



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

CIVIL SUIT NO. 8 OF 2008

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

- VERSUS -

1. JULIUS MWAMSAE

2. MOHAMED MAHFUDH SAAD

3. ISAAC MUNYI NJERU.....DEFENDANTS

4. KENNETH K. GITHII

RULING

The 2nd defendant came before the Court by Chamber Summons dated **14th July, 2009** and brought under Orders **VI** (rules 8, 13) and **VII** (rule 3 (b)) of the Civil Procedure rules then in force. In the background was the plaintiff's suit dated **18th January, 2008** in which the claim related to the regularity of issuance of proprietary instruments for a certain property, L.R. No. Mombasa Island/Block **XI/983**. The plaintiff sought to have the said issuance of title declared a nullity, with consequential rectification of the land register, eviction of perceived wrongful occupants, permanent injunctions, and damages.

The applicant herein strives to stop the plaintiff's case by seeking, at this interlocutory stage, a

striking out of the suit, as against 2nd defendant/applicant.

The general grounds stated as a basis of the application are as follows:

(i) that, in breach of Order VII, rule 3 (b), the verifying affidavit is not sworn by an officer of the plaintiff, but by a person employed as a process server, who would not have personal knowledge of the matters averred in the plaint;

(ii) that, in breach of Order VI, rule 8 (1), the plaint does not give particulars of fraud by 2nd defendant;

(iii) that, as against 2nd defendant, there is an abuse of the process of the Court, as, under s. 27 (b) of the Registered Land act (Cap. 300, Laws of Kenya), the [2nd defendant's"] title cannot be challenged.

Mohamed Mahfudh Saad, the 2nd defendant, gives supporting evidence by his affidavit of **14th July, 2009**, in which he deposes that he believes to be true his Advocate's advice, that the plaint as filed, is "*incurably defective and ... in breach of the provisions of the Civil Procedure Act (Cap. 21, Laws of Kenya] and sections 39 (1) and 27 (b) of the Registered Land Act,*" and moreover, does not comply with Order **VII**, rule 3 (b) of the Civil Procedure Rules. The deponent avers that the plaint, though attributing fraud to him, does not give any particulars of the alleged knowledge on his part. By the advice of the same Advocate, which the deponent believes to be true, it was not the deponent's obligation to ascertain the circumstances under which 1st defendant came to be registered as proprietor of the suit property: and therefore, the plaint does not disclose a reasonable cause of action, and is an "*abuse of [the] process of the Court.*" The deponent avers that by s. 27 (b) of the Registered Land Act, upon the registration of the lease in his name, the leasehold, thenceforth, vested in him, and a certificate of lease was duly issued in his name.

Dedan Okwama, who had sworn the verifying affidavit to the plaint on **18th January, 2008** and who the applicant impugned as a fit person to provide that affidavit, now swore a replying affidavit dated **29th October, 2009**. The deponent exhibited documentary evidence showing that he is an investigator with the Kenya Anti-Corruption Commission [plaintiff], duly appointed as such under s. 23 (1) of the Anti-

Corruption and Economic Crimes Act, 2003 (Act No. 3 of 2003) and holds the position of Legal Assistant, with authority to effect service of process.

The deponent deposes that he was a member of the plaintiff's team which conducted investigations into the loss of the suit property, and that he has personal knowledge of the facts forming the basis of the suit.

Counsel for the applicant, in the submissions, contested the verifying affidavit annexed to the plaint. Counsel submitted that, by Order III, rule 2 (c) of the Civil Procedure Rules, the plaintiff as a corporate body could only have its plaint verified by an officer authorised under its seal; and, in counsel's reckoning *"the person making [the] verifying affidavit is not an officer."* Counsel still questioned the verifying affidavit for not having been filed **together** with the plaint. (Upon checking, however, I notice that the verifying affidavit is physically clipped to the plaint, and each bears the Court stamp showing the date **21st January, 2008.**) On this point, counsel invoked a case authority: **Bishop Joshua Gawo & Others v. Nairobi City Council & Others**, Civil Application No. Nai 345 of 2000. Counsel also invoked the decision in **Lucy Njoki Waithaka v. Industrial & Commercial Development Corporation**, Nairobi HCCC No. 321 of 2001 (Ringera, J.) for the statement that:

