REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NYERI

ELC CASE NO. 598 OF 2014

TERY CRANE .... 1ST PLAINTIFF/APPLICANT

PROJECT KENYA INTERNATIONAL LTD....................... 2ND PLAINTIFF/APPLICANT

VERSUS-

PETER WANJOHI KAMAU.. 1ST DEFENDANT/RESPONDENT

FRANCIS KINYANJUI GITHINJI..................................... 2ND DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect of the motions dated **7th August, 2015** and **13th August, 2015**.

The motion dated 7th August, 2015

2. The motion is brought under **Order 2 Rule 15(d)** of the Civil Procedure Rules. It seeks to strike out the amended plaint filed in this case, on 16th October, 2014 on the grounds that the affidavit accompanying the amended plaint was sworn way before the amended plaint was prepared. For that reason, it is contended that there is noway the deponent, Teri Crane, could have verified the contents of the supporting affidavit when it had not been prepared. It is also contended that the amended plaint is incompetent for failure to comply with mandatory requirements of the law-the Civil Procedure Act and the Companies Act. For instance, it is contended that the 2nd plaintiff did not file written authority authorising the 1st plaintiff to swear any affidavit on its behalf.

3. The application is supported by the affidavit of the 1st defendant/applicant (Peter Wanjohi Kamau) in which the grounds on the face of the application are reiterated. The deponent has annexed to the affidavit a copy of the impugned verying affidavit and marked it as **PWK-1**.

4. The application is opposed through the replying affidavit of the 1st plaintiff respondent, Teri Crane, sworn on **16th November, 2015** in which it is deposed that the application is meant to forestall the hearing of the main suit and to prevent the court from investigating the truth of the dispute between the parties and as such is frivolous and vexatious. The application is said to be based on technicalities.

5. With regard to the contention that 2nd defendant did not file any authority authorising the 1st

plaintiff to swear pleadings on its behalf, reference is made to letters dated 29th September, 2010 and 12th November, 2015 annexed to the affidavit and marked **TC-1** and contended that the 1st plaintiff had authority to institute the suit right from its inception. It is also contended that no evidence has been provided to show that the 1st plaintiff has no authority to swear pleadings on behalf of the 2nd plaintiff. Further reference is made to the minutes of the Board of Directors meeting of the 2nd plaintiff company held on 7th September, 2010 and reiterated that the 1st plaintiff had authority to act on behalf of the 2nd plaintiff.

6. In view of the decision of this court made in respect of the defendant/applicant's application dated 16th February, 2012 some of the issues raised in the instant application are said to be similar to those raised in that application.

7. The indication that the verifying affidavit was sworn 8th October, 2013 is explained as an error and averred that the affidavit was sworn on 8th October, 2014.

8. Maintaining that the application is hinged on technicalities which do not warrant the dismissal of the entire suit, the respondent urges the court to dismiss the application with costs to the plaintifs/respondents.

9. Whereas the verifying affidavit makes reference to the amended plaint filed therewith, it is indicated that it was sworn on 8th October, 2013 when the amended plaint accompanying it was amended on 8th October, 2014.

10. The deponent has also averred that she is competent and authorized to swear the affidavit. There is no indication as to whether there could have been any other amended plaint in the suit herein.

11. In view of the foregoing, I take judicial notice of the process that culminated in the filing of the amended plaint. The application for leave to amend the plaint was, for instance, supported by an affidavit sworn by the same deponent. Her signature is not contested. The only reasonable inference that can be drawn from the circumstances of this case is that the indication of the verying affidavit as having been sworn in 2013 as opposed to 2014 is a typographical error. The replying affidavit of the deponent of the impugned verying affidavit confirms as much. **Section 100** of the Civil procedure Act gives the court power to correct any defects in pleadings so that the same can accord with the intention of the parties. The court's power may be exercised either upon being moved by the parties or *suo moto*.

12. The duty of this court is to hear disputes presented before it on their merit and will not accept legal technicalities to be used to deny litigants their right to access the seat of justice especially where the defect in the proceedings is rectifiable without occasioning any injustice to the parties like in the instant case.

