



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
COMMERCIAL CASE NO35 OF 2017
(FORMERLY CIVIL CASE NO.20 OF 2006)

HIGHLAND PLAZA LIMITED.
**PLAINTIFF/APPLICANT**

VERSUS

SAFARICOM
LIMITED.....DEFENDANT/RESPONDENT

AND

- 1. EVANS ONDIEK ANYONA**
- 2. CHUMA ADHIAN NYUNDO**
- 3. JACKSON KIPNG'ETICH TUITOEK.....INTERESED PARTIES**

RULING

1. The Plaintiff filed a Chamber Summons Application dated 14th July 2006 under Order VI Rule 13 (1) (b)(c) and (d) of the former edition of Civil Procedure Rules (now repealed) and Section 3A of the Civil Procedure Act praying that the defence filed by the Defendant be struck out. The application is made on the grounds that the defence is frivolous and/or otherwise an abuse of the Court process and is intended merely to delay the fair and expeditious disposal of the suit and is further grounded on the affidavit of Darius M. Mbela a Director of the Plaintiff company dated 7th November 2006.

2. The former provisions of the Order VI Rule 13 (1), (b)(c) and (d) is equivalent to the current Order 2 Rule 15 (1), (b), (c) and (d) and provides as follows:

“(1) at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

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,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

3. In the Supporting Affidavit, Mr. Mbela deposes that the Suit Property is a leasehold interest created in favour of the Plaintiff Company effective 1990 and he annexed a copy of the lease document. He further deposes that the purported interest of the third parties under whom the Defendant claims in its defence is fictitious and/or non-existent and that investigations and/or inquiries with the relevant government offices have revealed anomalies which clearly point to fraud in creation of the alleged interest. That the alleged third parties had no right or interest capable of being conferred upon the Defendant and that the Defendant can now only look to such third parties for recompense.

4. The application is opposed by the Defendant through the Replying Affidavit dated 21st December 2006 sworn by Nzioka Waita, the Legal Services Manager of the Defendant who deposes that the Defendant proceeded to erect the mast on the Suit Premises based on documents of the title and verification that were and continue to be authentic and which are annexed to the said affidavit. Mr. Waita deposes that on the basis of those documents, the Defendant entered into an agreement of the lease dated 20th July 2005 with one Ondieki Evans Anyona and constructed the mast which took several months during which time the Defendant had possession and free access to the Suit Premises without any notice of objection or actual objections from the Plaintiff. The Defendant believes that the Original Title presented to it is authentic as the same has to its knowledge neither been revoked nor notice impeaching the same given to it. Further, that the said Certificate of Lease held by Mr. Anyona was issued first in time. The Defendant contends that the Plaintiff's annexures being photocopies that are not certified by the authors are subject to verification that can only be best done through trial and under the security of cross-examination as against the Defendant's documents. Further, it is the Defendant's contention that serious allegations and claims of forgery and fraud are made by and against parties that are not enjoined in this suit and which allegations can only be tried in viva voce hearing. Mr. Waita further deposes that the Defendant has indicated and pleaded intention to enjoin third parties to the suit in which event summary determination would be premature. It is the Defendant's contention that the defence filed raises substantive issues that deserve to be ventilated in trial, the substantive issue being the basis for the Defendant's entry on the Suit Land, which issue can only be effectively disposed of by enjoining the third parties. It is also deposed that the cost of erecting the mast and the business loss that would be suffered by removing it is huge and one that demands for a trial of the dispute on merit so as to apportion liability where it falls. The Defendant also filed Grounds of Opposition dated 6th December 2006 in which it contends that the defence raises bona fide trial issues and the Plaintiff's application is incompetent inept and/or bad in law, vexatious, frivolous and an abuse of the court process.

5. The application was canvassed by way of Written Submissions which were duly filed and exchanged, with the respective parties' advocates making skeletal Oral Submissions on 10th July 2017 highlighting salient points of their submissions.

