



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND COURT CASE NO.128 OF 2008(O.S)

IN THE MATTER OF LR NO. WEST KASIPUL/KOTIENO KOKECH/67

RHODA AWOUR ODUO.....PLAINITFF/RESPONDENT

VERSUS

MONICA ATIENO OUMA 1ST DEFENDANT

WILLIS ODHIAMBO OUMA 2ND DEFENDANT/APPLICANT

RULING

1. This suit was brought by way of originating summons dated 2nd October, 2008. The originating summons was brought under Order XXXVI Rule 3 of the repealed Civil Procedure Rules. The Plaintiff sought two principal prayers namely, a declaration that the Plaintiff is the lawful purchaser of all that parcel of land known as **LR. No. West/Kasipul/KotienoKokech/67**(hereinafter referred to as “**the suit property**”) through the agreement for sale dated 28th March,2008 having paid the full purchase price, taken possession and commenced development on the suit property and, an order compelling the 1st defendant to deliver to the Plaintiff the title deed for the suit property, the transfer of the suit property in favour of the Plaintiff and all other completion documents within such time that the court may determine in default of which the Deputy Registrar of the Court to execute all such documents as may be necessary for securing the consent and transfer of the suit property to the Plaintiff. The originating summons application was brought on the grounds that the Plaintiff and the 1st defendant had entered into an agreement for sale under which the 1st defendant had agreed to sell and the Plaintiff had agreed to purchase the suit property at a consideration of Ksh. 1,250,000.00. The Plaintiff paid to the 1st defendant a sum of Ksh. 800,000.00 leaving a balance of Ksh. 450,000.00 that was to be paid to the 1st defendant within three months upon delivery by the 1st defendant to the Plaintiff of, the original title deed for the suit property, a duly executed transfer and other completion documents such as, copies of the 1st defendant’s identity card, PIN Certificate, photographs and Consent of the Land Control Board. In July, 2008, the 1st defendant purported to verbally rescind the said agreement for sale with the Plaintiff and attempted to refund to the Plaintiff the said sum of ksh. 800,000.00 that had been paid to her on account of the purchase price for the suit property. The Plaintiff rejected the refund and insisted on specific performance of the agreement for sale. In the meantime, the Plaintiff proceeded to lodge a caution on the title of the suit property to protect his interest in the same.
2. While the originating summons was pending hearing and determination, the 1st defendant caused the suit property to be transferred to the 2nd defendant, who is her son on 20th November, 2009. The said transfer is claimed to have been made by the 1st defendant while the caution that was

lodged by the Plaintiff on the register of the suit property was in force. In view of this development, the Plaintiff filed an application on 2nd February, 2010 seeking among others, an order that the 2nd defendant be added as a party to this suit. The Plaintiff's application was heard by Musunga J. (as he then was) ex parte on 2nd February, 2010 and the Plaintiff was granted leave to join the 2nd defendant in this suit. The 2nd defendant appointed his advocates on record on 9th January, 2012 but seems from the record not to have filed an affidavit in reply to the originating summons or the application that sought his joinder to the suit.