"An affidavit sworn on behalf of a corporation by a person who does not disclose his position in the corporation violates the provisions of Order II, Rule 3 (1) of the Civil Procedure Rules and is therefore unacceptable and worthless and is to be disregarded"

On that basis, counsel urged that the verifying affidavit filed with the plaint, *"is against [the] provisions of Order VII, Rule 3 (1) [of the Civil Procedure Rules]"*; and he submitted that *"[as] a process server, the deponent of the verifying affidavit would not have personal knowledge of the matters averred in the plaint."*

Counsel next contested the pleadings: *"The plaint merely avers knowledge on the part of 2nd defendant that the suit property was a road reserve without specifically stating the source of such knowledge"*; and he urged that such does not amount to fraud. Counsel submitted that 2nd defendant was protected by s. 39 (1) of the Registered Land Act (Cap. 300) and had no obligation to make certain kinds of inquiry before committing himself to purchase such property; in his words:

"The 2nd defendant was not concerned about the circumstances under which the 1st defendant was registered as proprietor of the property. He was dealing legally with 1st defendant when he bought the suit property for valuable consideration. Consequently, the suit property was rightfully and legally vested in 2nd defendant pursuant to section 27 (b) of the [Registered Land Act] when the lease between him and 1st defendant was registered at the Lands Registry."

In response to the foregoing submissions, learned counsel **Mr. Murei**, for the plaintiff, submitted that the striking out of the plaint was, in this case, being sought on technicality: and that, in the circumstances, the governing principle is that such a decision would have to be subjected to much care — *“because it has the potential to dislodge a litigant with an otherwise meritorious case from the [seat]of judgment.”* Counsel was relying on the Court of Appeal decision in **D.T. Dobie & Company (Kenya) Limited v. Muchina** [1982] KLR 1, in which **Madan, JA** thus stated (at page 9):

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing

“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 principle is well recognized, and there are many judicial decisions adopting it: **Achkay Holdings Limited v. N.M. Shah, trading in the name & style, Braidwood College**, Nairobi Civil Appeal No. 187 of 1994 [1995] eKLR; **Bakari Ali Ogada & 245 Others v. Unilever Kenya Limited**, Nairobi Civil Appeal No. 32 of 2008 [2009] eKLR; **Nuru Chemist Limited & James Isaboke v. National Bank of Kenya**, Nairobi Civil Appeal no. 219 of 2002 [2008] eKLR.

Counsel submitted that the applicant had stated no basis for the conclusion that the deponent of the verifying affidavit *“is not allowed to make [that] affidavit”*; the plaintiff, a statutory body, is mandated to investigate loss or damage to public property and to institute proceedings for its recovery — and those carrying out the investigations, like the said deponent, are investigators appointed under s. 23 of the Anti-Corruption and Economic Crimes Act, 2003. There was nobody in the said statutory body, it was urged, *“in a better position to verify the correctness of the facts in the plaint than the person who [conducted investigations].”* It would be improper, counsel urged, to import into the scheme of the statutory body rules such as those concerning directors and secretaries, in the framework of companies.

Counsel submitted that there was no legal basis to the contention made for the applicant, that the averments verifying the plaint ought to have been detailed out in some particular way: for if the applicant required further and better particulars of any aspect of the pleadings, then it was open to him to make a special request for the same; though he could also await the trial process to accord him a wide opportunity for cross-examination.