6. The Plaintiff submitted that it is the registered proprietor of the Suit Property and there cannot be a valid defence and/or any bona fide triable issue as between itself and the Defendant. It further submitted that the defence is to the effect that the Defendant entered upon the property as lessee of a third party and subsequent to its defence, the Defendant sought and obtained leave of court to take out third party proceedings which have not been determined. That the Plaintiff annexed TO its affidavit a letter from the erstwhile Town Clerk, Municipal Council of Mombasa in response to a complaint by the Plaintiff which suggested that there may have been double allocation of the Suit Property but a letter from the Commissioner of Lands dated 5th May 2004 shows that the third party's title has since been cancelled. It is the Plaintiff's submission that as between the Plaintiff and the Defendant, the validity of the Plaintiff's title cannot be an issue and therefore submitted that the defence on record is for striking out.

7. On its part, the Defendant submitted that the defence raises several triable issues and is not frivolous or an abuse of the Process of the Court. That the points raised in the defence are capable of being proved through documentary and oral evidence such as the competing claim of ownership of and interest in the Suit Property. The Defendant further submitted that the rationale for Plaintiff filing suit against the

Defendant while not taking any action against Evans Ondieki through whom the Defendant claims an interest and is in possession of a large part of the Suit Property is a matter that requires interrogation and consideration in a full trial. Further, that the fact that there are two sets of competing interests that appear to be sanctioned by the Lands Department means that the dispute regarding the ownership of the Suit Property requires an adjudication involving witnesses from that department and which may only be possible in a full trial. The Defendant further submitted that the power to strike out a pleading under Order VI Rule 13 (1) (now repealed) of the Civil Procedure Rules is limited to plain and obvious cases or cases that are clear, beyond doubt and do not require a thorough examination as in this case. Accordingly, the Defendant submitted that the defence does not qualify for striking out as it raises issues that cannot be determined summarily in an Interlocutory Application. The Defendant cited several authorities in support of its submissions.

8. I have considered all the issues raised in the application, the rival submissions and the case law cited by the parties. The principles which guide the courts in determining an application for striking out pleadings are well settled. In the case of **DT Dobie & Company Kenya Limited – v- Muchina (1982) KLR** Madan, JA stated on the power to strike out pleadings:

“i)the power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.

ii) the Court should aim at sustaining rather than terminating suit. A suit should only be struck out if it is beyond redemption and incredible by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”

In the case of **Henkel Polymer Co. Ltd & 2 others (2004) eKLR J.B** Ojwang, J (as he then was) after analyzing several authorities stated as follows:

“From the foregoing review of authorities, it is clear that only very sparingly will any application for the striking out of a statement of defence be entertained..... the decision to strike out a defence should not be based on the unlikely success of the defence case.”

In the case of **Samuel Ndungu Mukunya –vs- Nation Media Group & another (2012) eKLR** Odunga, J while considering an application such as this stated:

“From the onset I am cognizance of the fact that in an application of this nature the court must avoid the temptation to try the case by way of affidavit evidence”

9. I will apply this test in this application. I have considered the argument by the Plaintiff that it is the registered proprietor of the suit property and that the Defendant’s defence alleges that the Defendant validly entered upon the land upon executing a lease between itself and a third party by the name Evans Ondieki. It has also come out from the pleadings that the suit land seemed to have had two sets of registered proprietors, one being the Plaintiff and the other being the third parties, Chuma Adhman Nyundo and Jackson Kipngetich. The Defendant is basing its occupation of the suit land on the title in the name of the third parties. As to who between the Plaintiff and third parties holds a valid title, in my view is a triable issue among others worth a trial by the court. I do not need to go into the merits of those issues. It suffices to state from the pleadings, whether the issues are or are not triable issues in the sense of the law. I find that the defence raises triable issues and I hereby sustain it.

10. The up shot is that the application dated 14th July 2006 is without merit and is dismissed with costs.

Ruling delivered, dated and signed at Mombasa this 19th day of September 2017

C. YANO

JUDGE