that the court finds that the 5th defendant had no title in the suit property which it could pass to the plaintiff. I am not convinced at this stage by the 5th defendant's argument that under the proviso to section 24 of the Registration of Titles Act, Chapter 281 Laws of Kenya(now repealed), the plaintiff would not be entitled to compensation from the 5th defendant even if the court finds that the 5th defendant had no title to pass to the plaintiff. In any event, my understanding of the law is that a reasonable cause of action is not one that must succeed. It is sufficient that it is well founded in law and fact. I am satisfied that the cause of action pleaded against the 5th defendant in the further amended plaint meets these criteria. On whether the plaintiff's claim is time barred, I am in agreement with the submissions by the plaintiff and the authorities cited in support thereof that this argument by the 5th defendant has no merit.

In the final analysis, I find no merit in the 5th defendant's application dated 20th February 2017. The same is accordingly dismissed with costs to the plaintiff and the 1st, 2nd and 4th defendants.

Delivered and Signed at Nairobi this 22nd day of September 2017

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Ashitiva for the Plaintiff

Mr. Ochieng and Mr. Okatch for the 1st Defendant

Ms. Nyagah h/b for Ngatia for the 2nd Defendant

Ms. Ndungu for the 3rd and 4th Defendants

Mr. Fraser S. C for the 5th Defendant

Kajuju Court Assistant