



REPUBLIC OF KENYA



KENYA LAW
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**Magondu v Chavda Educational Holdings Ltd (Environment & Land Case
E301 of 2022) [2023] KEELC 16355 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16355 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E301 OF 2022
AA OMOLLO, J
MARCH 23, 2023**

BETWEEN

JANE WANGUI MAGONDU PLAINTIFF

AND

CHAVDA EDUCATIONAL HOLDINGS LTD DEFENDANT

RULING

1. The Defendants application dated October 3, 2022 and brought under the provisions of sections 1A & B and 3A of the [Civil Procedure Act](#) and order 2 rule 15(2) of the [Civil Procedure Rules](#) sought for prayers;
 - i. That the plaintiff's suit dated September 16, 2022 be struck off.
 - ii. Costs of this application.
2. The application was premised on the following grounds;
 - a. That the Defendant's property where the said construction is ongoing is known as L R No 27398/153, I R No 103329 and not L R No 12673/153, I R 85236.
 - b. In view of the foregoing, the plaintiff's claim does not disclose any reasonable cause of action against the Defendant because:
 - i. The orders sought in the Plaint are not directed at the Defendant's property L R No 27398/153 I R No 103329 but rather a different property known as L R No 12673/153 I R No 85236 which does not belong to Defendant.
 - ii. This honourable court cannot issue an injunction to stop the Defendant from trespassing onto or constructing on the property known as L R No 12673/I R No



85236 as the Defendant is not in occupation and neither is it constructing on the said property.

- c. In the circumstances, the entire suit should be struck out with costs of the suit and the applicants to be borne by the plaintiff because:
 - i. The suit does not disclose any reasonable cause of action against the Defendant.
 - ii. The suit is scandalous, frivolous or vexatious.
 - iii. The suit is otherwise an abuse of the court process.
 - iv. The suit may prejudice, embarrass, or delay the fair trial of the action.
3. The application was supported further by the affidavit sworn by the Defendant's director Amrital Chavda on October 3, 2022. Mr Chavda reiterated the grounds stated on the face of the application arguing that the claim does not disclose any reasonable cause of action against the defendant. The basis of the argument was that the defendant's property L R No 27398/153, I R No 103329 is different from the plaintiff's property L R 12673/153 I R 85236. Secondly that the Defendant is lawfully and legally considered on its property.
4. In opposing the orders sought, the plaintiff filed a replying affidavit dated October 5, 2022 and stated that there was a typo error on the number given for their land. The number stated of 12572/153 was erroneous as her title reads 12672/153 and she has since amended her pleadings to reflect the correct number. She deposed that the defendant has disclosed that its title is rooted in the original title 12672/153 pursuant to a resurvey purportedly for change of user.
5. That from the pleadings, it is clear that the defendant's title 27398/153 refers to the same property as L R 12672/153 claimed by the plaintiff. The Plaintiff/Respondent avers that by the time of the purported change of user in 2006, the Respondent/plaintiff was already registered as the owner of 12672/153 and no one could have undertaken the change of user without involving her. Further, that by 2006, ITE Farmers Limited. was under liquidation so the purported change of user was done by an imposter. She urged the court to dismiss the application.
6. The Defendant/Applicant filed a further affidavit sworn by Francis Kago Gathuo who introduced himself as the Secretary of ITE Farmers was formed in 1970 and purchased 160 acres of land in Runda area. The suit property formed part of the subdivision of the land bought. Mr Kago conceded that ITE Farmers was dissolved in 2006 by the commissioner of Co-operatives but it was later re-instated in November, 2016 vide gazette notice No. 11041 dated November 28, 2016.
7. Mr Kago denied that ITE Sacco Limited surrendered any property to the City Council of Nairobi as alleged and the only condition for subdivision was to have some plots reserved for public utilities. He deposed that the City Council of Nairobi had no right to sell or transfer any of their plots to Wakani Enterprises or any third party. In response to the status of their case number HCC No 1214 of 2001, Mr Kago deposed that they abandoned the said case after realising they held a proper title. That the plaintiff has not produced any evidence to show the suit was dismissed.
8. The parties agreed to dispose the application by filing of written subdivisions. The Defendant's submissions in support of this motion was from paragraph 11 of their submissions where they stated that the suit does not disclose any reasonable cause of action since it is premised on a non-existent title No. 12672/153. The Defendant also submitted that this suit is res judicate HCC 1214 of 2001.



