



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 96 OF 2015

JACKSON KOECH.....PLAINTIFF

VERSUS

MICHAEL BETT SIROR.....DEFENDANT

R U L I N G

1. The Defendant/Applicant **Michael Bett Siror** filed a Notice of Motion dated 2/11/2015 in which he seeks the following orders:-

(a) That the plaint be struck out

(b) That the costs of the suit and the application be awarded to the Defendant.

2. The application is brought under the provisions of **Order 2 Rule 15(1) (b) (c) and (d)** of the **Civil procedure Rules 2010, Sections 4 and 7** of the **Limitation of Actions Act Cap 22 Laws of Kenya and Sections 6, 8 and 22** of the **Land Control Act Cap 302** of the **laws of Kenya**.

3. The Applicant is raising three grounds why he seeks the striking out or dismissal of the plaintiff's suit. The first ground is that there was no consent of the Land Control Board granted and as such the transactions herein became null and void when such consent was not granted.

4. The second ground is that the Plaintiff's suit is statute barred. The Applicant contends that the Plaintiff is seeking to recover land from the Defendant. He contends that since he was registered owner of the land which the Plaintiff seeks in the 1970's, the Applicant suit is caught up by limitation. That since the Plaintiff did not bring his suit within 12 years, he is thereby barred from filing suit to recover land from the Defendant.

5. The third ground is that the Plaintiff's suit is an abuse of the process of the court in that the Plaintiff has filed a number of suits which have either been dismissed for want of prosecution or withdrawn. The Applicant contends that the filing of this suit by the Plaintiff is therefore an abuse of the process of court which should not be entertained.

6. The Plaintiff/Respondent has opposed the Applicant's application based on replying affidavit sworn 13/1/2016.

The Respondent denies that the filing of this suit is an abuse of the process of court and that contrary to the Applicant's contention that no consent of the Land Control Board was given, there was actually consent of the Board which was granted on 8/12/1977.

7. The Respondent contends that this case is not statute barred and that it should be allowed to go to full trial where the issues will be addressed after evidence is adduced. He contends that striking out of a suit is a drastic step which should only be entertained in the clearest of cases.

8. I have considered the Applicant's application and the opposition thereto by the Respondent. I have also considered the submissions by the counsel for the respective parties as well as the cases cited in support of the rival submissions. There are three issues which must be addressed. The first is whether this suit is an abuse of the process of the court. The second issue is whether there was consent of the Land Control Board given. The third issue is whether this suit is statute barred.

Whether this case is an abuse of the process of the court

9. There is no contention that the Plaintiff has previously filed suits against the Defendant. There was **Nairobi HCCC No 2028 of 1998 Stephen Sugut & 2 others – Vs- Michael Bett Siror**. There was also **Kitale HCCC No 129 of 2001 Michael Bett Siror – Vs- Jackson Koech**. The Plaintiff who was a Defendant in this case had raised a counter-claim. These two cases were dismissed for want of prosecution.

10. The Plaintiff then filed **Kitale HCCC No 136 of 2000. Stephen Sugut & 12 others – Vs – Michael Bett Siror**. He later withdrew this case. The Applicant contends that the Respondent should have filed an application to reinstate the dismissed suits instead of filing fresh ones. In answer to the Applicant's contention, the Respondent stated that the Applicant had filed an application to reinstate **Kitale HCCC NO 129 of 2001 (Michael Bett -Vs- Jackson Koech)** but that application was dismissed. He annexed a ruling of the court dismissing the application.

11. A party is at liberty to bring a fresh suit if a previous one has been dismissed for want of prosecution. He is free to do so subject to limitation. The Defendant had mounted a counter-claim in **Kitale HCCC NO 129 of 2001**. When this suit was dismissed for want of prosecution, the current Applicant who was the Plaintiff in that suit tried to have it reinstated but the application seeking to reinstate it was dismissed. There was no point of him filing a similar application for reinstatement. Had the Applicant's application succeeded, it would have benefited him as well because his counter-claim would have been reinstated as well.

