



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 1210 OF 2013

BEATRICE OKOTH.....PLAINTIFF

VERSES

FRANCIS PIUS OMWERI NYABERI & REBECCA

NYABOKE OMWERI T/A TOPLAND MOTORS AND

GENERAL AGENCIESDEFENDANT

RULING

The Defendants' Application

The application before the Court for determination is a Notice of Motion dated 20th December 2013 filed by the Defendants. The Defendants are seeking orders that the suit herein be struck out for contravening the Law of Contract Act and the Land Act, and that the costs of the suit be borne by the Plaintiff. The grounds for the application as set out on its face and in the supporting affidavit sworn on 20th December 2013 by Francis Pius Omweri Nyaberi, one of the Defendants.

The main grounds are that the suit herein concerns the disposition of an interest in land based on an agreement entered between the Defendants and Plaintiff dated 30/7/2012. Further, that the said agreement is not executed by the 2nd Defendant, and does not therefore meet the conditions set out in the Law of Contract Act and the Land Act, rendering the suit herein incompetent. The Defendants annexed a copy of the said agreement, copies of section 3 and 38 of the Law of Contract Act and Land Act respectively and two judicial authorities they sought to rely on, namely **John Michael Wanjao vs Lubala Abenayo Andambi, Eldoret HCCC No. 134 of 2008** and **Machakos District Co-Operative Union Limited vs Philip Nzuki Kiilu, Nbi Appeal No. 112 of 1997.**

The Plaintiff's Response

The Plaintiff opposed the said application in a replying affidavit she swore on 20th January 2014. She states that her suit against the Defendants is competent and properly before court, and ought to be heard as it complies with section 3 of the Contract Act. Further, that the agreement for sale dated 30th July 2012 was signed by the parties to the said agreement, and that it was drawn and witnessed by the Defendant's advocate Mr. Eric Omariba who represented the vendors in the said sale.

The Plaintiff further stated that she complied with all the conditions of the said agreement and paid the vendors a total of Kshs.3,000,000/= out of the agreed Kshs.4,000,000/=, which the Defendants have not refunded. Further, that the Defendants cannot purport to seek the striking out of the suit when they have

not fulfilled their part of the agreement. She detailed the conditions of the said agreement that she alleges the Defendants have not complied with, and averred that she is therefore entitled to an order of specific performance. Lastly, the Plaintiff stated that she is ready and willing to pay the balance of the purchase price of Kshs.1,000,000/=.

The Plaintiff's counsel filed submissions dated 20th February 2014, wherein he argued that the sale agreement that is the subject matter of the suit herein meets the criteria set out in section 3 of the Contract Act and section 38 of the Land Act, as the said agreement was drawn by the Defendants' own Advocate, was signed by the vendors and purchaser and attested by the said Advocate, and was also witnessed by an agent of the vendors. The counsel also relied on section 17 of the Partnership Act No 16 of 2012 to submit that the Defendants have not brought any evidence to show that they did not have authority to act for their partnership, Lastly, that the omission to sign the agreement by the 2nd Defendant was an oversight on the part of their Advocate and cannot be used to rescind the contract.

The Issues and Determination.

I have carefully considered the pleadings filed herein, and submissions made by the Plaintiff and Defendants. The issue for determination is whether the suit filed herein by the Plaintiff should be struck out for reasons that it has been filed in contravention of the law and is incompetent. The provisions of Order 2 Rule 15 (1) of the Civil Procedure Rules state as follows in this regard:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be. “

It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 at p. 9 by Madan, J.A.as follows:-

“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 a case before it.”

The overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. It is also provided in Order 2 Rule 15(2) of the Civil Procedure Rules that the fact of a Plaintiff disclosing no cause of action must be clear on its face and no evidence shall be admissible in this regard.

Section 3(3) of the Law of Contract Act which is relied upon by the Defendants to strike out this suit provides as follows:

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party...”

Similar provisions are found in section 38 of the Land Act of 2012. Their main argument is that the sale agreement was not signed by one of The 2nd Defendant who was a party thereof.

The Plaintiff on the other hand has relied on section 17 of the Partnership Act of 2012, to argue that the signature of the 1st Defendant, bound the partnership in which the 1st and 2nd Defendants were partners, and which was the party to the sale agreement. Section 17 of the Partnership Act provides as follows:

“(1) A partnership is bound by an act done by a partner who is carrying on the business of the partnership.

(2) A partnership is not bound by an act or omission of a partner under subsection (1) if—

(a) the partner has no authority to act on behalf of the partnership; and

(b) the person with whom the partner is dealing—

**(i) has notice that the partner does not have authority to act on behalf of the partnership;
or**

(ii) does not know that the partner is a partner in the partnership or does not believe that the partner is a partner in the partnership.”

It is evident from the pleadings and submissions filed by the parties that there are triable issues raised as to whether the subject sale agreement was entered into by the Defendants as a partnership, if so, the legal effect of signing of the said sale agreement by only one of the Defendants, and whether any money was paid by the Plaintiff pursuant to the said sale agreement, and the legal effect thereof. The Plaintiff should therefore be given the opportunity to have her day in court to ventilate on these issues.

The Defendants’ Notice of Motion dated 20th December 2013 is therefore hereby denied for the reasons given in the foregoing. The costs of the said Notice of Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____28th____ day of ____May____, 2014.

P. NYAMWEYA

JUDGE