3. On 12th April, 2012, the 2nd defendant filed an application by way of Notice of Motion dated 5th April, 2012 seeking an order that this suit be struck out and dismissed with costs to the defendants. This is the application which is the subject of this ruling. The 2nd defendant's application was brought under Order 2 rule 15 (1),(b), (c) and (d) of the Civil Procedure Rules. The 2nd defendant's application that was supported by his affidavit sworn on 5th April, 2012 was brought on several grounds. In summary, the application was brought on the grounds that; the 2nd defendant is the legitimate registered owner of the suit property and as such he is entitled to absolute and exclusive right over the same. The Plaintiff's suit herein is based on an agreement for sale that did not materialize. The said agreement for sale was a controlled transaction under the provisions of the Land Control Act, Cap. 302 Laws of Kenya and as such consent of the land control board was required for the same to be valid. No consent was sought and none was obtained and as such the said agreement became null and void for all intents and purposes and as such cannot form a basis for this suit. The 2nd defendant contended further that the reliefs sought by the Plaintiff are not available to the Plaintiff through originating summons and that in any event, the Plaintiff's suit does not lie against the 2nd defendant with whom she had no contractual relationship. The 2nd defendant termed the Plaintiff's suit as disclosing no reasonable cause of action, scandalous, frivolous, and vexatious and an abuse of the process of the court. The Plaintiff filed grounds of opposition dated 22nd May, 2012 and a replying affidavit sworn on 12th February, 2013 in opposition to the 2nd defendant's application. In her response to the application, the Plaintiff urged the court to dismiss the 2nd defendant's application as this is not an appropriate matter to determine summarily. The Plaintiff contended that the 2nd defendant's title to the suit property on the basis of which this application has been mounted was procured fraudulently and in breach of the doctrine of *lis pendens*. The Plaintiff contended that although the 2nd defendant's application is based to a large extent on the failure of the 1st defendant and the Plaintiff to procure a consent of the land control board for the agreement for sale 28th March, 2008, the transfer of the suit property to the 2nd defendant was also effected without consent of the land control board having been first obtained. The Plaintiff contended that this suit raises several issues which should be determined at the trial. The Plaintiff contended that the originating summons is properly before the court.
4. On 16th May, 2013, the advocates for the parties agreed to argue the application by way of written submissions. The 2nd defendant filed his submissions on 10th June, 2013 while the Plaintiff filed her submissions on 18th June, 2013. In his submission, 2nd defendant submitted that since no consent of the land control board was obtained for the agreement for sale between the Plaintiff and the 1st defendant on which this suit is anchored, the said agreement for sale became null and void, for all intents and purposes. Consequently, the said agreement for sale is incapable of conferring any legal rights upon the Plaintiff. The 2nd defendant contended that this suit which is founded on the sale agreement that is voided by law, does not raise and/ or disclose any reasonable cause of action, whatsoever against the 2nd defendant. The 2nd defendant contended further that the Plaintiff's suit is void in its entirety and no amount of evidence, either through affidavit or at the trial would be able to redeem the suit. It was the 2nd defendant's further submission that the reliefs sought cannot be obtained through an originating summons. According to the 2nd defendant, originating summons is a procedure that is provided for and/ or aimed at addressing summary issues, where the facts and the attendant law, are not elaborate and/ or in dispute. The 2nd defendant contended that the cause of action herein concerns a declaration pertaining to purchase of the suit property and where the existence and validity of the sale agreement, are in question,

cannot be addressed as the same are outside the provisions of Order XXXVI Rule 3 of the repealed Civil Procedure Rules and order 37 Rule 3 of the Civil Procedure Rules, 2010 which prescribes matters which may be determined through originating summons.

5. The 2nd defendant contended further that the sale agreement, on which this suit has been founded, was entered into between the Plaintiff and the 1st defendant. It follows that, in the event of any breach thereof, the Plaintiff's remedies lies only as against the 1st defendant and not otherwise. The 2nd defendant contended therefore that there does not exist any privity of contract between the 2nd defendant and the Plaintiff. This suit to the extent that it has been brought against the 2nd defendant is therefore misplaced, frivolous and devoid of any merit. The 2nd defendant submitted that the objections raised herein above to the Plaintiff's suit are not mere technical issues but substantive issues of law. In conclusion, the 2nd defendant submitted that this suit is hopelessly and irredeemably bad.
6. In her submissions in reply, the Plaintiff submitted that, although the 2nd defendant claims to be the current and legitimate registered owner of the suit property, the 2nd defendant has not annexed any document to show how he acquired and/or purchased the suit property. He has not exhibited any agreement for sale save for a copy of the title deed and has not indicated whether they obtained consent to transfer the suit property from the Land Control Board. The Plaintiff submitted that in the circumstances, the 2nd defendant's ownership of the suit property that was acquired while this suit is pending is questionable and cannot be termed legitimate so as to warrant the orders sought herein. The Plaintiff submitted further that it is not open to the 2nd defendant to raise the issue of non compliance with section 6 of the Land Control Act, Cap. 302 in relation to the Plaintiff's transaction with the 1st defendant when the 2nd defendant secured a transfer of the suit property into his name without any consent from the Land Control Board in breach of the provisions of the said section 6 of the Land Control Act. The Plaintiff submitted further that; as a purchaser in the process of buying the suit property under a valid agreement for sale and who has been voluntarily given and has taken possession of the suit property by the 1st defendant from March 2008, this originating summons in which she is seeking the intervention of the court to compel the 1st defendant to deliver the completion documents which includes the original title, transfer and a valid consent from the Land Control Board was validly brought under the provisions of Order XXXVI Rule 3 of the repealed Civil Procedure Rules. According the Plaintiff, that rule entitles a vendor or purchaser of immovable property to take out summons for determination of issues relating to requisition, objection, claims arising from or connected with a contract for sale. The Plaintiff submitted that when the originating summons is listed for directions, the court will determine whether the same may be treated as a plaint and the Replying Affidavits treated as Defence. The Plaintiff contended that at that stage it would be open to her to seek other reliefs that may include, an order for the nullification of the 2nd defendant's title. The Plaintiff cited Article 159 of the Constitution of Kenya and section 18 © of the Environment and Land Court Act, No. 19 of 2011, and urged the court to lean towards determining this suit on merit and not in a summary manner.
7. The Plaintiff submitted that the issues raised in this suit cannot be determined in a summary manner. She submitted that the court can only arrive at a final decision as to whether this suit discloses a legitimate cause of action or whether the suit is legally tenable and make a decision on the rights of all the parties after a full hearing of the case on merits.
8. I have considered the 2nd defendant's application and the opposition thereto by the Plaintiff. I have also considered the parties' respective written submissions and the case law cited. As I stated above, the 1st defendant's application was brought under Order 2 rule 15 (1) (b), (c) and (d) of the Civil Procedure Rules. Under that rule, the court has a discretion to strike out a pleading on the grounds that it discloses no reasonable cause of action or defence or that it is scandalous, frivolous or vexatious or that it may prejudice, embarrass or delay the fair trial of the action or that it is otherwise an abuse of the process of the court. The 2nd defendant sought the striking out of the originating summons filed herein on the grounds that; the same is scandalous, frivolous or vexatious, the same may prejudice, embarrass or delay the fair trial of this suit and that, the same is otherwise an abuse of the process of the court. In view of the draconian nature of this remedy of