12. I do not find that the Plaintiff's filing of this suit is an abuse of the process of the court. ***“The term abuse of the process of the court”*** has been defined in ***Bullen, Leak and Jacob's precedents of pleadings 12th edition page 148*** as follows:-

“ The term “abuse of the process of court” is a term of great significance. It connotes that the process of the court must be carried out properly, honestly and in good faith; and it means that the court will not allow its function as a court of law to be misused but will in a proper case, prevent its machinery from being used as a means of vexation or oppression in the process of litigation. It follows that where an abuse of process has taken place, the intervention of the court to stay or even dismissal of proceedings, “Lightly it should not be highly done, yet it may often be required by the very essence of justice to be done”.

13. There is no indication that the Plaintiff's suit has been filed in bad faith or that it is being used as a means of vexation. There is therefore no ground to hold that the process of this court is being abused. There is no bar to a litigant bringing a suit after dismissal of a previous one. The only bar is limitation which I shall hereinafter address. I therefore find that there is no abuse of process of court as to call for dismissal or striking out of this case. The Applicant relied on **Nyeri Environment and Land case No. 111 of 2010 Peter Ngugi Kabiri -Vs- Esther Wangari Githinji & another.** This case is distinguishable from the current one. In the Nyeri case, the Plaintiff had been ordered to pay costs for a case which had been dismissed earlier on before filing a fresh one. He did not pay costs and went ahead to file fresh suit abandoning an early one without explaining why he did so. This is unlike the present case where the Plaintiff's suits were dismissed for want of prosecution and he withdrew one of them.

Whether consent of the Land control Board was given

14. Though the Applicant contends that there was no consent of the land control Board sought and obtained, there is evidence that consent was given to him to sub divide the land for his benefit and 13 others. The consent was given at the Board meeting held on 7/12/1977. There was an argument by Mr Kigamwa that the Plaintiff's name does not appear in the consent given in 1977 and that in any case the consent was given seven years after the agreement between the parties. There was no requirement that the Plaintiff's name had to appear on the consent. It is indicated that the sub division was to benefit the Defendant in this case and 13 others. The Plaintiff could as well be among the 13 persons who were to benefit. It cannot be assumed that since the consent did not name him, then he was not to benefit. The Plaintiff was the main actor in all this arrangement. The fact that the consent was obtained seven years after the agreement is immaterial. The fact remains that it was obtained. I therefore find that this suit cannot be defeated on account that there was no consent of the Land Control Board obtained. Consent had actually been applied for and obtained.

Whether the suit is statute barred

15. The Applicant is contending that the Plaintiff's suit is statute barred. That if there was to be any suit, the Plaintiff should have filed the same within a period of 12 years from the date the agreement was made. To determine whether this suit is statute barred, a brief look at the nature of the agreement is necessary. From the pleadings, it is clear that both the Defendant and Plaintiff entered into an agreement as partners. It was agreed that the Defendant was to take **400 acres** and the Plaintiff was to take **300 acres**. Of course there were other partners who were brought on board. Their respective shares are only known to the two main partners. The arrangement between the Plaintiff and the Defendant was not for purchase of land by one from the other. The arrangement was on who was to occupy which portion and how much. This arrangement was sealed when the Defendant and Plaintiff agreed that the Plaintiff was to take **300 acres** and the Defendant take **400 acres**.

16. The Defendant had the land registered in his name. The plaintiff has filed a suit seeking for a declaration that the Defendant is holding the **300 acres** in trust for himself. The Plaintiff is not claiming any land which had not been given to him. The three hundred acres had been given to him. He has been in possession of the same since then. It cannot therefore be argued that his claim has been caught up by limitation.

17. This is not a clear case where the remedy of striking out can be given. Let the parties be heard so that the background of the same is made clear. I therefore find that the Applicant's application cannot be allowed in the circumstances. The same is hereby dismissed with costs to the Plaintiff/Respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 27th day of April 2016.

E. OBAGA

JUDGE

In the presence of Mr Mogambi for Defendant and M/s Mufutu for Mr Kiarie for the Plaintiff.

Court Assistant- Isabellah

E. OBAGA

JUDGE

27/4/16