



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1403 OF 2007

TULIP PROPERTIES LIMITED.....PLAINTIFF

VERSUS

MOHAMED KORIOW NUR

SIMON KIPRONO LABOSO

MACDONALD LIJOODI MARAKA1ST DEFENDANT

NOOR MOHAMED HASSAN

DAVID MWENJE.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

THE REGISTRAR OF TITLES.....4TH DEFENDANT

(BY WAY OF ORIGINAL ACTION)

AND

MOHAMED KORIOW NUR.....1ST PLAINTIFF

SIMON KIPRONO LABOSO.....2ND PLAINTIFF

MACDONALD LIJOODI MARAKA.....3RD PLAINTIFF

NOOR MOHAMED HASSAN.....4TH PLAINTIFF

VERSUS

TULIP PROPERTIES LTD.....1ST DEFENDANT

THE RETIRED PRESIDENT H.E.

DANIEL TOROTICH ARAP MOI.....2ND DEFENDANT

THE COMMISSIONER OF LANDS.....3RD DEFENDANT

(BY WAY OF COUNTERCLAIM)

RULING

The 1st Application

There are two applications before the Court for determination. The first application is a Notice of Motion by the 2nd Defendant in the Counterclaim dated 10th September 2013, seeking orders that the claim by the Plaintiffs in the Counterclaim be struck out, and that the suit against the said 2nd Defendant be dismissed with costs. The grounds for the application are that the said Plaintiffs' claim discloses no reasonable of action against the said second Defendant as it seeks to reverse an allotment made properly under the law, as the said allotment and subsequent title issued thereunder are no longer in the name of the said 2nd Defendant as the same have since been transferred and registered in the name of the 1st Defendant in the Counterclaim; and that the claim is founded on a misconception of the law that the said 2nd Defendant could not be allocated land, yet such powers existed under the repealed Government Lands Act, the repealed Registration of Titles Act as well as the then existing Constitution.

The Plaintiffs in the Counterclaim filed Grounds of Opposition dated 17th September 2013 in response to this application. They stated that the application does not meet the threshold set out under Order 2 Rule 15(1) (a) of the Civil Procedure Rules on striking out of the pleadings in that the grounds relied on in the said application are matters of evidence that can only be resolved through affidavit and/or viva voce evidence.

Further, that the application is grounded on disputed facts that need to be ascertained, as the question whether the subject allotment was made properly under the law is a question of both the evidence and the law and cannot be disposed of summarily at this stage. Lastly, that the test in such an application is not whether or not the title is in the name of the said 2nd Defendant, but whether or not the Plaintiffs in the Counterclaim have a reasonable cause of action with some chances of success.

The 2nd Application

The second application for determination is a Notice of Motion dated 17th September 2013 filed by the the Plaintiffs in the Counterclaim. They are seeking orders that :

1. The 2nd Defendant Statement of Defence to their Counterclaim dated the 10th day of September 2013 and filed on the same day be struck out as disclosing no reasonable defence in law and judgment is entered for the said Plaintiffs as prayed for in the Counterclaim and/or;
2. That in the alternative the 2nd Defendant Statement of Defence to their Counterclaim be struck out for having been filed in violation of Order 7 rules 5 of the Civil Procedure Rules, 2010 and therefore BEING improperly on record and fatally defective.

The main grounds for the application are that the said 2nd Defendant's Statement of Defence to the Counterclaim is a mere denial, has no merit and discloses no semblance of a reasonable defence. Further, that that the said defence has been filed in violation of the mandatory provisions of Order 7 rule 5(a), (b), (c) and (d) of the Civil Procedure Rules, 2010 and is therefore irregular, fatally defective, and amounts to an abuse of the process of the court.

The 2nd Defendant in the Counterclaim filed Grounds of Opposition dated 14th October 2013 in response to the application by the Plaintiffs in the Counterclaim. He stated that he has a reasonable cause of action, and that the suit has many disputed facts which ought to be ascertained in the spirit of natural justice and fair hearing, and on which the court ought to be fully informed on the merits through viva voce evidence. Further, that the matter has not been set down for pre-trial conferencing when all statements and

documents are required to be filed, and failure to file the same cannot be a ground for striking out pleadings.