striking out, it has been held that the court's power should be exercised with great caution and only in clearest of cases. See the case of, **Chatte vs. National Bank of Kenya Ltd. Civil Appeal No. 50 of 1996 (unreported)**. See also the case of, **D.T. Dobie & Company (K) Ltd. vs. Joseph Mbaria Muchira & Another, Civil Appeal No. 37 of 1978(unreported)** where Madan J.A stated as follows regarding the exercise of the court's power to strike out pleadings; **"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment."** In the case of, **Murri vs. Murri and another [19991 E.A 209(CAK)**, the court of appeal held that, summary remedy of striking out pleadings is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the court process or is unarguable. In the case of, **J.P. Machira vs. Wangethi Mwangi, Court of Appeal, Civil Appeal No. 179 of 1997(unreported)**, Omolo J.A, rendered himself as follows on the issue of striking pleadings;

"I do not think the unfettered power in the courts to allow amendments at any stage is to be used to enable the parties to create all sorts of fanciful defences in the course of litigation. Nor do I understand the decision of this court, particularly that of Madan J.A in the case of D.T. Dobie & Company(Kenya) Ltd. vs. Joseph Mbaria Muchina & another, Civil Appeal, No. 37 of 1978(unreported) to mean that no pleading could ever be struck out even where it is patently clear that no useful purpose could ever be served by a trial on merits.....I agree that these powers are drastic and as the court said.....the powers are to be exercised with great caution and only in clearest of cases. But once such caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on the merits, the court is perfectly entitled to strike out a pleading for as I have said, there is no magic in holding a trial on the merits particularly where it is obvious to everyone that no useful purpose would be served by it."

9. In the book, **Pleadings: Principles and Practice by Sir Jack Jacob and Iain S. Goldrein**, a pleading or an action is said to be frivolous when it is without substance or unarguable. Examples of pleadings which are frivolous are given as those which are put forward to waste the court's time and those which cannot possibly succeed. On the other hand, a vexatious pleading or action is defined in the said book as a pleading or action which lacks bona fides, is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Borrowing still from the same book, a pleading or action is said to be tending to prejudice, embarrass or delay fair trial when; it is ambiguous or unintelligible, when it states immaterial matter and in the process raises irrelevant issues, when it contains unnecessary or irrelevant allegations and when it involves a claim or defence which a party is not entitled to make use of. Lastly, an action which is an abuse of the process of the court is defined in the said book as one which is pretenceless or absolutely groundless. It is on the foregoing principles that the 2nd defendants' application herein is to be considered. The question that I need to answer is whether this is an appropriate case in which the court should exercise its discretion to strike out the suit. In answering this question, I would need to consider whether the suit filed herein is frivolous or vexatious, whether it is likely to embarrass or prejudice the fair trial of this suit or whether it amounts to an abuse of the process of the court. In addition, I would need to consider whether any purpose would be served by allowing the Plaintiff's claim herein to proceed to hearing. The facts giving rise to this suit are not disputed to a large extent. The 1st defendant had entered into an agreement for sale of the suit property with the Plaintiff. The purchase price was Ksh. 1,250,000.00. The Plaintiff paid to the 1st defendant a sum of Ksh. 800,000.00. The balance in the sum of Ksh. 450,000.00 was to be paid within three months from the date of the agreement that was dated 28th March, 2008. The sale was subject to the land control board. The Plaintiff has contended that whereas she was ready and willing to pay to the 1st defendant the balance of the purchase price, the 1st defendant was not forthcoming with the sale completion documents such as the land control board consent and the transfer. The Plaintiff has contended that without a valid notice to him, the 1st defendant purported to rescind the agreement for sale and refund the sum of Ksh. 800,000.00 that had been paid to her by the

