



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 288 OF 2011**

**KENT LIBISO.....1<sup>ST</sup> PLAINTIFF**

**ITRONIX LIMITED .....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**CIRKON TRUST CO. LD.....1<sup>ST</sup> DEFENDANT**

**BEUFORT INVESTMENT LTD.....2<sup>ND</sup> DEFENDANT**

**JAMES MWANGI T/A ELAN TRADERS.....3<sup>RD</sup> DEFENDANT**

**SAMUEL NJUGUNA KIMANI.....4<sup>TH</sup> DEFENDANT**

**RULING**

What is before me is the 4<sup>th</sup> defendant’s application by way of Notice of Motion on 7<sup>th</sup> February, 2014 brought under Order 2 Rules 15(1)(a) and(2), Order 51 Rule 1 of the Civil Procedure Rules 2010 and section 3A of the Civil Procedure Act seeking the striking out of the amended plaint dated 24<sup>th</sup> May, 2012 and the dismissal of the plaintiffs’ suit as against the 4<sup>th</sup> defendant.

The application which was not supported by any affidavit was brought on the ground that amended plaint discloses no reasonable cause of action against the 4<sup>th</sup> defendant. The 4<sup>th</sup> defendant contended that no contractual relationship existed between the plaintiffs and the 4<sup>th</sup> defendant in relation to L.R No. 1/811(hereinafter referred to as “the suit property”) hence the 4<sup>th</sup> defendant was unable to respond adequately to the plaintiffs’ claim against him. The 4<sup>th</sup> defendant contended that the plaintiffs’ claim was misplaced since the 4<sup>th</sup> defendant was not a proper party to the claim.

The application was opposed by the plaintiffs through grounds of opposition dated 14<sup>th</sup> July 2014. The plaintiffs contended that the 4<sup>th</sup> defendant was a necessary party to the suit since he was the registered owner of the suit property and any final order issued herein in favour of the plaintiffs regarding the suit property would affect his interest in the property. The plaintiffs contended that it would be un-procedural to litigate over the suit property without involving the 4<sup>th</sup> defendant in the proceedings. The plaintiffs averred that even if they had no direct claim against the 4<sup>th</sup> defendant, the 4<sup>th</sup> defendant was a beneficiary of the fraud which was committed by the 1<sup>st</sup> to 3<sup>rd</sup> defendants against the plaintiffs and as such the defendants did not pass a good title over the suit property to the 4<sup>th</sup> defendant. The plaintiffs averred further that part of the damages claimed by the plaintiffs are payable by the defendants jointly thus the

plaintiffs have a cause of action against the 4<sup>th</sup> defendant.

The 4<sup>th</sup> defendant's application was argued by way of written submissions. I have considered the application together with the grounds of opposition which was filed by the plaintiffs in opposition thereto. I have also considered the parties' respective submissions and the authorities cited in support thereof. The 4<sup>th</sup> defendant has attacked the amended plaint on two fronts which are intertwined. First, the 4<sup>th</sup> defendant has contended that the amended plaint discloses no reasonable cause of action against him. Secondly, the 4<sup>th</sup> defendant has claimed that he was wrongly joined in the suit. As I have stated earlier, the 4<sup>th</sup> defendant's application was brought under among others, Order 51 Rules 1 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. See, the case of, Chatte vs. National Bank of Kenya Ltd. Civil Appeal No. 50 of 1996 (unreported). See also the case of, D.T. Dobie & Company (K) Ltd. vs. Joseph Mbaria Muchina & Another, Civil Appeal No. 37 of 1978[1982]KLR 1, where 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. Wangethi Mwangi, Court of Appeal, Civil Appeal No. 179 of 1997(unreported), Omolo J.A, stated as follows on the issue of striking pleadings;

*“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.”*

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 seeks 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.”*