13. Being of the view that the error on the verying affidavit has being sufficiently explained, in accordance with the overriding objective of this court under **Section 1A** of the Civil Procedure Act, and in exercise of the power donated to this court under **Section 3A** as read with **Section 100** of the Civil Procedure Act, I amend the date of execution of the verying affidavit to read 8th October, 2014 as opposed to 8th October, 2013. See **<u>Samwel Barkoiyet Kangogo & 3 others vs. Daniel Ndung'u (2009) eKLR</u>** where **Omondi J.**, stated:-

> **"My considered view is that the court has a duty to ensure the ends of justice are met and that Section 3A gives this court wide discretion for that purpose.....I have a duty to put a stop to such mischief and rule that the misheading of the application to read chamber summons instead of notice of Motion causes no prejudice to the respondent and under section 100 Civil Procedure Act, I amend the title to read Notice of Motion**."

14. If anything, the law does not require the deponent of a verying affidavit to verify all the contents of the plaint but that there is no other suit pending, and there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action

relates to the plaintiff named in the plaint. See **Order 4 Rule 2** of the Civil Procedure Rules.

15. With regard to the contention that no authority was filed by the 2nd plaintiff to show that the 1st plaintiff (read the deponent) was authorised to swear the verying affidavit on behalf of the 2nd plaintiff company, having read the ruling of this court delivered on 28th August, 2013, I agree with the respondent contention that that issue was heard and determined in the application that was the subject of that ruling (1st defendant's notice of motion dated 12th October, 2010). In that motion, the 1st defendant (the applicant in the current motion) sought to strike out the suit herein on the ground that the plaintiffs' lacked *locus standi* to file the suit and that being the case the suit is incompetent.

16. In its ruling delivered on the aforementioned date this court (read the Environment and Land Court Nyeri) observed:-

> **"The documents availed by the plaintiffs show Board minutes of meetings held on 6th July, 2006; 26th June, 2006, 7th July, 2008, 17th November, 2009, 17th March, 2010 and 1st June, 2010 which indicate that there was a relationship between the plaintiffs and the defendant. The court has a duty to find out the nature of the relationship which can only be after hearing of the suit but not way of interlocutory application.....for this court to reach an informed decision on *locus standi* the relationship between the plaintiffs, the defendant and Project Kenya Inc (USA) must be thoroughly verified and this can only be determined after hearing *viva voce* evidence where witnesses will be cross-examined and re-examined...the upshot of the above is that the application is dismissed on ground (b) and (c) as it lacks merit. However ground (a) whose import is that the plaintiffs lack *locus standi* to file the suit and therefore the suit is incompetent cannot be determined without hearing the parties and their witnesses.**
>
> **Having found the court requires evidence to determinethe issue of *locus standi* and the other grounds of the application dated 16th February, 2012 is hereby dismissed with costs to the plaintiffs."**

17. It is clear from the above ruling, that the issue of competency or otherwise of the suit herein on the alleged want of *locus standi* on the part of the plaintiffs was heard and determined by a court of competent jurisdiction. That being the case, it is not open for the applicant to re-open the same issue disguised as want of compliance with mandatory provisions of the law. This not being an application for review of those directions, this court lacks jurisdiction to re-open the issue. See **Section 7** of the Civil Procedure Act and the case of ***Edwin Thuo v Attorney General & Another*** **Nairobi Petition No. 212 of 2012 (Unreported)** where the court stated:-

> **" [57] The courts must always be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff is in the second suit is trying to bring beforethe court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction.**

In the case of *Omondi v National Bank of Kenya Limited and Others* [2001] EA 177 the court held:-

> ***"Parties cannot evade the doctrine of res judicata bymerely adding other parties or causes of action in a subsequent suit.'*** **In that case the court quoted Kuloba J., in the case of *Njangu v Wambugu and Another* Nairobi HCCC No. 2340 of 1991 (unreported) where he stated, *'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata* ....** I **am of the firm view as that of Justice R. Kuloba in his book, *Judicial Hints on Civil Procedure, 1984 (Vol 1)* at page46 in a paragraph**

headed, “Guard against attempts to evade the doctrine [of res-judicata]” where he states that, ***“One of the greatest difficulties which face those courts which try land suits is the disposition of the disappointed litigant to dress up a suit which has failed in a new guise and to try his luck once more …. Once a man has had his say, has taken his case as far as the law permits him, and has failed, he must be stopped from re-litigating the same matter.”***

18. I reiterate the sentiments expressed in the above cited ruling that this court has a duty to find out the nature of the relationship which can only be after hearing of the suit but not by way of interlocutory application and based on the aforementioned reasons decline to grant the orders sought.

