



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 249 OF 2014

RIMCO OIL COMPANY LIMITED PLAINTIFF

VERSUS

JINAT INVESTMENT COMPANY LIMITED 1ST DEFENDANT

VIVO ENERGY KENYA LIMITED 2ND DEFENDANT

RULING

1. The 2nd defendant by an application dated 26th November 2014 interalia sought an order that:-

“This honourable court be pleased to strike out the plaint filed herein by the plaintiff and dismiss the suit as against the 2nd defendant with costs.”

The said 2nd defendant’s application was brought under Order 2 Rule 15 (1) (d) and Sections 1A, 1B and 3A of the Civil Procedure Act. It was the 2nd defendant’s contention that the suit against it had been compromised by the consent and/or conduct of the parties and that the continued pendency of the proceedings against the 2nd defendant constituted abuse of the process of the court. The court in a considered ruling delivered on 17th July 2015 dismissed the 2nd defendant’s application holding that the suit had not been compromised and was not an abuse of the court process.

2. The 2nd defendant has now filed the present Notice of Motion dated 25th November 2015 which is the subject of this ruling. The application is brought under Order 2 Rule 15 (1) (a) and section 3 (3) of the **Law of Contract Act**, Cap 23 Laws of Kenya and seeks the following orders:-

1. That this honourable court be pleased to strike out the plaint dated 30th June 2014 as amended and filed herein on 7th June 2014 and to dismiss the suit as against the 2nd defendant with costs.

2. That costs of this application and the suit be provided for.

3. That this honourable court be pleased to make such other or further orders as it may deem just and fit in the circumstances of the case.

3. The application is premised on the grounds set out on the face of the application and on the affidavit sworn in support of the application by Naomi Assumani, the company secretary of the 2nd defendant. The 2nd defendant has set out the following grounds in support of the application:-

(a) The proceedings herein to the extent that they seek to enforce an agreement in respect of an immovable property are an abuse of the process of the court.

(b) The agreements dated 22nd September 2012 and 25th October 2013 are not capable of being enforced in light of the provisions of Section 3 of the Law of Contract Act, Cap 23 Laws of Kenya.

(c) The continued pendency of these proceedings is otherwise an abuse of the process of this honourable court.

4. The affidavit in support of the application refers to certain agreements under paragraph 4 which it is indicated are annexed as a bundle and marked “VAI”. These annexures are not included or attached and this appears to be borne out by the assessment done for the application endorsed on the body of the application showing “**App. 250.00, Order 150.00 and Aff. 75.00**”. There was no assessment for any annexures denoting there were none. The deponent states the alleged agreements relate to sale of the suit property and that the same were neither stamped, attested nor registered against the title. The 2nd defendant aver that to the extent that the said agreements are aimed at enforcing the agreements the suit is unsustainable as the agreements are in breach of Section 3 (3) of the **Law of Contract Act**, Cap 26 Laws of Kenya.

5. The plaintiff filed a replying affidavit sworn by Hon. Richard Onyoka, a director of the company in opposition to the 2nd defendant’s application sworn on 8th December 2015. The plaintiff depones the 2nd defendant’s application is similar to the previous application dated 26th November, 2014 filed by the 2nd defendant, the ruling whereof is annexed and marked “**R01**”. Additionally the plaintiff avers that inter alia the suit seeks a declaration that the lease agreement made between the defendants in regard to the station on **LR No. Kisii Municipality/Block III/77** is illegal and null and void and thus there is potential that the 2nd defendant stands to be directly affected by orders that the court may make at the conclusion of the suit and for that reason remains a relevant party whose joinder to the proceedings is necessary.

6. The 1st defendant for its part filed a statement of grounds of opposition to the 2nd defendant’s application and inter alia states that:-

(i) The instant application is res judicata and hence same is barred and/or prohibited by dint of section 7 (4) of the Civil Procedure Act, 2010.

(ii) The Notice of Motion application herein and the reliefs sought thereunder are precluded by the provisions of Order 3 Rule 4 (3) of the Civil Procedure Rules, 2010.

(iii) The application is frivolous, scandalous and vexatious.

(iv) The application constitutes and/or amounts to an abuse of the due process of the court.

