



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 590 OF 2013

DOROTHY MARGARE WANJIKU KUNG’UPLAINTIFF

VERSUS

AKASH HIMATLAL DODHIA.....DEFENDANT

RULING

The Notice of Motion

The Defendant filed a Notice of Motion pursuant to the provisions of Order 2 Rule 15 (1) (b) and (d) dated 2nd September 2013, in which he is seeking orders that the Plaintiff’s Originating Summons be struck out, and that the Plaintiff pays the Defendant the costs of this application and of the suit. The grounds for the Notice of Motion are that this suit is an abuse of the process of the court, as the Plaintiff has filed this suit to force the Defendant to re-negotiate the purchase price of the suit property. Further, that this suit is vexatious in that the Plaintiff has admitted that she is unable or unwilling to complete the sale of land transaction, but has filed this suit an order to remove the caveat placed by the Defendant on the suit property, which caveat is in place to protect the Defendant’s interest.

The Defendant relied on an Affidavit sworn on 2nd September 2013 by Wangai Maina, who was his Advocate in the sale transaction entered into with the Plaintiff. The deponent stated that all the correspondence exchanged between himself and the Defendant’s lawyer in the said sale transaction was not before the court, and he annexed the missing letters dated 4th June 2012, 30th November 2012 and 15th May 2013. He further stated that the said letters show that:

- a. The Plaintiff was unwilling to complete the agreement for sale.
- b. The Plaintiff was served with a complete notice.
- c. The Plaintiff has admitted to trying to get the Defendant to re-negotiate the purchase price.
- d. The Plaintiff has threatened to sell the property to a different purchaser.

The Preliminary Objection

The Plaintiff’s counsel thereupon filed a Notice of Preliminary Objection dated 25th October 2013, which she also submitted was their response to the Defendant’s Notice of Motion. The grounds of objection raised by the Plaintiff were as follows:

1. That Mr. Wangai Maina is not a party in these proceedings and is not even acting for the Defendant in this suit. As such the applicant is supported by an Affidavit sworn by a stranger.
2. That the said affidavit deals with factual matters and an advocate should leave the production of evidence to the parties and their witnesses.

3. That the matters referred to in the said affidavit are of a contentious nature and should be canvassed at the hearing of this suit.
4. That the application is intended to avoid the matter from being heard on its merits and as such contravenes Articles 47, 50 and 159 of the Constitution of Kenya 2010.

The Submissions

The court directed that both the Defendant's Notice of Motion and Plaintiff's Preliminary Objection be heard and determined together, and that the parties file written submissions on the same. The Defendant's counsel in submissions dated 14th January 2014 and in reply submissions dated 28th January 2014 argued that the Plaintiff entered into an agreement with the Defendant on 26th May 2011 for the sale of L.R. No 7741/422 which was a subdivision of L.R No 7741/163, for a consideration of Kshs 20,000,000/=. Further, that in order to protect its interest as a purchaser, the Defendant registered a caveat over the suit property.

The counsel submitted that the Originating Summons filed by the Plaintiff dated 17th May 2013 which is seeking to remove the caveat lodged on the suit property is an abuse of the court process, as it has been filed mischievously and in bad faith by the Plaintiff who is seeking to release herself from her obligations in a valid and binding agreement. Further, that the said Originating Summons is also vexatious as it was filed for the purpose of forcing the Defendant to renegotiate the purchase price of the agreement.

The Defendant's counsel in this regard relied on the decisions in **Time Magazine Limited & Another vs Rotich & Another (2000) KLR 544** and **Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others (2009) KLR 229** as to what amounts to an abuse of the court process, and in **Mpaka Raod Development Ltd vs Kana (2004) 1 EA 161** as to when a pleading will be deemed to be vexatious. The counsel also submitted relying on the decision in **Dr. Kiama Wangai vs John N. Mugambi and Another (2012) e KLR** that this court has inherent jurisdiction to strike out the Originating Summons herein for being in abuse of the process of court.

On the Plaintiff's preliminary objection, the counsel for the Defendant relied on the test as to what amounts to a preliminary objection set out in **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, to submit that the preliminary objection dated 25th October 2013 does not state the mandatory provisions of the law that have been offended. Further, that the Plaintiff in the said preliminary objection has admitted that the facts of this case are contentious, which contradicts the requirement that a preliminary objection cannot be determined on contested facts or in the exercise of judicial discretion. The counsel relied on the decision in **Omondi & Another vs National Bank of Kenya & 2 Others (2001) KLR 579** in this respect. The counsel further argued relying on the Court of Appeal's decision in **Patni vs Ali & Others (2005) 1 EA 339** that an Advocate can swear an affidavit in a matter on behalf of his client.

The Plaintiff's counsel filed submissions dated 20th January 2014 wherein he argued that the Defendant has never filed a replying affidavit to rebut the Originating Summons dated 17th May 2013, and that this raised a presumption in law that the contents therein are true. Further, that the Originating Summons raises weighty issues as to the effect of the sale agreement entered into by the parties herein that need to be fully determined by the court. The counsel relied on the decision in **D.T Dobie Co Ltd vs J.M Muchina (1982) KLR 1** in this regard, as well as on the provisions of Articles 47, 50 and 159(1) (d) and (e) of the Constitution and Order 21 Rules 4 and 5 of the Civil Procedure Rules.