19. Consequently, I dismiss the application dated 7th August, 2015.

20. The costs of the application to abide the outcome of the main suit.

<u>The motion dated 13th August, 2015</u>

21. The 2nd motion, dated **13th August, 2015**, is by the plaintiffs/applicants. It seeks judgment against the 2nd defendant for:-

1. **An order compelling the 2nd defendant to execute the transfer and other necessary documents/instruments of transfer in regard to the property known as L.R No. Nyeri Municipality Block 1/1287 to the 2nd plaintiff; award for mesne profits payable by 1st defendant to the 2nd plaintiff, assessable at Shillings thirty thousand (Kshs. 30,000/-) per month from the month of September 2010, until the date of delivery of vacant possession of the suit properties.**
2. **An order authorising the Deputy Registrar of this court to execute the transfer and other necessary documents/instruments of transfer in regard to the property known as L.R No. Nyeri Municipality Block 1/1287 to the 2nd plaintiff in case the 2nd defendant fails to do so.**
3. **An order for eviction and vacant possession against the defendants in respect of L.R No. Nyeri Municipality Block 1/1287.**
4. **Costs of the application be borne by the 2nd defendant.**

21. The application is premised on the grounds that the plaintiffs claim is premised on the ground that the 2nd defendant has unreasonably and unlawfully failed, refused and/or neglected to transfer ownership of L.R No. Nyeri Municipality Block 1/1287. (hereinafter referred to as the suit property) to the 2nd plaintiff.

23. Terming the 1st defendant a trespasser on the suit property, the applicants point out that the 2nd defendant, whom they accuse of having put the 1st defendant into possession of the suit property, despite having entered appearance to the suit did not file a statement of defence within the time stipulated in law and having failed to execute the necessary transfer documents in favour of the 2nd plaintiff.

24. Explaining that owing to the defendant’s refusal to transfer the suit property to the 2nd plaintiff, the 2nd plaintiff continues to incur loss and prejudice (is denied access to the suit property), the applicants contends that its just and mete for the court to grant the orders sought.

25. The application is supported by the affidavit of the 1st plaintiff/applicant sworn on **13th August, 2015** in which the grounds thereon are reiterated. To attest to the averments contained in the supporting affidavit, the following documents are annexed to the affidavit:-Demand letter dated 17th May, 2012; summons to enter appearance served on the 2nd defendant; memorandum of appearance filed on behalf of the 2nd plaintiff.

26. The application is opposed through the replying affidavit of the 1st defendant/respondent, Peter Wanjohi Kamau sworn on **22nd October, 2015** and the grounds of opposition filed by the 2nd defendant/respondent dated **20th January, 2016**.

27. In his replying affidavit, the 1st defendant/respondent explains that he bought the suit property from the 2nd defendant on 3rd May, 2007 who inaccordance with the terms of the sale agreement put him into possession of the suit property. Claiming that he is a bona fide purchaser of the suit property and in possession of all the parcels claimed by the plaintiffs/applicants, the 1st respondent avers that he would be greatly prejudised if the orders sought are granted. The 1st defendant/respondent furthercontends that the plaintiff/applicants have no written document capable of showing what their interest in the suit property is.

28. Vide the grounds of opposition referred to above, the 2nd defendant contends that he has no contract with the plaintiffs/applicants. Terming the dispute purely between the plaintiffs and the 1st defendant, the 2nd defendant states that he has no interest in the outcome of the suit. He also terms the application misconceived and an abuse of the process of the court.

29. For the foregoing reasons, the 2nd defendant/respondent contends that its mete and just that the suit be heard on the merits so that all issues in dispute between the plaintiffs and the 1st defendant are resolved once and for all as each party is claiming the land from him.

30. When the matter came up for hearing, counsel for the plaintiffs/applicants, **Mr.Mugambi**, reiterated the grounds on the face of the application and the supporting affidavit of Teri Crane. Explaining that the entire purchase price in respect of the suit property was paid, he urged the court to grant the orders sought.

31. Counsel for the respondents, **Mr. Kiama**, reiterated the averments contained in the replying affidavit and the grounds of opposition filed by the respondents. Hemaintained that the dispute in this suit is purely between the plaintiffs/applicants and the 1st defendant/respondent who is in possession. According to him, the most prudent way of dealing with the issues in question is to fix the suit for hearing as contemplated under **Order 10 Rule 9** of the Civil Procedure Rules.

