



REPUBLIC OF KENYA



KENYA LAW
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Johnson Nduya Muthama Holdings Ltd v Musomba & 5 others (Environment & Land Case 39 of 2020) [2023] KEELC 16595 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16595 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 39 OF 2020**

**A NYUKURI, J
MARCH 22, 2023**

BETWEEN

JOHNSON NDUYA MUTHAMA HOLDINGS LTD PLAINTIFF

AND

FRANCIS MULWA KAVOI MUSOMBA 1ST DEFENDANT

JOSEPH NZYOKA MUSOMBA 2ND DEFENDANT

MUTHOKA MATAKA SOO 3RD DEFENDANT

ALBANUS MUASA KAVOI 4TH DEFENDANT

MBITHI NGULUKYO 5TH DEFENDANT

DANIEL MUTISO MATAKA 6TH DEFENDANT

RULING

1. Before court are two Notices of Motion, both filed by the 1st and 4th Defendants. The Notice of motion dated July 2, 2020 seeks to discharge, vacate and or set aside the exparte orders issued on June 12, 2020; while the Notice of Motion dated July 30, 2020 seeks to strike out the Plaintiff's verifying affidavit dated June 14, 2020 and paragraph 17 of the plaint.

Notice of Motion dated July 2, 2020

2. In the Notice of Motion dated July 2, 2020, the 1st and 4th Defendants sought the following orders;
 - a. Spent.
 - b. That the Honourable Court be pleased to discharge, vacate and or set aside the exparte orders issued herein on June 12, 2020.



- c. That costs for this application be awarded to the Defendants.
3. The application is anchored on the grounds on its face together with the supporting affidavit sworn by Francis Mulwa Kavoi Musomba, the 1st Defendant herein. The Applicants' case is that the exparte orders should not last for more than 15 days; that there was material non disclosure on the part of the Plaintiff who failed to disclose a similar suit filed in Kangundo Magistrates Court being ELC No 35 of 2020; that the Plaintiff has been using the police to harass the Defendants and; that the 2nd Defendant is deceased and therefore the suit is malicious.
4. The application was unopposed.

The Notice of Motion dated July 30, 2020

5. In the Notice of Motion dated July 30, 2020, the 1st and 4th Defendants sought the following orders;
 - a. That the verifying affidavit dated June 11, 2020, sworn by Wilson Mwaniki Ngumbi on behalf of the Plaintiff be struck out.
 - b. That paragraph 17 of the plaint be struck out.
 - c. That costs of this application be awarded to the Defendants.
6. The application is premised on the grounds on its face and the supporting affidavit of the 1st Defendant. The Applicants' case is that the verifying affidavit is defective and contains falsehoods as the Plaintiff swore that the averments in the plaint are true when the plaint contains some inaccurate averments. According to the Applicants, paragraph 17 of the plaint states that there is no civil suit pending and there are no previous proceedings between the parties over the same subject matter, when at the time of filing this suit, there was a pending suit namely Kangundo CMC ELC No 35 of 2020.
7. The application was opposed. The Respondent filed a replying affidavit sworn on October 24, 2020 by Wilson Mwaniki Ngumbi. The Respondent's case was that the suit property belongs to the Plaintiff and that the Plaintiff filed a suit at Kangundo Magistrates Court on February 19, 2020 and that upon realizing that the court lacked jurisdiction, instructed their advocates to withdraw that suit and file a fresh suit before this court, which matter was withdrawn and this matter filed. That if the withdrawal was not done on the date of the institution, that may not have been by intention of the Plaintiff who had instructed the advocate to withdraw. That on June 12, 2020, a Notice of Withdrawal of suit was filed in Kangundo Magistrates Court and this suit filed on the same date. That the case at Kangundo in ELC No 35 of 2020 was marked as withdrawn on June 15, 2020.
8. It was further averred that the matter in Kangundo was withdrawn for lack of jurisdiction. Therefore, that nothing was concealed to the court.
9. Although parties were directed to file submissions, none were filed.

