



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI - MILIMANI

ELC CASE NO. 111 OF 2019

ANN NJERI WACHIRA.....PLAINTIFF/RESPONDENT

=VERSUS=

ROSE NYAMBURA NGATUNYI.....DEFENDANT/APPLICANT

RULING

(Notice of Motion dated 1st December 2021)

Background.

1. The Notice of Motion Application dated 1st December 2021 by the Defendant/Applicant seeks to strike out with costs the amended Plaint dated 15th July 2019. The Application is premised on the grounds on the face of it and the supporting affidavit of Rose Nyambura Ngatunyi, the Defendant/Applicant.
2. Defendant/Applicant claims that she is the widow of the late Ngatunyi Chabi who was the registered proprietor of the Suitland. Therefore, the Defendant/Applicant contends that the Plaintiff has wrongly brought the suit against her since she is not the registered proprietor of the Suitland, the subject matter of the suit. The Defendant/Applicant is of the view that the Plaintiff's suit does not disclose any cause of action against her and therefore ought to be struck out.
3. Interestingly, the Defendant/Applicant states that the Plaintiff's suit should be stayed pending the outcome of the Succession Cause No.1239 of 2010 in the matter of estate of Simon Ngatunyi Chabi. The Defendant allegation is that the suit property forms part of the estate of Simon Ngatunyi Chabi.
4. The Defendant/Applicant in her supporting affidavit depones that the Plaintiff wishes to give evidence through another person to whom she has denoted a power of attorney. The Defendant/Applicant states that she vehemently opposes giving of evidence through the donee, who did not swear the verifying affidavit filed together with the suit.
5. The Plaintiff opposes the Defendant's application by way of a replying affidavit sworn by one Joan Wambui Mbugua. The Deponent has a general power of attorney donated by the Plaintiff.
6. The Plaintiff's response is that the Defendant's application is not only fatally defective but also frivolous and vexatious. The Defendant has no proprietary rights over the suit property. She therefore, illegally resides in the suit property, a fact that she admits in her application. She has undoubtedly admitted that she is not the registered proprietor of the suit property.
7. The Plaintiff further states that the issue as to who is the rightful legal owner of the suit property was determined by the National Land Commission (NLC) in 2016. The NLC made a determination that revoked the registration of the third party by the name of George Makwatta and the land reverted to the Plaintiff. This decision was not appealed from by any person. The Plaintiff is therefore the registered owner of the suit property. The Defendant is and has been illegally occupying the suit property. That is the reason for filing the suit.
8. The Plaintiff's terms the allegation by the Defendant that the suit property forms part of the estate of the late Simon Ngatunyi Chabi as sophistry.
9. The Plaintiff is of the view that the application by the Defendant is merely an attempt to delay the hearing and determination of the Plaintiff's case. The Plaintiff prays for the dismissal of the Defendant's application being an abuse of the process of Court.

10. The Defendant sought leave to file a further affidavit which was granted. In the further affidavit, the Defendant avers that the Plaintiff is economical with the truth for failing to disclose that: -

- a) *The ownership of the suit property has already been determined by a suit where the Plaintiff/Respondent participated.*
- b) *The City Council of Nairobi (as it then was) filed a suit to recover land rates against the Plaintiff/Respondent in suit No. 332/1991 and got orders to sell the suit property by way of public auction to recover the rates arrears.*
- c) *Capital auctioneers sold the suit property by public auction and the late Simon Ngatungi Chabi being the highest bidder bought the suit property for Kshs.1,600,000/- .*
- d) *An eviction order was issued to the late Simon Ngatungi Chabi and the Plaintiff/Applicant vacated the property.*
- e) *The Plaintiff/Respondent participated in the suit and even filed an application dated 14th July 1995 to set aside the orders of 17th February 1995, but the said application was dismissed.*
- f) *The Plaintiff/Respondent did not file an appeal nor review the vesting order dated 26th November 1993, so the Court order is still valid.*
- g) *The Plaintiff/Respondent instead moved to the National Land Commission ex-parte without notifying the estate of the late Simon Ngatungi Chabi despite the fact that the National Land Commission did not have jurisdiction over private land.*
- h) *The Plaintiff/Respondents is barred by time limitation under Section 7 of the Limitations of Actions Act.*
- i) *The suit property is the Defendant's matrimonial property.*

Directions by the Court.