32. In a rejoinder, Mr. Mugambi submitted that the procedure contemplated under **Order 36** is different from that contemplated under **Order 10** of the Civil Procedure Rules.

33. Although **Order 1 Rule 24(3)** entitles a defendant as a co-defendant to file a notice, he termed the notice filed by the 2nd defendant/respondent an afterthought, meant to hoodwink the court.

34. He pointed out that annexture **PWK-2**, confirms that the 1st defendant received the entire purchase price from the 1st plaintiff. In that regard, he made reference to the replying affidavit of Francis Githinji sworn on 27th February, 2015 and the annnexture marked **TCW** annexed to the affidavit sworn in support of the application herein) and urged the court to allow the application as prayed in order to give effect to the overriding objective of the court.

Law applicable to the application

35. The law applicable to the application was stated in the case of **Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR** thus:-

> **"…Order 36 rule 1 of the Civil Procedure Act provides as follows:**
>
> > **1. (1) In all suits where a plaintiff seeks judgment for—**
> >
> > **(*a*) a liquidated demand with or without interest; or (emphasis added).**
> >
> > **(*b*) the recovery of land, with or without a claim for rent or *mesne* profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount**

claimed, or part thereof, and interest, or for recovery of the land and rent or *mesne* profits.

A plain reading of the above rule shows that a court will grant the plaintiff summary judgment where the claim is of a liquidated demand with or without interest or recovery of land where the defendant has entered appearance but not filed a defence.

The Court of Appeal in the cases of Job Kilach vs Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono Civil Appeal no 94 of 2006[2015] eKLR observed that:

> ***"Summary judgment has far reaching consequences. It must therefore be granted only in the clearest of cases, as was stated by this Court in <u>Laljit/a Vakkep Building Contractors v. Casousel Ltd</u>. [1989] KLR. 386, in which the predecessors of this Court held that:***
>
> ***"Summary judgment is a draconian measure and should be given in only the clearest of cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist."***
>
> ***An application for summary judgment under order XXXV rule 1 (now order 36 rule 1) may be made where the sum claimed is a liquidated sum, or where the defence rises no triable issues, and is a mere sham. In the authority of <u>Continental Butchery Limited v Nthiwa</u> [1978] KLR (Civil Appeal No. 35 of 1977) Madan JA set out the scope of the court's power to grant summary judgment as follows:***
>
> ***"With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a defendant leave to defend."***
>
> ***The principles upon which a court may grant summary judgment are therefore well settled. They have been the subject of various decisions of this Court, such as that of <u>Postal Corporation of Kenya vs. Inamdar & 2 Others</u> [2004] 1 KLR 359where the following passage appears:***
>
> ***"However, we have accepted that the application that was before the learned Judge was an application for summary judgment under Order XXXV rule 1 and 2. We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. <u>The law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend</u>."***
>
> ***10. before the grant of summary judgment, the court must satisfy itself that there are no triable issues raised by the defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner."***

Thus, the same stringent conditions for striking out pleadings are also applicable in cases of seeking for entry of summary judgment for a claimant even where the claim is liquidated like in the instant case."

36. In applying the principles discussed above to the circumstances of this case, I hold the view that summary judgment cannot issue against the applicant for the following reasons:-

1. The issue of the 1st plaintiff's capacity to prosecute the suit has been reserved for determination

during the hearing of the main suit. (see the ruling in the 1st application herein).

2. The interest of the 2nd defendant to the suit property cannot be determined without granting him opportunity to defend himself.
3. Any prejudice occasioned on the applicant owing to delay in hearing and determination of the suit is compensatable by way of damages (mesne profits).

37. The upshot of the foregoing is that the application dated 13th August, 2015 has no merit and is dismissed.

38. Costs of the application shall abide the outcome of the main suit.

Directions

39. To fastrack the hearing and determination of the suit, the parties are directed to comply with all pre-trial procedures and have the matter fixed for hearing once the diary for 2017 opens but not later than February, 2017.

Orders accordingly.

Dated, signed and delivered at Nyeri this 19th day of July, 2016.

L N WAITHAKA

JUDGE

In the presence of:

Mr. Cheruiyot h/b for Mr. Mugambi for the plaintiffs

Mr. Kinyua Kiama for the 1st defendant

N/A for the 2nd defendant

Court assistant - Lydia