



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 427 OF 2012

DAVIS NATHAN CHELOGOI..... PLAINTIFF

VERSUS

DR. NOAH MAHALANG'ANG'A WEKESA..... DEFENDANT

RULING

The plaintiff by a Notice of Motion dated 21st December 2012 but filed in court on 26th April 2013 seeks the following orders:-

1. That the Defendant's list of documents dated 27th August 2012 and his forwarded documents vide his letter dated 7th September 2012 be expunged from the record as inadmissible in evidence.
2. That the defendant's statement of defence be struck out for being frivolous for being able to embarrass the fair trial of this suit and for otherwise being an abuse of court process and that thereafter judgment be entered for the plaintiff as per the plaint filed herein.
3. That in the alternative, the defendant's statement of defence filed on 28th August 2012 be and is hereby expunged from the record as having been filed outside the mandatory time provided and judgment be entered in favour of the plaintiff as per his plaint herein filed.
4. That costs of the application be provided for.

The plaintiff's application is founded on the grounds set out in the face of the application.

- a. That the defendant has forged documents and or they are doctored to specifically defeat the plaintiff's case, and importantly, justice.
- b. That the defence has been filed outside the mandated time without leave of the court.

The plaintiff **DAVIS N. CHEROGOI** has further sworn a supporting affidavit in support of the application dated 21st December 2012 and a further affidavit dated 18th July 2013.

The Defendant opposes the application and has sworn a replying affidavit dated 4th July 2013 and a supplementary affidavit dated 19th September 2013 in opposition to the plaintiffs application.

The parties additionally have each filed written submissions in support of their respective positions.

The plaintiff's case simply put is that he alleges to have been hoodwinked by the Defendant into transferring to the Defendant Land Parcels **Kapoi/Mabonde Blocks 1/268 and 1/269** without the Defendant paying the full purchase price for the properties. The plaintiff states that the sale price for his

two properties to the Defendant was at the consideration of Kshs.12,000,000/- out which the Defendant paid an initial deposit of Kshs.200,000/- while the balance of Kshs.11,800,000/- was to be paid through the Defendant's financier, the Parliamentary **Service Commission** (PSC). The plaintiff asserts that the documents tendered by the Defendant that show that the purchase price for the two properties was Kshs.6,000,000/- are not genuine and contend that the same are forgeries. The plaintiff avers that the agreement for sale for Kshs.6,000,000/- that the Defendant relies on was altered with the purpose of defrauding the plaintiff and points to the correspondences exchanged with the **Parliamentary Service Commission** (PSC) to the effect that PSC had agreed to finance the Defendant to the extent of Kshs.11,800,000/- for the purchase to support his assertion that the purchase price was Kshs.12,000,000/- and not Kshs.6,000,000/- as claimed by the Defendant.

The Defendant for his part maintains that his agreement with the plaintiff was for Kshs.6,000,000/- as per the agreement dated 10th September 2009 bearing this amount as the consideration. The Defendant explains that the agreement annexed to the plaintiff's affidavit marked "**BNC-1**" which indicates the consideration as Kshs.12,000,000/- was made by him (the Defendant) for purposes of obtaining a bigger loan from the Parliamentary Service Commission. On the question of the Land Control Board consent which the plaintiff raises issue with the Defendant avers that it was the plaintiff's responsibility to procure the consents and that it was indeed the plaintiff who procured the consents and if there is any discrepancy it is for the plaintiff to explain. The plaintiff on the other hand states it is the Defendant who obtained the consents and thus it is for the Defendant to explain. **Who should the court believe on this issue?** It is not possible to make a determination on that issue at this point without hearing the parties in evidence.

The parties in this matter have exhibited two signed agreements for sale one carrying a consideration of Kshs.6,000,000/- and the other carrying a consideration of Kshs.12,000,000/-. The Defendant states he altered the latter so as to obtain a bigger loan from the PSC while the plaintiff insists the consideration for the two properties was Kshs.12,000,000/- and not Kshs.6,000,000/-. The primary issue for determination would therefore be what was the agreed consideration for the purchase as between the plaintiff and the defendant. Without determining that issue in my view it would be premature to determine whether or not any fraud was perpetrated by either of the parties. In case the consideration was Kshs.6,000,000/- then the plaintiff would have no basis to claim that he was defrauded and/or he has not been paid any balance of the purchase price as he admits having been paid Kshs.6,000,000/-. Forgery in regard to any document can only be established through evidence and it is not possible to merely look at a document and determine that the same is forged.

The issue whether or not there was a valid consent in my view would be a matter to be determined on the basis of evidence and it is a fact that the court cannot determine at the interlocutory stage especially in such a matter as the present one where each of the parties denies having been responsible for obtaining the consent of the Land Control Board. That the consent of the Land Control Board was obtained is not in doubt and the issue is whether the consent was validly procured and that is a matter to be determined after the evidence is taken from the parties and their witnesses at the trial. Each party will then have the opportunity to cross-examine the other and any witness would be called.