It is on the foregoing principles that the 4<sup>th</sup> defendant's application falls for consideration. I am not

satisfied that this is a proper case in which the court should exercise its discretion to strike out a plaint and dismiss the case summarily. It is not disputed that the suit property is currently registered in the name of the 4<sup>th</sup> defendant. In the amended plaint which the 4<sup>th</sup> defendant has sought to strike out, the plaintiffs have averred that on 14<sup>th</sup> August 2007, the 1<sup>st</sup> plaintiff entered into an agreement for sale with the 1<sup>st</sup> defendant under which the 1<sup>st</sup> defendant agreed to sell and the 1<sup>st</sup> plaintiff agreed to purchase the suit property at a consideration of Kshs. 25 million on terms and conditions which were set out in the said agreement which provided among others that the purchase price was to be paid in instalments by 30<sup>th</sup> November 2007. The plaintiffs averred that the 1<sup>st</sup> defendant was to release the completion documents to the 1<sup>st</sup> plaintiff upon receipt of the last installment of the purchase price. The plaintiffs averred that the completion period for the agreement was varied from time to time and by 23<sup>rd</sup> February 2008, the 1<sup>st</sup> plaintiff had paid to the 1<sup>st</sup> defendant a sum of Kshs. 11 million towards the purchase price. The plaintiffs have averred that while the agreement for sale aforesaid was still in force, the plaintiffs discovered on or about 17<sup>th</sup> August 2009 that the 1<sup>st</sup> defendant had purported to sell the suit property to the 2<sup>nd</sup> defendant. The plaintiffs averred that the purported sale was conducted in breach of an order of injunction which had been issued by the court in favour of the plaintiffs in Nairobi HCCC No. 319 of 2008 and also contrary to the caveat which the plaintiffs had placed on the title. The plaintiffs have averred that the purported sale of the suit property by the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant was illegal, un-procedural and fraudulent. The plaintiffs have contended that in the face of the said court order, the 1<sup>st</sup> defendant did not have the legal capacity to sell the suit property. The plaintiffs have averred that on or about January 2012, they discovered that the 2<sup>nd</sup> defendant had sold and transferred the suit property to the 4<sup>th</sup> defendant who has proceeded to take possession of the premises. The plaintiffs have contended that the purported sale of the suit property by the 2<sup>nd</sup> defendant to the 4<sup>th</sup> defendant was illegal null and void since the 2<sup>nd</sup> defendant for reasons which I have mentioned above did not have a good title to pass to the 4<sup>th</sup> defendant. The plaintiffs have sought among others, specific performance of the agreement for sale between the 1<sup>st</sup> plaintiff and the 1<sup>st</sup> defendant dated 14<sup>th</sup> August 2007 and the cancellation of the transfer of the suit property from the 1<sup>st</sup> defendant to the 2<sup>nd</sup> defendant and from the 2<sup>nd</sup> defendant to the 4<sup>th</sup> defendant.

I am satisfied from the contents of the amended plaint which I have highlighted above that the 4<sup>th</sup> defendant is a necessary party to these proceedings. The 4<sup>th</sup> defendant would have been prejudiced if he had been left out of the suit. At the center of the dispute is a property which is registered in the name of the 4<sup>th</sup> defendant. The plaintiffs have challenged the process through which the title of the property changed hands from the 1<sup>st</sup> defendant to the 4<sup>th</sup> defendant. The court has been called upon to cancel the 4<sup>th</sup> defendant's title and to award the suit property to the 1<sup>st</sup> plaintiff. The court cannot conclusively determine the dispute and the issues raised before it without the 4<sup>th</sup> defendant. The 4<sup>th</sup> defendant has contended that there was no privity of contract between him and the 1<sup>st</sup> plaintiff. That may be the case. The plaintiffs claim against the defendant is however not based on contract. The plaintiffs' contention is that the 4<sup>th</sup> defendant's title over the suit property is tainted with illegality and fraud and as such is null and void. I am satisfied that the plaintiffs have a reasonable cause of action against the 4<sup>th</sup> defendant. A reasonable cause of action is not necessarily one which 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 4<sup>th</sup> defendant in the amended plaint meets these criteria.

In the final analysis, I find no merit in the 4<sup>th</sup> defendant's Notice of Motion dated 7<sup>th</sup> February 2014. The application is dismissed with costs to the plaintiffs.

**Delivered and Signed at Nairobi this 15<sup>th</sup> day of September, 2017**

**S.OKONG'O**

**JUDGE**