If, however, the Court were to find the said verifying affidavit to be defective in any manner, then, counsel urged, this would be a deficiency limited to form, but did not go to substance, and thus, not a

deficiency going to jurisdiction: therefore, it does not give cause for an order for striking out. For this proposition, counsel invoked the Interpretation and General Provisions Act (Cap. 2, Laws of Kenya); **Welcome Properties v. Karuga & 2 Others** [2001]KLR 402; **Robert Mbevi Maluki v. Kenrub Industries Ltd**, Nairobi H.C. Civil Appeal No. 235 of 2003 [2005]eKLR; **Kenya Reinsurance Corporation Ltd v. Dr. Joseph N. K. Arap Ng'ok**, Nairobi MCC Civ. Case No. 776 of 2003 [2005]eKLR; **Korica (U) Ltd & Mitsui OS.K. Lines Ltd v. Kenya Ports Authority**, Mombasa HCCC No. 200 of 2005 [2008]eKLR.

Learned counsel contested the prayer for striking out under Order VI, rule 13 (b) of the Civil Procedure Rules: although the applicant claims that the suit is an abuse of Court process, he has not shown that the suit is scandalous, frivolous or vexatious; and so it is not clear how the Court's striking-out jurisdiction is being invoked in this respect; the plaintiff is not, in this regard, accorded a fair opportunity to defend against the claim.

Counsel began from the principle that a pleading is frivolous if it lacks seriousness; vexatious if annoying; scandalous if it pleads irrelevant facts [**Nyati (2000) Kenya Ltd v. Kenya Revenue Authority**, Nairobi M C C H C C C No. 67 of 2007, [2009]eKLR]; and he proceeded to urge that the plaint was not lacking in seriousness, nor was it annoying, nor did it contain irrelevant facts. For it is pleaded that the suit property was a **road reserve**, and thus, not available for alienation; so, the alienation was illegal and could confer no valid interest or right.

Counsel urged that the provisions of the Registered Land Act (Cap. 300) were "not intended to render illegal acts legal, or void acts valid"; and he gave as validation for this argument the proviso to s.4 of that Act:

"Provided that, except where a contrary intention appears, nothing contained in this Act shall be construed as permitting any dealing which is forbidden by the express provisions of any other written law, requiring the consent or approval of any authority to any dealing".

While the applicant invokes implicitly the theory that he has an indefeasible title to the suit property, counsel contested this, citing the Court of Appeal decision in **Chauhan v. Omagwa** [1985]KLR 656, in which it was held that once fraud is proved against 1st registered owner, it ceases to be relevant that no wrong-doing can be established in relation to the transferee: the transfer is void, as the transferee has no better title than that which was held by the transferor.

Counsel submitted that there is plenty of evidence to justify this matter going on to trial; and any defects such as might be found in the pleadings, can be rectified by way of amendment.

The principle governing the Court's discretion on a striking-out application, is absolutely clear; no

case is pre-ordained to be struck out, until good cause is shown; and good cause is to manifest itself in the suit showing ***no cause of action***, or being scandalous, frivolous, vexatious and an abuse of the process of the Court.

I have already considered the technicalities which the applicant raised, regarding the quality of the verifying affidavit; from the facts, the deponent was indeed the right person to swear the affidavit, and so the complaint in this regard does not stand up. The evidence on file also shows that the verifying affidavit was correctly annexed to the plaint at the time of filing; and the complaint cannot be sustained.

The requirement of the verifying affidavit attendant upon the plaint is, in my opinion, a requirement of form: that the "owner" of the plaint should solemnly attest to the pleadings being his or her act. Such a document should not, in my opinion, be greatly detailed, in the manner urged by the applicant herein.

Insofar as the plaintiff, a statutory body empowered to protect and retrieve public assets dishonestly alienated, has made a claim to the suit land on the basis of its statutory mandate, there is, ***ex facie***, a ***serious cause of action*** asserted in the claim; and so the discretion of the Courts, which is to be exercised on merits, is from the beginning, set in favour of ensuring that a hearing takes place on the merits.

The 2nd defendant's application by the Chamber Summons of ***14th July, 2009*** clearly fails, and must be dismissed, with costs to the plaintiff/respondent.

I further direct that the parties shall move diligently to complete the pre-trial steps, and have the suit set down for hearing.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 8th day of April, 2011.

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J. B. OJWANG

JUDGE



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