



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT MOMBASA
Civil Case 21 of 2009

1. MARIA ERIKA SEEZER

2. KUNT FREODRCH ALBERTR SEEZER.....PLAINTIFFS

VERSUS

DAGMAR URSULA MULLER.....DEFENDANT

RULING

I have before me an application to strike out the plaintiffs' suit. It is expressed to be brought under the provisions of Order VI Rule 13 (1) (a) of the Civil Procedure Rules. The defendant contends that the suit does not disclose a reasonable cause of action for the reasons that: the suit property is registered in the names of the plaintiffs together with one Hurst Gunther Gultling and the latter did not sign the sale agreement upon which this suit is founded; that the plaintiffs have not complied with Order 1 Rule 12 of the Civil Procedure Rules and even if they have complied, the authority of the 2nd plaintiff to institute the suit should have been obtained. Under Rule 13 (1) (a) of Order VI, no evidence is admissible and therefore no supporting affidavit was filed.

In his written submissions in support of the application, counsel for the defendant argued that neither the second plaintiff nor the said 3rd proprietor of the suit property authorized the 1st plaintiff to file this suit as no such authority has been filed. Counsel also contended that the agreement relied upon by the plaintiffs was not executed by the 2nd plaintiff and the said 3rd proprietor. In those premises, counsel submitted the 1st plaintiff had no capacity to enter into any agreement with the defendant and that the suit had therefore been filed in contravention of Order 1 Rule 12 of the Civil Procedure Rules. For those propositions, reliance was placed upon the cases of **Christopher Wanyoike – v – Lyric Investments & Another [Nairobi HCCC No. 172 of 2007] (UR)** and **Shirika La Kusaidia Watoto Wa Kenya Faidi Kenya – v – Rhodah Rop & 4 others [Nakuru HCCC No. 201 of 2005] (UR)**.

The plaintiffs opposed the application by way of Grounds of Opposition filed by their advocates. In elaboration of those grounds, counsel for the plaintiffs submitted that the defendant's own averments in the defence acknowledge that the plaintiffs agreed to sell to her the suit property and having so acknowledged the plaintiff's capacity, she cannot challenge the same in this application. It was also argued on behalf of the plaintiffs that the defendant took possession of the suit property pursuant to the said agreement and therefore took benefit of the same and cannot now challenge the same. In any event as the defendant executed the said agreement and took possession of the suit property, she knew that the 2nd plaintiff and the 3rd proprietor had not signed the said agreement. She cannot therefore approbate and reprobate at the same time.

With regard to the authority of the 1st plaintiff to file suit, counsel submitted that Order 1 Rule 12 of the Civil Procedure Rules does not prescribe a time limit for filing of the same and in any event the authority had since been filed. In counsel's view the defects identified by the defendant are curable and do not affect the merit of the case. For that

proposition counsel cited the case of **Research International East Africa Ltd – v – Arisi & Others [2007] 1 EA 348.**

As this application has been brought under Order VI Rule 13 (1) (a) of the Civil Procedure Rules, it should be determined on the basis of an examination of the pleadings only. Paragraphs 3 and 4 of the plaint read as follows:-

- “3. At all material times relevant to this suit the plaintiffs are the registered owners of a 99 year leasehold interest in Kwale/Galu Kinondu/1225 herein referred to as the suit property alongside Hurst Gunther Gutling who holds a nominal interest therein which property the plaintiffs have developed with one main building consisting of two apartments, one guest house with one apartment, two buildings housing a store, a laundry, staff kitchen, one water tower, one swimming pool and one garden pavilion under the 1st plaintiff’s name, Mama Erika Apartments.**
- 4. Sometime on or about the 22nd day of January 2008, the plaintiffs entered into a pre-contract agreement in Germany with the defendant in which the defendant was to pay a sum of 10,000 Euros as deposit for rent of the suit property with an option to purchase the same at an agreed purchase price of 180,000 Euros the balance of which was to be paid by agreed monthly installments with effect from 1st January 2009 together with interest calculated from the 1st day of March 2008 and on or about the 1st day of March 2008 the plaintiffs duly handed over the management of the suit property to the defendant and her agents Papa Musili Safaris Ltd.”**

The averments in the above paragraphs are plain that the named plaintiffs dealt with the defendant in respect of the suit property. The named plaintiffs however acknowledge the nominal interest of Hurst Gunther Guiltling. Considering the averments in the two paragraphs, is it plain that the 1st plaintiff had no capacity to enter into a sale agreement with the defendant? She is a co-proprietor of the suit property. Whether her interest in the suit property is severable or not cannot be determined on a plain reading of the plaint. None of the co-proprietors are complaining. In any event in the defence and counter-claim filed by the defendant the capacity of the 1st plaintiff to enter into the said agreement is not challenged. In the premises, the objection that the 1st plaintiff had no capacity to enter into the sale agreement with the defendant is clearly misconceived and is rejected. The facts in this case are clearly distinguishable from the facts in **Christopher Wanyoike – v – Lyric Investments Ltd** where two judges, Kihara Kariuki and Khamoni (JJ) found that one of the parties to the suit was not a party to a contract upon which the cause of action was founded.

The defendant further submitted that Order 1 Rule 12 of the Civil Procedure Rules had not been complied with since the 2nd plaintiff’s authority to file the suit and also that of the 3rd proprietor of the suit property had not been filed. In view of the decision of the Court of Appeal in **Research International East Africa Limited – v – Arisi & Others (supra)** the defendant’s objection is well founded. It was held as follows in the said case.

“Where one plaintiff performs any pleading or other act on behalf of co-plaintiffs in a suit, the authority should be in writing signed by the party giving it and should be filed in the case. Where there are numerous plaintiffs, each plaintiff is required by the rules to verify the correctness of the averments in the plaint by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs in writing and files such authority in the case.”

The same court however further found that the court has a discretion where Rule 1 (2) of Order VII of the Civil Procedure Rules has not been complied with. Instead of striking out the plaint the court can make other appropriate orders including giving an opportunity to the plaintiffs to comply with the said rule. On the authority of the cited Court

of Appeal decision therefore, the suit filed by the 2nd plaintiff would, prima facie, appear incompetent.

In this case it has been submitted by counsel for the plaintiffs that the 2nd plaintiff's authority has since been filed. Counsel pleads that the same be deemed as having been validly filed. To strike out a pleading is a draconian step to take and should be resorted to in only the most of plain and obvious of cases. This is not one of those cases. I agree with counsel for the plaintiffs that substantive hearing and determination of cases on their merits has now been codified in sections 1A and 1B of the Civil Procedure Act. As the 2nd plaintiff has now complied with Rule 1 (2) of Order VII, I exercise my discretion in his favour and admit the same into the record with the result that the defect in the verifying affidavit has now been cured.

For the avoidance of doubt, I must state that the suit by the 1st plaintiff does not suffer from any defect and the defendant's objections in respect of that suit are obviously without merit.

In the result, the application dated 29th January 2010 and filed on 9th February 2010 is dismissed with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF MAY 2010.

F. AZANGALALA

JUDGE

Read in the presence of:-

Sudi holding brief for Munyiya for Applicant and Mulwa holding brief for Onyango for the Respondent.

F. AZANGALALA

JUDGE

10TH MAY 2010