Both parties have alluded to commission of fraud by the opposite party and each party denies having been fraudulent. Allegations of fraud are serious issues and the standard of proof on issue of fraud is on higher threshold than the usual proof on balance of probabilities in civil matters. The plaintiff relies on various documents to claim that the Defendant acted fraudulently and in my view the contents of the alleged documents need to be interrogated at the hearing to determine whether the same were made and/or procured fraudulently and thus it is not possible to make definite findings as to whether there was fraud committed by either party on the basis of affidavit evidence which at any rate is contravened by the party charged of having acted fraudulently. It is my view therefore it is only the trial court that can make any definite findings whether fraud had been established after hearing the evidence and after the witnesses have been subjected to cross-examination. I therefore would at this stage decline to expunge the Defendant's documents as I am invited to do by the Plaintiff.

On the issue as to whether or not the defence filed by the Defendant is frivolous and/or an abuse of the process of the court I would respectively answer in the negative. As I have discussed earlier in this

ruling, pertinent issues arise as to whether the contract/agreement for sale between the parties was for a consideration of Kshs.6,000,000/- or Kshs.12,000,000/-. If the consideration was Kshs.6,000,000/- as the Defendant claims it was, then the defendant would be absolved of any liability as regards to the payment of any balance of the purchase price. The plaintiff claims the consideration was Kshs.12,000,000/- which if established would render the Defendant liable to pay the balance. This indeed is a triable issue considering each party is relying on documents that support their positions. The Defendant denies all allegations of fraud and denies any breach of the agreement on his part. Whether or not the Defendant acted fraudulently and/or was in breach of any term of the agreement for sale are triable issues. I would therefore hold and find the statement of defence raises triable issues and is not frivolous and vexatious.

The plaintiff in the alternative in his notice of motion prayed that the Defendant's statement of defence filed on 28th August 2012 be struck out on the basis that the same was filed out of time a memorandum of appearance having been filed on 10th August 2012. The Defendant in his submissions states that he was one day out of time taking account the provisions of the Civil Procedure Act and submitted that this being a court of equity the court should endeavour to do justice to all parties in the spirit of Article 159 2 (d) which enjoins the court to do justice without undue regard to procedural technicalities.

Indeed under section 1A and 1B of the Civil Procedure Act Cap 21 Laws of Kenya the courts are enjoined to foster the overriding objective of the Act and section 1A (1) provides thus:-

“The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act”.

Section 1B (1) provides thus:-

“for the purposes of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purposes of attaining the following aims:-

- a. **The just determination of the proceedings,**
- b. **The efficient disposal of the business of the court,**
- c. **The efficient use of the available judicial and administrative resources,**
- d. **The timely disposal of the proceedings and all other proceedings in the court at a cost affordable by the respective parties and**
- e. **The use of suitable technology”.**

Having regard to the above cited sections 1A(1) and 1B(1) of the Civil Procedure Act and Article 159 2(d) of the constitution it is quite clear that the court is clothed with wide discretion in the conduct of its business to attain substantive justice for all the parties who come before it. Order 7 Rule 1 that fixes the period for filing a defence where a memorandum of appearance is filed is a procedural rule and for purposes of doing justice the court will ordinarily admit a defence that is filed only a few days out of time where no prejudice is occasioned to the plaintiff and will refuse to shut out a defendant from the seat of justice merely because he filed his defence a few days late.

In filing the plaint the plaintiff anticipated that the defendant will defend the suit and thus simply because the defence was delivered a couple of days late the plaintiff cannot properly agitate that the defendant should not be allowed to defend. In the present case depending on when the days fell the Defendant may have been up to three days late in filing the defence but I would not consider the delay to be inordinate so as to be said to visit any prejudice on the plaintiff and pursuant to the overriding objective under section 1A(1) which enjoins this court to facilitate the just, expeditious, proportionate and affordable resolution of disputes that come before it I admit the defence filed by the Defendant as being properly on record.

To avoid any prejudice on the part of the plaintiff I grant the plaintiff leave to reply to the defence within the period prescribed under the Civil Procedure Rules from the date of this ruling.

No doubt it must have become apparent or evident by now that I will not grant the prayers sought in the plaintiff's application dated 21st December 2012. I accordingly dismiss the same but in view of the

reprieve I have extended to the Defendant in regard to his defence filed out of time will not award the costs of the application to him. I order that each party bears his own costs of the application.

Ruling dated signed and delivered at Nairobi this.....21stday ofMarch.....2014.

J.M. MUTUNGI

JUDGE

In presence of:

..... for the plaintiff

.....for the Defendant