



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
CIVIL SUIT NO. 63 OF 2005

PETER KIPKEMOI CHERUIYOT.....1ST PLAINTIFF
CHARLES ARAP MAIYWA.....2ND PLAINTIFF
CHERUIYOT ARAP CEHEPKWONY.....3RD PLAINTIFF
ESTHER CHELANGAT.....4TH PLAINTIFF
JONATHAN MIBEL.....5TH PLAINTIFF
CHEPCHILAT ARAP MAINA.....6TH PLAINTIFF
PHILIP RUGUT.....7TH PLAINTIFF
(Suing in a representative capacity)

VERSUS

JAMES FINLAY (K) LTD.....1ST DEFENDANT
COUNTY COUNCIL OF KIPSIGIS.....2ND DEFENDANT
ATTORNEY GENERAL.....3RD DEFENDANT

RULING

This ruling is in respect of the 1st Plaintiff's application by way of Chamber Summons dated 28th March 2017. The application which was filed by the 1st Plaintiff in person does not state the provisions under which it is brought. The prayers which are equally ambiguous appear to be to the effect that the 2nd and 3rd defendants be struck out from the suit. Both the grounds and the brief supporting affidavit do not shed much light on why the application was filed but in view of Article 159 2(d) of the Constitution, I shall not dwell on the procedural inadequacies.

Both the 1st and 2nd respondents filed Grounds of Opposition. On its part the 1st Defendant/Respondent states that the application is an abuse of the process of the court as the plaintiff's suit stood dismissed on 30th August 2014 as per the Ruling of Justice Waithaka delivered on 30th July 2014 and the court is therefore functus officio. The 1st Defendant further maintains that the orders sought by the plaintiff are incapable of being granted by the court.

The second defendant/Respondent states that the application is frivolous, scandalous, vexatious and an abuse of the process of the court. They further state that the application is incompetent and fatally defective as a decree was issued on 12th February 2015. The delay in bringing the application is therefore inexcusable.

Before I consider the merits of the application, it is important to give a brief background of this case so as to put things into perspective.

The plaintiffs filed this case in their own capacity and on behalf of 370 members of a Kaptuigen Welfare Group also known as Chepchabas. They claimed that they were inhabitants of all that property comprised in LR number 629, 630, 5468, 5469, 5470 and 7797 Kericho Municipality which is now occupied by the first defendant. They claim that these parcels of land were fraudulently registered in the name of the first defendant by the 3rd defendant under a leasehold interest for 999 years. Their prayer is for a declaration that the land is held in trust for them by the first defendant. The Defendants filed their defences denying the plaintiff's claim.

On 1st February 2006, the first defendant then filed an application under Order XXV Rules 1, 5(1) and 6 of the Civil Procedure Rules (now Order XXV1) of the Civil Procedure Rules praying that the Plaintiffs be ordered to furnish security for costs in the sum of Kshs. 115,000 or such other sum as the court may deem fit within 30 days failing which the suit should be dismissed. The application was allowed by Musinga J (as he then was) in October 2006.

The plaintiffs deposited the sum of Kshs.115,000 in court in compliance with the court order.

On 6th June 2007 the first Defendant made an application for the Plaint to be struck out but the same was dismissed by Justice Waithaka on 11th February 2014.

On 2nd November 2007 the 2nd Defendant filed an application similar to the one earlier filed by the 1st Defendant seeking orders that the Plaintiffs be ordered to furnish security for costs in the sum of Kshs.115, 000 within 30 days failing which the suit should be dismissed with costs. The application was allowed by Justice Waithaka on 30th July 2014.

Unfortunately for the plaintiffs, they were not able to provide security for costs as ordered by the court in this second application with the result that their suit was dismissed with costs and a decree issued to that effect on 12th February 2015. The 1st defendant then proceeded to tax its Bill of Costs on 22nd September 2015.

In the meantime, the 1st Plaintiff wrote several letters to court alleging that the court file had disappeared and insinuating that the defendants had something to do with it. On 10th December 2015 the Deputy Registrar wrote to the 1st Plaintiff advising him that the file was available and that since the plaintiffs had failed to provide security for costs as ordered by the court, the suit stood dismissed as at 30.8.2014 and there was therefore nothing pending in the matter.

In response to the letter by the Deputy Registrar, the 1st Plaintiff wrote a letter to the Resident Judge disputing the fact that the suit had been dismissed and insisting that it must proceed. He then proceeded to file the instant application.

From the above history it is clear that that the applicant has either deliberately or through a mistaken belief chosen to ignore the Ruling of the court delivered on 30th July 2014. As submitted by counsels for the 1st and 2nd defendants, the instant application serves no purpose as the court cannot strike out parties from a non-existent suit. The applicant and the other plaintiffs never appealed against the court's ruling which resulted in the suit being dismissed. It is now well over three years since the suit was dismissed and the current application is an abuse of the court process. In any event litigation must come to an end.

I sympathize with the applicant as he erroneously believes that he has been treated unfairly by the justice system although I note that he ignored the court's advice to engage the services of another advocate after he fell out with the firm of Orina and Company advocates who initially acted for him. However, no matter how dissatisfied the applicant feels, he cannot force the court to reopen a matter that has been finally determined.

Having carefully considered the application herein, the grounds of opposition, counsels' submissions and the proceedings in this matter including the various Rulings delivered herein, I have come to the inescapable conclusion that the application lacks merit and I have no option but to dismiss it with costs.

DATED, SIGNED AND DELIVERED AT KERICHO THIS 28TH DAY OF SEPTEMBER 2017

J.M ONYANGO

JUDGE

IN THE PRESENCE OF;

Plaintiffs/Applicants; present in persons

Mr. Koech for Mr.Njeru for the 1st Defendant/Respondent and for

Siele Sigira for the 2nd Defendant/Respondent

Court Assistant: Rotich