



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO 152 OF 2016

NASSOR SULEIMAN MBARUK.....PLAINTIFFS

VERSUS

1. JAMILA NASSIR ALI

2. NASSIR ALI SAID.....DEFENDANTS

RULING

1. This is the Notice of Motion dated 14th March 2017. It is brought under Section 1A, 1B and 3B of the Civil Procedure Act Order 2 rule 15(a) of the Civil Procedure Rules 2010.
2. It seeks orders;
 - a) That this Honourable Court be pleased to strike out this suit.
3. The grounds upon which the application is brought are in on the face of the application and are;
 - a) The suit is based on an agreement for the purchase of land.
 - b) That under section 3(3) of the Law of Contract Act, Cap 23 Laws of Kenya an agreement for sale of land must be writing and signed by the parties.
 - c) That the proposed document of the Plaintiff do not amount to written agreement for sale of land.
 - d) That there is no right and therefore no cause of action to bring this suit.
4. The application is supported by the affidavit of Nassir Ali Said, the 2nd Plaintiff/Applicant sworn on the 14/3/2017.
5. The application is opposed. There are grounds of opposition filed by the Plaintiff/Respondents advocate dated 25/5/2017 and filed in court on the 26/5/2017.
6. On the 12/6/2017 when the application came up for hearing it was agreed between the parties that the application be disposed by way of written submissions.
7. I have considered the pleadings generally, the application, the grounds of opposition and the written submissions. I have also considered the authorities cited. The issue for determination is whether the contract of sale is invalid and the suit ought to be struck out.
8. It is the Defendant/Applicants submission that no written agreement exists between the parties for sale of LR.NO 5648/MN/I.

That the Plaintiff's claim is founded on the documents dated 24/9/2005 and 6/7/2011 which of land section 3 (3) of the Law of Contract on the requirement for contracts of sale of land.

Further that the Defendant did not sign the said documents.

They have relied on the case **of Solomon Amiani –Versus- Salome Muteyo Otunga Mombasa ELC No. 59 of 2013** that there exists no reasonable cause of action.

9. On his part the Plaintiff/Respondent submitted that the allegations made by the defendant/Applicant are matters of evidence which can only be tendered at the trial. That the plaintiff paid the defendant the purchase price in full. He prays that the application be dismissed with costs.

10. The Plaintiff/Respondent relies on the agreement of sale dated 24/11/2005 between himself and the second defendant. It was signed both parties. There is a subsequent agreement dated 6/7/2011 in which the second defendant confirms that he has so far received Kshs1,875,000/= for the portion of land and that the balance of Kshs425,000/= was to be paid after release of the title from the bank.

11. These two agreements are in writing, signed by the plaintiff and the 2nd Defendant who was the seller. The only thing missing is an attestation by a witness. Can this invalidate this sale agreement? I think not. The intention of the parties is clear. The second Defendant was selling a portion of land to the Plaintiff.

There is no dispute that money changed hands. It would therefore be unfair to decide that the sale agreement is invalid merely because it was not attested by a witness.

It is clear from the agreement dated 6/7/2011 that survey and demarcation was to proceed. What remained was the issue of title that was to be issued upon release from the bank. The Defendant does not dispute all these facts.

12. The Defendant/Applicant relies on the case of **Solomon Amiani –Verses- Salome Muteyo Otunga**, I find that the circumstances in the above case are distinguishable from those in the present case.

13. The application is brought under orders rule 15(a) of the civil procedure rules, Rule 15(2) states; “No evidence shall be admissible on an application under sub rule 1 (a) but the application shall state concisely the ground on which it is made”.

14. The application dated 14/3/2017 is supported by the affidavit of Nassir Ali Said, the 2nd Defendant, contrary to the provision of order 2 rule 15(2) of the civil procedure rules. This rule is set in mandatory terms. On this ground alone the application fails.

I will however go ahead and make a finding on the application as a whole.

15. It was held on the case of **Dev. Surinder Kumar BIJ –Verses- Agility Logistics Limited(2014) eKLR**, that,

“For a pleading to be dismissed pursuant to the provision of order 2 rule 15(i). It should be made clear and obvious that the issues raised by the plaintiff can neither be substantiated nor disclose any reasonable or justifiable cause of action as against the defendant”.

I find that this is not the scenario in the present case.

16. In the case of **D. T. Dobbie And Co (K) Ltd –versus- Muchina (1982) KLR** the Court of Appeal enunciated the principles applicable in considering whether or not to strike out pleadings, the Court of Appeal was categorical. Madan J A (as he then was) adopting the findings of sellers L J in **Wenlock –versus- Moloney (1965) 1 WLR 1238** where the Learned Judge had this to say;

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and to produce a trial of the case in chambers on affidavits only, without discovery and without oral evidence tested by cross examination in the ordinary way. This seems to be an abuse of the inherent power of the court and not a proper exercise of that power”.

Madan J A added;

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

I have looked at the pleadings herein and find that it is not so hopeless nor is it weak to warrant it to be struck out.

17. Article 159(2) of the constitution of Kenya 2010 states, “In exercising judicial authority the courts and tribunals shall be guided by the following principles:-

a)

b)

c)

d) Justice shall not be administered without undue regard to procedural technicalities.

e)

I am guided by the above principle in finding that there was clear intention on the part of the 2nd Defendant to sell a portion of the land to the plaintiff.

18. The plaintiff ought to be given an opportunity to present his case at the trial so that the court can make a finding on all issues.

I find no merit in this application and the same is dismissed with costs to the Plaintiff/Respondent.

It is ordered.

L. KOMINGOI

JUDGE

4/10/2017