



REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO

CIVIL CASE NO.04 OF 2015

HENRY BELSOI **1ST PLAINTIFF**
JAMES CHIRCHIR **2ND PLAINTIFF**

VRS

KENYA TOURIST DEVELOPMENT
CORPORATION **1ST DEFENDANT**
DR. DAVY KOECH **2ND DEFENDANT**
SOLOLO INVESTMENTS
LIMITED **3RD DEFENDANT**

RULING

The Notice of Motion application dated the 25th day of January 2016 and which is expressed to be brought under section 1A, 1B, 3, 3A 63 (4) Order 15 rule 1(b), (c) and (d) of the Civil Procedure Act seeks the following orders:

- (1) That the 1st defendant's defence 30/3/2013 be struck out and judgment be entered for the plaintiffs as prayed in the plaint.
- (2) Costs to be borne by the 1st defendant.

The grounds are as follows:

- (1) That the defendants' statement of defence does not raise any triable issues.
- (2) There is no documentary evidence to back up the denials.
- (3) That under Order 2 rule 15 of the Civil Procedures Rules 2010 a court can strike out pleadings that do not disclose a defence in law, that may prejudice embarrass or delay a fair trial.

On the 28th day of April, 2016, the 1st defendant was granted leave to file a replying affidavit within 14 days from that date and the matter was placed for hearing on 13/6/2016. On the 13th day of June, 2016, there was no representation for the 1st defendant and a perusal of the file shows that no replying affidavit had been filed to-date.

I have perused the plaint herein. Paragraph 6 of the plaint, there is an averment to the effect that the cause of action is based on the fraudulent sale and transfer of Ksh.12,000/=, 60% ordinary shares that the 1st defendant held in Tea Hotel Limited to the 2nd and 3rd defendants jointly and severally. Paragraph 11 of the plaint gives the particulars of fraud committed by the defendants.

I have similarly perused the 1st defendant's statement of defence. At paragraph 6 of the statement of defence it denies that the transfer of shares was through fraudulent means and contends that it sought approval from the government and that there was an authorization from the State Corporation Advisory Committee to sell shares to Yasangwan Holdings Limited. Further that valuation was obtained at a price of kshs.10,000,000/- for the 1st defendant's shares in Tea Hotel Limited which price was approved by State Corporation Advisory Committee and an offer made to Yasangwan Holdings Limited to execute its pre-empting right in purchase of the said shares but it did not take steps for the offer of the purchase of the said shares. Notice of 90 days was given to Yasangwan Holdings Limited within which to purchase the shares, failure to which they would be put to any other third party.

It is further the 1st defendant's defence that the transfer of shares from the 1st defendant to the 3rd defendant was sanctioned by the Auditor General Corporations.

The 1st defendant's contentions and shares are not mere denials but they do raise to my mind triable issues. The cause of action in this case is grounded on fraud which borders all criminality and there is every need to afford each party a fair hearing in line with article 50 (1) of the Constitution which provides:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court.”

In the present case, I find the 1st defendant's statement of defence does not consist of mere denials but raise triable issues which should go for hearing.

The application is dismissed. It is noted that the 1st defendant did not file a replying affidavit to the application and it was not represented in court. It is condemned to pay costs of this application to the plaintiff.

Ruling delivered, dated and signed in open court this 15th day of June 2016 in the presence of Koko Advocate for the applicant/plaintiff. No appearance for 1st defendant/respondent and Hillary court clerk.

M. MUYA

JUDGE

15/6/2016