7. The 2nd defendant/applicant elected not to file any written submissions but to rely on the grounds in support of the application and the authorities as per the list of authorities dated 11th March 2016 filed in court on 14th March 2016. Equally the plaintiff and the 1st defendant/respondent chose not to file any written submissions but to rely on the replying affidavit and statement of grounds of opposition filed respectively. I have reviewed the 2nd defendant’s application together with the affidavit sworn in support and in opposition together with the authorities referred to the court by the applicant and the issues for determination are as follows:-

(i) Whether the 2nd defendant’s application is res judicata.

(ii) Whether the plaintiff’s suit against the 2nd defendant offends Section 3 (3) of the Law of Contract Act, Cap 23 Laws of Kenya and therefore liable to be struck out.

8. It is not disputed that the 2nd defendant/applicant brought the application dated 26th November 2014 referred to earlier in this ruling seeking inter alia an order for the plaintiff's plaint to be struck out as against the 2nd defendant. The 2nd defendant's instant application virtually seeks a similar order as in the previous application under prayer (1) except that the grounds upon which the application is premised are different. The respondents have contended the present application is *res judicata* and point to Section 7 explanation (4) of the **Civil Procedure Act**, Cap 21 Laws of Kenya to support their assertion. Section 7 provides thus:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Explanation (4) is on the following terms:-

“Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

9. The 2nd defendant at the time of making the previous application had at its disposal all the material and facts on which it now premises its instant application. The previous application sought to have the plaintiff's plaint struck out and the suit against the 2nd defendant dismissed. There is in my view no reason as to why the 2nd defendant could not make the grounds it now relies upon in the instant application, grounds in the previous application. To sustain the 2nd defendant's instant application would amount to allowing the 2nd defendant to literally litigate in instalments. A party is not free to make a **“trial and error”** application and if the application fails and in case the same fails he seeks to bring a fresh application. The rule of pleadings requires that a party pleads his entire case on the basis that a party ought not to be subjected to a multiplicity of actions when such actions ought to and should be compressed in one suit. A party takes a risk when they plead only a part of their case when essentially all the case should be pleaded so that the case and/or application can be determined on the basis of all the issues. The rule on *res judicata* is intended to guard against abuse of the court process. The 2nd defendant ought to have pleaded its entire case for striking out of the plaint as against it when it filed the earlier application. Nothing new has come between when the earlier application was filed and when the instant application was filed. The present application by the 2nd defendant having regard to explanation (4) of the Section 7 of the **Civil Procedure Act**, Cap 21 Laws of Kenya in my view is *res judicata* and I would dismiss the same for that reason.

10. Although what I have stated above should be sufficient to dispose of the 2nd defendant's application there is the issue whether or not the suit against the 2nd defendant is brought in breach of Section 3 (3) of the **Law of Contract Act**, Cap 23 Laws of Kenya which requires that contracts relating to a disposition of any interest over land be in writing and be executed by all parties to the contract and their signatures be attested by a witness present at the time of signing. Earlier in this ruling I made an observation that the 2nd defendant's application did not exhibit the agreements referred to as being in breach of the aforementioned statutory provision. The net effect of that omission is that the supporting affidavit of Naomi Assumani is rendered to be incomplete and incompetent to support the application. The affidavit did not comply with Rule 9 of the **Oaths and Statutory Declarations Rules** made under the **Oaths and Statutory Declarations Act**, Cap 15 Laws of Kenya. Rule 9 provides thus:-

“All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification.”

11. There were no exhibits attached to the affidavit for the court to review and scrutinize to make a determination whether or not the agreements referred to were in breach of section 3 (3) of the **Law of**

Contract Act or not. The 2nd defendant/ applicant referred the court to various authorities where the application of Section 3(3) of the **Law of Contract Act** had been considered but I am not in the circumstances of the instant application in any position to consider whether any specific contracts satisfied the said provisions as none were exhibited and hence the authorities become irrelevant.

12. Arising from what I have discussed hereinabove, it is my conclusion that the 2nd defendant's application dated 28th November 2015 is without any merit and I order the same dismissed with costs to the plaintiff and the 1st defendant.

13. Orders accordingly.

Ruling dated, signed and delivered at Kisii this 22nd day of July, 2016.

J. M. MUTUNGI

JUDGE

In the presence of:

M/s Shilwatso for Ochoki for the plaintiff

M/s Nyandika for Ochwangi for the 1st defendant

M/s Luseno for the 2nd defendant/applicant

Mr. Ngare Court Assistant

J. M. MUTUNGI

JUDGE