Analysis and Determination

10. I have carefully considered the two applications together with the replying affidavit. The issues that arise for determination are;
 - a. Whether there is sufficient cause to set aside exparte orders issued on June 12, 2020; and
 - b. Whether there is justification for striking out the verifying affidavit and paragraph 17 of the plaint for non disclosure of material facts.



11. Setting aside of *ex parte* orders is a matter of discretion, and may be done where there is sufficient cause. The record shows that on June 12, 2020, the Plaintiff filed the instant suit together with a Notice of Motion dated June 11, 2020 seeking for orders of injunction to restrain the Defendants from interfering with parcel known as Matungulu/Kyaume/1485.
12. I have perused the record and it appears that the first time this matter was first placed before the court was on July 6, 2020 when none of the parties were in court and the court gave directions for the hearing of the application dated July 2, 2020. Therefore, there are no proceedings on the court record dated June 12, 2020. Besides, no order issued on June 12, 2020 was annexed to the application of June 2, 2020. It is therefore clear that no orders were issued by this court on June 12, 2020 and therefore the 1st and 4th Defendants prayer was an abuse of the court process and a waste of the courts precious time. The application is therefore dismissed.
13. I now turn to the issue as to whether the verifying affidavit and paragraph 17 of the plaint should be struck out; Order 2 Rule 15 of the [Civil Procedure Rules](#) provides for striking out of pleadings as follows;
 - a. At any stage of the proceedings the court may order to be struck out or amended any pleading on 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.
14. Therefore, grounds for striking out any pleading are where there is no disclosure of a cause of action or defence; where it is scandalous, frivolous or vexatious; if it may prejudice, embarrass or delay the trial of the action or where it is an abuse of the court process. Having considered the application herein, none of the grounds above have been cited by the Applicants. The Applicants state that paragraph 17 of the plaint is not accurate and therefore the same should be struck out and as the verifying affidavit stated that the averments in the plaint are correct, it should as well be struck for failure to disclose that there is Kangundo ELC CMC No 35 of 2020. The Applicants attached a copy of the ruling on costs in respect of Kangundo CMC ELC No 35 f 2020, which ruling was made on June 30, 2020. They also attached a copy of the Notice of withdrawal of the suit filed under Order 25, of the Civil Procedure Rules. The notice was dated June 12, 2020, but received and stamped by the court on June 15, 2020.
15. Therefore, as at July 30, 2020 when the application herein was filed, the Applicants were aware that Kangundo ELC No 35 of 2020 was not pending as the same was withdrawn on June 15, 2020. The Plaintiff stated that the instructions to withdraw the lower court suit and to institute this suit were both dated June 12, 2020 but that the withdrawal notice was endorsed on July 15, 2020, for reasons he was not party to. He also explained that the matter was withdrawn for want of jurisdiction. Therefore, the verifying affidavit verified the correctness of the averments in the plaint while paragraph 17 of the plaint stated that there was no civil suit pending and no previous proceedings existed between the parties over the same subject matter.
16. As the instructions to withdraw the suit at Kangundo and to file the instant suit were issued simultaneously as evidenced by the notice of withdrawal of suit dated June 12, 2020, the averments made in the verifying affidavit cannot be faulted. As to whether paragraph 17 of the plaint is accurate



or not, that is a matter to be determined at the hearing upon availing of evidence as this court cannot embark on determining the accuracy of the averments in the pleadings without allowing parties to give their evidence, as that would amount to determining the suit without allowing the parties to support their averments by evidence at the trial. In any event, that is not a ground for striking out a pleading under Order 2 Rule 15 of the Civil Procedure Rules.

17. In the premises, I find no merit in the prayer to strike out the verifying affidavit and paragraph 17 of the plaint.
18. The upshot is that the applications dated July 2, 2020 and July 30, 2020 lack merit and the same are dismissed with costs to the Plaintiff/Respondent.
19. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22ND DAY OF MARCH, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Mr. Were for Defendants

No appearance for the Plaintiff

Ms Josephine – Court assistant