The Submissions

The court directed the parties to file written submissions on the two applications. The counsel for the Plaintiffs in the Counterclaim filed submissions dated 16th December 2013 . He first dealt with the application by the 2nd Defendant in the Counterclaim, and argued that the essence of the said 2nd Defendant Defence is that the suit property was legally allocated to him, but that he did not give the particulars in his defence of the fraud or defects in the title held by the Plaintiffs in the Counterclaim.

Further, that the said 2nd Defendant ignored the provisions of Order 7 Rule 5 of the Civil Procedure Rules that require a Defence to be accompanied by a list of witnesses and witness statements, as well as the documents to be relied upon during trial. The counsel submitted that the title issued to the Plaintiffs in the Counterclaim was the good title and relied on the decisions in **Dr. Joseph N.K. Ngok vs Justice Moijole Keiwa & 4 Others, Civil Application No. NAI 60 OF 1997** and **Njilux Motors Ltd vs Kenya Power & Lighting Company & Another, (2000) 2 E.A. 466.**

The Plaintiffs in the Counterclaim further submitted that the question whether allocation of the subject property was properly and legally made to the 2nd Defendant in the Counterclaim is both a question of fact and law that will require viva voce evidence and a full hearing, and that so long as the statement of claim in the Counterclaim discloses a cause of action or raises questions that require determination by a judge, the mere fact that the case is weak and not likely to succeed is not a ground for striking it out. The counsel cited various authorities in support of this argument including **D.T. Dobie vs Joseph Mbaria Muchina , Civil Appeal Number 37 of 1988** and **Yaya Towers Ltd vs Trade Bank Ltd (in Liquidation), Civil Appeal Number 35 of 2000.**

Coming to the application by the Plaintiffs in the Counterclaim, their counsel submitted that the Defence by the 2nd Defendant in the Counterclaim Defence raised no *prima facie* issue which should go to trial for adjudication. The counsel relied on the decision in **Fremar Construction Co. Ltd vs Minakshi Navin Shah, Nairobi Civil Appeal No. 85 of 2003** in this respect. Further, that the said Defence is unsustainable given that the said 2nd Defendant's title which was passed to the 1st Defendant in the Counterclaim was acquired in contravention of the repealed Government Land Act, and illegally and fraudulently, and was therefore null and void *ab initio*. The counsel cited the decisions in **Kenya Transport Association vs The Municipal Council of Mombasa & Another, Mombasa H.C. Constitutional Petition No 6 of 2011** and **Paramount Bank Limited vs Mohammed Ghias Qureisho & Another, Civil Appeal No. 239 of 2001** for this position.

The counsel for the 2nd Defendant to the Counterclaim filed submissions dated 27th January 2014 wherein he argued that the joinder of the said 2nd Defendant was an afterthought which is misconceived in both law and fact, and that the allegations made against the said Defendant are baseless and meant to embarrass and demean him in the eyes of the public. The counsel further submitted that no reasonable cause of action is disclosed in the Counterclaim as against the said 2nd Defendant as he acted within the law and the allocation complained of was done in accordance with the Constitution, repealed Government Lands Act and the repealed Registration of Titles Act. Further, that the title acquired by the said 2nd Defendant became an indefeasible title under section 23 of the repealed Registration of Titles Act.

The counsel contended that all the requirements for a valid transfer and conveyance of land were undertaken as between the 2nd Defendant and 1st Defendant in the Counterclaim. Further, that the said 2nd Defendant cannot be held accountable for actions affecting third parties to which he was not privy. It was also submitted that the suit against the 2nd Defendant in the Counterclaim is time barred under section 4 of the Limitation of Actions Act, as the subject property was transferred to the 1st Defendant in 1996 which is 17 years ago.