Plaintiff. The Plaintiff rejected the said refund and moved to this court to compel the 1st defendant to provide the aforesaid completion documents. The 1st defendant has contended that it is the Plaintiff who failed to honour her part of the bargain by paying the balance of the purchase price as had been agreed. The 1st defendant contended that she was entitled to rescind the agreement that she had entered into with the Plaintiff which agreement in any event was null and void on account of alterations that had been made thereto. While this suit was pending, the 1st defendant caused the suit property to be transferred to the 2nd defendant. The 2nd defendant was thereafter joined into this suit as he was now the registered proprietor of the property that is in dispute in this suit between the Plaintiff and the 1st defendant. The 2nd defendant has not filed any affidavit in response to the originating summons.

10. Order XXXVI Rule 3 of the repealed Civil Procedure Rules under which the Plaintiff's originating summons was brought provided that a vendor or purchaser of immovable property may at any time move the court by way of originating summons for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation or any other question arising out of or connected with the contract of sale save for a question as to the validity or the existence of the contract for sale. There is no doubt that a dispute has arisen between the Plaintiff and the 1st defendant over the agreement for sale that they had entered into. The Plaintiff has moved the court to determine whether the 1st defendant is entitled to rescind the agreement for sale in the manner she purported to do and why the 1st defendant cannot be compelled to deliver to the Plaintiff the sale completion documents. I am in full agreement with the 2nd defendant's submissions and the authorities cited by him that where consent of the land control board is not obtained with regard to a sale transaction that is subject to the Land Control Act, Cap. 302 Laws of Kenya, the transaction becomes null and void for all intents and purposes. This in my view however cannot stop a party to such a transaction from moving the court to determine certain questions that have arisen from that sale transaction and to seek whatever reliefs he/she may feel is appropriate. Whether the reliefs sought by such a party can be granted by the court is for the court to determine. Due to the foregoing, I do not think that the fact that the 1st defendant had failed to secure land control board consent would bar the Plaintiff herein from moving the court under Order XXXVI Rule 3 of the repealed Civil Procedure Rules to determine the questions that have been raised in the originating summons. On the issue of the Plaintiff being non-suited as against the 2nd defendant, the 2nd defendant was joined in this suit by an order of the court which order the 2nd defendant has not challenged. The Plaintiff's alleged misjoinder in this suit cannot therefore be a ground for striking out this suit. I would wish to add that if I am wrong on the findings that I have arrived at above, I would not still allow the 2nd defendant's application for another reason. The orders sought by the 2nd defendant are discretionary. I am of the view that the conduct of the 2nd defendant does not deserve the exercise of this court's discretion. The 2nd defendant who is the 1st defendant's son had the suit property transferred to his name while this suit was pending and when there was a caution in the register of the suit property lodged by the Plaintiff. Such a conduct which is aimed at defeating and/or frustrating the cause of justice cannot be given approval by this court which the striking out of this suit would amount to.
11. The upshot of the foregoing is that, I am not convinced that the Plaintiff's originating summons filed herein is frivolous, vexatious and amounts to an abuse of the process of the court. I therefore find no merit in the 2nd defendant's application dated 5th April, 2012. The same is dismissed with costs to the Plaintiff.

Delivered, dated and signed at KISII this 22nd day of November 2013.

S. OKONG'O

JUDGE

In the presence of:

..... for the Plaintiff

..... for the 2nd defendant

..... Court clerk

S. OKONG'O

JUDGE