They cited the case of *Co-operative Bank of Kenya Vs. Cosmas Mrombo Moka Vs Legacy Auctioneering Services* (2019) eKLR where the Court of Appeal said thus;

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

9. The Defendant further submitted that this suit is an abuse of the court process. In support of this argument, the defendant cited the case of *Kiranga Estate Ltd Vs. National Bank of Kenya* (2017) eKLR where the Court of Appeal stated thus;-

“ 15.

- (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.” (Our emphasis).”

10. The plaintiff submitted that the guiding principles on striking out pleadings were set out in the case of *D.T Dobie & Company (K) Ltd Vs. Muchina* (1982) KLR 1 that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly does not disclose any reasonable cause of action and is so weak beyond redemption and incurable by amendment. That in view of the materials the plaintiff has presented, her case cannot be said to be hopeless. The plaintiff submits that the Defendant want her to be condemned unheard. She urged the court to dismiss the application dated December 5, 2022.
11. The Defendant has raised two grounds upon which it is urging the court to strike out the present suit and which the court frames as the issues for determination:
- a. Whether the Plaintiff’s suit is res judicata the case filed as HCC 1214 of 2001.
 - b. Whether this suit is an abuse of the court process.
12. The Defendant relied in the Court of Appeal decision in *Co-operative Bank of Kenya Ltd Supra* in arguing that this suit is res judicata HCC 1214 of 2001. The Court of Appeal in the cited case referred to *Mulla’s Indian Civil Procedure Code* 13 Ed Vol 1 page 798 which says that “judgment” means the statement given by the judge on the grounds of a decree or order, judgment – in England is generally used in the same sense as decree in this code.”
13. The Court of Appeal went further to state that a dismissal of a suit under order 12 rule 6(2) of the *Civil Procedure Rules* is a judgment for the defendant against the plaintiff. The learned judge observed



note that the current dispute was between the same parties on a matter litigated upon in previous suit which stands dismissed for want of prosecution and has not been sought to be reinstated.

14. In the further affidavit sworn by Mr. Kago in support of the application, he deposed that the plaintiff had not produced an order in HCC 1214 of 2001 to confirm that the previous suit was indeed dismissed for want of prosecution. He also did not annex any order/decreed of dismissal. Neither did the Defendant/Applicant annex such an order in its affidavit in support of the motion. On what basis did the defendant want the court to rely on the doctrine of res judicata when they doubted the existence of the dismissal order.
15. The second issue is whether the issue in dispute here is the same as what was in dispute in the case HCC 1214 OF 2001. In the present case, the plaintiff is claiming the Defendant was interfering with her peaceful occupation of her land L R 12672/153. The defendant argues that it purchased her land L R 27893/153 from ITE Farmers LTD. The documents presented in the affidavit indicate that there was a resurvey and change of user done on L R 12672/153 in the year 2006 which change then created the title that was subsequently sold to the Defendant. The dispute herein arose after the filing of the suit in 2001 while original suit was for cancellation of titles amongst them, the plaintiff's title No 12672/153.
16. Further, the plaintiff has also raised the question of whether a transaction could be undertaken on L R No. 12672/153 still in her name without her involvement. She also argued that the change of user was fraudulent first because there was a pending case (HCC 1214 of 2001) and second, ITE Farmers undertaking the change had been dissolved in 2006. All these are issues which did not arise for determination in the "dismissed suit."
17. Is this case an abuse of court process? The Defendant argued that their parcels of land are distinct. Indeed, the parcels of land were distinct before the plaintiff applied to amend the numbering of her land. The plaintiff stated that her suit title was erroneously typed as 12572/153 instead of 12672/153. After the amendment, the affidavits sworn by both the defendant and the plaintiff demonstrate that the land being claimed is the same. For instance, in paragraph 4(d) of the affidavit in support of the application the Defendant drew a table showing the difference in the two titles. Under item one of the table, it is stated that the resultant land reference number 27398 is pursuant to change of user from the original number 12673/153. It is the same title which the Plaintiff claims as the registered owner. The Defendant has not denied that they had commenced construction works on this plot.
18. On the face of the documents filed, the suit raises substantial triable issues inter alia whether one parcel of land can have two parallel set of titles; whether the title document in the name of the plaintiff still exists or otherwise, and if the plaintiffs title exist now that she claims to be the owner from the current searches done, is the defendant holding a valid title.
19. In view of the analysis made, I conclude and hold that the Defendant's application seeking to strike out the suit is without merit, the same is dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MARCH, 2023

A. OMOLLO

JUDGE

In the presence

Koyoko for Plaintiff

Wawire for Defendant