On the application by the Plaintiffs in the Counterclaim, the counsel submitted that the court's power to strike out pleadings should be used sparingly and cautiously, and even then only in the plain and obvious cases. The counsel relied on the decisions in **D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1** **Ragbir Singh Chatte vs National Bank Ltd** , Civil Appeal No 50 of 1996, and **Kenya Commercial Bank vs Karanja (1981) KLR 209**. The counsel further submitted that the 2nd Defendant in the Counterclaim's Defence raised disputed facts and triable issues which require further interrogation by *viva voce* evidence. Lastly, the counsel submitted that Order 7 of the Civil Procedure Rules allows for statements to be filed prior to pre-trial conferencing, and cannot be used to strike out pleadings.

The counsel for the 3rd and 4th Defendants in the Counterclaim filed submissions dated 25th February 2014 in opposition to the Notice of Motion by the Plaintiffs in the Counterclaim dated 17th September 2013. The counsel submitted that the suits by the Plaintiffs in both the original suit and counterclaim raise allegations of fraud and illegality in the allocation of land, which can only be determined at a full hearing and by way of *viva voce* evidence.

Further, that the issue of ownership of land can only be determined by way of evidence, and where there is a title to land which is not genuine the court must conduct a hearing to determine the rightful owner of land.

The Issues and Determination

I have carefully considered the two Notices of Motion before the Court, together with the submissions made by the parties' counsel. The issue for determination is whether the Counterclaim and Defence filed herein by the Plaintiffs in the Counterclaim and 2nd Defendant to the Counterclaim respectively should be struck out for reasons that they do not disclose a cause of action. The two Notices of Motion by the Plaintiffs in the Counterclaim and 2nd Defendant in the Counterclaim are brought pursuant to the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rule, which provides as follows:

(1) "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 also provided in Order 2 Rule 15(2) of the Civil Procedure Rules that the fact of a pleading disclosing no cause of action must be clear on its face and no evidence shall be admissible in this regard.

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. I have perused the claim by the Plaintiffs in the Counterclaim dated 14th August 2013. I note that the Plaintiffs in the Counterclaim claim to be registered proprietors of the parcel of land known as LR Number 14277 in Nairobi, having been allocated the same and paid the necessary stand premium and stamp duty. They further claim that the allocation of the said land to the 2nd Defendant in the Counterclaim, and the subsequent transfer of the said land by the said 2nd Defendant to the 1st Defendant in the Counterclaim was illegal, null and void, and they have given the particulars of the said illegality.

The 2nd Defendant in the Counterclaim in his Statement of Defence dated 10th September 2013 on the other hand denies that the Plaintiffs in the Counterclaim were allocated the said land, and that if there was any such allocation it was procured illegally and unprocedurally as the allocation was undertaken when the property had already become registered in the name of the 2nd Defendant to the Counterclaim, and subsequently transferred to the 1st Defendant in the Counterclaim. The 2nd Defendant averred that he acted in accordance with the laws then existing in making the allocation complained of.

It is evident that both the Plaintiffs and the 2nd Defendant in the Counterclaim were allocated the same parcel of land namely LR No 14277, and both claim title and rely on certain facts which they state need to be proved in court to demonstrate their respective cases. They also both claim that the other's title is the irregular and illegal one. Each party is thus depending on certain facts in defence of their respective titles.

It thus the finding of this court that there are triable issues raised by both the Plaintiff in the Counterclaim and 2nd Defendant in the counterclaim as to how their respective titles were obtained, that will need further evidence to be called for their determination. It is also not lost to this Court that the suits filed herein concern the apparent double allocation of LR No 14277, and the issue of which of the two disputed titles is the valid title will have to be determined by the Court one way or another.

Lastly, Order 7 Rule 4 of the Civil Procedure Rules is inapplicable and cannot be used to strike out pleadings in the circumstances of the two applications before the court, as its provisions only comes to operation when the court is considering compliance during the pre-trial procedures conducted under Order 11 of the Civil Procedure Rules.

The prayers in the Notice of Motion by the 2nd Defendant in the Counterclaim dated 10th September 2013 and in the Notice of Motion dated 17th September 2013 by the Plaintiffs in the Counterclaim are accordingly hereby denied for the reasons given in the foregoing. Each of the parties shall meet the costs of their respective Notices of Motion.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 16th day of June, 2014.

P. NYAMWEYA

JUDGE