11. The Court's directions were that the application be canvassed by way of written submissions. Both parties complied and filed their respective submissions.

Submissions by the Defendant/Applicant.

12. The Defendant/Applicant reiterates the averments in her two affidavits. The gist of the Defendant's/Applicant's application is that the suit by the Plaintiff/Respondent is based on concealment of material facts. It is the Defendant's case that the late Simon Ngatunyi Chabi bought the suit property via a public auction and she has been in occupation since 1994. The registered proprietor of the land according to the Defendant is the late Simon Ngatunyi Chabi who was her husband. That is the reason why she insists that the suit should have been filed against her husband's estate.

13. The Defendant/Applicant submits that under the provisions of the Land Registration Act, a certificate of title issued by the Registrar upon registration shall be taken by all Courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner. The Defendant/Applicant cites the **Court of Appeal Case Petition No. 29 of 2012 & Civil Appeal No. 12 of 2013, Charles Karathe Kiarie & 2 Others Vs Administrators of the Estate of John Wallace Mathare (Deceased) & 5 others (2013) eKLR**, where the Court held that a title, in the absence of fraud is absolute and indefeasible. The Defendant/Applicant therefore submits that the title which is in the name of the late Simon Ngatunyi Chabi, as far as she is concerned, is therefore absolute and indefeasible.

14. The Defendant/Applicant further submits that the Plaintiff/Respondent seeks to deprive her of her matrimonial home which she has been in occupation since 1994. The Plaintiff/Respondent vacated the suit property in 1994 as ordered by the Court in Civil suit No. 332/19991.

15. It is the Defendant's further submission that the Plaintiff/Respondent is precluded by Law from bringing an action to recover the premises after the expiry of over 12 years. She cites the case of **Mwangi & another Vs Mwangi (1986) KLR, 328** to support her argument.

16. The Defendant finally submits that the estate of the late Simon Ngatunyi Chabi did not participate in the proceedings before the National Land Commission. In any event, the Defendant submits that the National Land Commission does not have jurisdiction over private land.

17. The Defendant's conclusion is that the suit by the Plaintiff/Respondent is based on a false and baseless claim over the suit property. The late Simon Ngatunyi Chabi was a bona fide purchaser for value of the suit property without notice of any defect in title. Any rights the Plaintiff/Respondent may have had over the suit property were extinguished once the property was registered in the name of the purchaser. Further that the Defendant has wrongly been brought before the Court since she is not the registered proprietor. The Defendant therefore prays that the Plaintiff's suit be struck out.

Submissions by the Plaintiff/Respondent.

18. The Plaintiff/Respondent in her submissions states that the Defendant's application lacks merit and merely seeks to prejudice, embarrass or delay the fair hearing of the Plaintiff's case. The Plaintiff submits that her case is not about the ownership of the suit property rather the eviction of the Defendant who is illegally in occupation of her premises. The Plaintiff is categorical that she is the registered owner of the suit property and has exhibited a copy of the title in her name to prove her point.

19. The Plaintiff/Respondent accuses the Defendant of being evasive and economical with the truth and out rightly ambiguous by referring to processes that are not evidenced by any documentary evidence. She relies on the case of **Madison Insurance Company Ltd Vs Augustine Kamanda Gitau (2020) e KLR** to support her submissions on that aspect.