The Plaintiff's counsel further submitted that the supporting affidavit sworn by the Advocate who acted for the Defendant in the sale transaction contained matters of a contentious nature, and that under Order 19 Rule 3 of the Civil Procedure Rules the affidavit must be confined to such facts as the deponent is able to prove. The Plaintiff's counsel submitted that the affidavit ought to have been sworn by the Defendant, and that it was sworn without the authority of the Defendant, and asked that the said affidavit be struck out. The counsel relied on various authorities in this regard including **Kenya Horticulture Exporters (1977) Ltd vs Pape (1986) KLR 705** and **Oduor vs Afro Frieght Forwarders (2002) 2 KLR 652**.

The Issues and Determination

I have carefully considered the pleadings filed herein, together with the evidence and submissions made by the Plaintiff and Defendant. There are two issues for determination. The first issue is whether the Plaintiff's preliminary objection raises a pure point of law, and if so, whether the said preliminary objection has merit and should be upheld. The second issue which will only arise if the preliminary objection is not upheld, is whether the Originating Summons filed herein should be struck out for reasons that it discloses no reasonable cause of action and is scandalous, frivolous and vexatious.

On the first issue, the circumstance in which a preliminary objection may be raised was also explained by the Court of Appeal in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, as follows:

“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary.

A preliminary objection cannot be raised if any fact requires to be ascertained. In the present objection, the arguments raised by the Plaintiff require ascertainment of certain facts, particularly as to whether the deponent had capacity to swear the Defendant's supporting affidavit. In addition the objection raised as to the jurisdiction of this court will also require ascertainment of the facts of the dispute before the court as to the sale agreement entered into between the Plaintiff and Defendant.

The court also stated in **Mukisa Biscuit Company -vs- West End Distributors Ltd(supra)** that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion. The issue of striking out of the Defendant's supporting affidavit is one which require this court to exercise its judicial discretion either in support of or against the Plaintiff, and cannot therefore be raised as a preliminary objection.

It is thus the finding of this Court that the Plaintiff's preliminary objection does not raise pure points of law for the foregoing reasons. The said preliminary objection dated 25th October 2013 therefore fails, and the Plaintiff shall meet the costs of the said Preliminary Objection.

On the issue of striking out of the Originating Summons, the applicable law is Order 2 Rule 15 (1) of the Civil Procedure Rules which provides as follows:

“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.”

It is my view that the overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues. This is because a pleading that raises triable issues confirms the existence of a reasonable cause of action, and it cannot consequently be said that the said pleading is scandalous, frivolous or vexatious.

The Plaintiff in the Originating Summons dated 17th May 2013 and filed on 21st May 2013 is seeking a determination of the question whether she is entitled to have the caveat registered against the parcel of land known as LR No 7741/163 Kitisuru removed. The Plaintiff does not dispute that the said caveat was registered by the Defendant who is claiming a purchaser’s interest, and neither does she dispute that she entered into a sale agreement with the Defendant dated 26th May 2011 for the sale of a parcel of land known as LR No 7741/422, being a sub-division of LR No 7741/163 Kitisuru. The Plaintiff also admits receiving a deposit of Kshs 2,000,000/= from the Defendant. What the Plaintiff is disputing is the validity of the said sale agreement for various reasons.

It is my view that the issue of the validity or otherwise of the said sale agreement is one that cannot be determined in proceedings for the withdrawal of a caveat. The applicable law on the withdrawal of a caveat is section 73 of the Land Registration Act of 2012 (Act No 3 of 2012), which provides that a caution may be withdrawn by the cautioner or removed by order of the court or by order of the Registrar. Section 2 of the Act defines a caution to include a caveat. The exercise of the court’s power in this regard must be undertaken with the provisions of section 71 of the said Act in mind, which section provides for the circumstances when a caveat may be lodged and therefore subsist as follows:

“A person who—

(a) claims the right, whether contractual or otherwise, to obtain an interest in any land, lease or charge, capable of creation by an instrument registrable under this Act;

(b) is entitled to a licence; or

(c) has presented a bankruptcy petition against the proprietor of any registered land, lease or charge,

may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge.”

The above provisions do not provide for, nor empower the court or Registrar to determine the respective substantive rights of the parties when considering the removal of a caveat. All that the court is required to confirm is whether the circumstances stated in section 71 of the Land Registration Act of 2012 obtain to justify the lodgment and continued subsistence of a caveat. Therefore, to the extent that the sale agreement between the Defendant and Plaintiff has not been declared null and void and the Plaintiff’s Originating Summons is seeking this court to determine substantive issues arising from the said sale agreement, I find that the said Originating Summons raises no triable issues and is in abuse of the process of court. The Plaintiff should prosecute her claims as to the validity of the said sale agreement in the appropriate proceedings.

The Defendant’s Notice of Motion dated 2nd September 2013 is accordingly allowed for the foregoing reasons, and the Originating Summons filed herein dated 17th May 2013 is hereby struck out for being in

abuse of the process of court. The Plaintiff shall meet the costs of the said Originating Summons and Defendant's Notice of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 8th day of May , 2014.

P. NYAMWEYA

JUDGE