20. The Plaintiff/Respondent urges the Court to find that the Defendant's application is an abuse of the process of Court. It is her submission that her suit discloses a reasonable cause of action against the Defendant/Applicant. The Plaintiff avers that the Defendant/Applicant has even admitted that she is not the registered owner of the suit property. She has not proprietary rights over the suit property yet she has refused to vacate and continues to interfere with the substratum thereof.

21. The Plaintiff/Respondent further submits that the title deed that the Defendant/Applicant relies on actually reveals that the purported ownership by Simon Ngatunyi Chabi and the subsequent transfer to George Mwakwatta were cancelled and the title reverted to the Plaintiff/Respondent on 31/7/2018.

22. In support of her submissions, the Plaintiff/Respondent relies on the case of **D.T Dobie & Company (K) Ltd Vs Muchina (1982) eKLR** that set out the principles guiding the striking out of pleadings. The Plaintiff/Respondent prays for the dismissal of the Defendant's application.

Issues for Determination

23. In my opinion the only issue for determination at this point in time is whether the Plaintiff's suit raises a reasonable cause of action against the Defendant.

Analysis and Determination.

24. A cause of action as defined in the case of **D.T Dobie & Company (k) ltd Vs Muchina (1982) KLR** is, ***"an act on the part of the Defendant which gave the Plaintiff a cause of complaint"***.

25. A perusal of the amended Plaint dated 15th July 2019 indicates the following: -

a) The Plaintiff/Respondent claims ownership of the parcel of land L.R 11502 L.R No. 3734/490 (suit property).

b) The suit property was in 1995 transferred to one Simon Ngatunyi who subsequently transferred it to one George Makwatta.

c) In 2015, the Plaintiff/Respondent filed a complaint with the National Land Commission on the basis that her land had fraudulently been transferred to a third party.

d) The National Land Commission after hearing the complaint found that the Plaintiff/Respondents claim meritorious and ordered the Chief Land Registrar to rectify the records.

e) That the rectification of the register was effected in 2018 and the title to the suit property reverted to the Plaintiff/Respondent.

f) All legal challenges to the decision of National Land Commission were unsuccessful.

g) That the Defendant entered into the suit property without the permission of the Plaintiff/Respondent and is therefore unlawfully occupying the land. The Plaintiff/Respondent therefore seeks eviction orders against the Defendant/Respondent.

26. Clearly, the Plaintiff's complaint against the defendant is that she is unlawfully occupying the suit property hence the prayer for an order of eviction. The dispute is not about the ownership of the suit property. As far as the Plaintiff is concerned, she is the registered owner of the land and she has exhibited a copy of the title to the land in her name.

27. Interestingly, it is the Defendant's submissions (highlighted above) that under the provisions of the Land Registration Act, a Certificate of title issued by the Registrar upon registration shall be taken by all Court's as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner of the land in question.

28. The Plaintiff by exhibiting the title to the suit property has demonstrated that at the moment, she is the registered owner of the land. The presumption that the registered owner is the prima facie the absolute and indefeasible owner of the land favours her. This came to be after the Registrar effected the decision of the National Land Commission.

29. The Defendant contends that the NLC did not have the jurisdiction to make the orders that they made over private land. In essence, the Defendant terms the decision by NLC a nullity. That is a matter that may only be determined after the full hearing to establish the circumstances under which the decision was made and off course its basis. At this point in time, the Court is not obligated to look into the merit or otherwise of the issues raised by the parties.

30. The Defendant has raised quite substantial issues which in the Court's opinion can only be considered after a full hearing. The Court must at this point be restrained lest it prejudices the fair and objective hearing of the main case.

31. The Court's finding is that the Plaintiff's suit raises a reasonable action against the Defendant. The Defendant's application is therefore

devoid of merits and is hereby dismissed with costs.

32. From the Court records, this case had already been certified ready for hearing and the Court will go ahead to issue a hearing date.

It is ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF JANUARY 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Dr. Oloo for the Plaintiff/Respondent

Ms. Ndugire for the Defendant/Applicant

Court Assistant: Hilda

M.D. MWANGI

JUDGE