



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT GARISSA

ELC CASE NO. 17 OF 2017

FIVE WAYS MEDICAL AND DIAGNOSTIC (K) LIMITED.....PLAINTIFF/1ST RESPONDENT

VERSUS

NORTHERN WATER SERVICES BOARD.....1ST DEFENDANT/APPLICANT

MAHATT KUNO ROBLE.....2ND DEFENDANT/RESPONDENT

ABDALLAH ALI.....3RD DEFENDANT/RESPONDENT

ZAINAB OSMAN IBRAHIM.....4TH DEFENDANT/RESPONDENT

RULING

1. The 1st Defendant filed application dated 20th January 2021 seeking the following Orders;

a. Spent.

b. That the plaintiff's suit be struck out on grounds that; -

(i) It discloses no reasonable cause of action against the applicant.

(ii) It is scandalous

(iii) It is an abuse of the process of the court.

c. That the costs of the application be in the course.

2. The application was supported by the sworn affidavit of **Abdikadir Noor Osman**, Chief Executive Officer of the Applicant, who averred that the letter of Allotment dated 6/1/1999, Grant No. 6367/1 for the suit premises issued on 6/7/2011 were allegedly issued to the Respondent prior to the Respondent being incorporated on 14/5/2009.

3. It was his averment that the letter of allotment was issued a non-existent entity and therefore the same was illegal and unlawful and the same cannot be sanctified in any way.

4. The Plaintiff/Respondent replied to the application vide Replying Affidavit dated 5th February 2021 sworn by Hussein Abdi Farah a director of the plaintiff's company. He averred that the 1st Defendant's application is based on factual dispositions which have been raised during cross examination of the plaintiff's witnesses, in the plaintiff's reply to the amended defence and by the plaintiff's further witness statements and bundle of documents.

5. That the application is an attempt to avoid the contested issues i.e. the suit property had been alienated for a public purpose and is not available for alienation

6. On 29/9/2021 the Court directed the parties to canvass the application through written submissions. At the time of making of making this Ruling only the applicant had filed the same. The applicant restated the averments made in the application and further submitted that the

documents attached to the plaintiff's list of documents discloses no reasonable cause of action.

Analysis and Determination

7. I have considered the averment made by both parties and the submissions filed. The application raises the following issue for determination i.e *Whether the plaint herein should be struck out for being scandalous and an abuse of the court process.*

8. The plaint herein was filed on 19th April 2012. The plaintiff seeks an Order that the Defendant be and is hereby evicted from that land known as Lr. No. 28618, damages for trespass and costs of the suit.

9. It was his averment that he was allocated the aforesaid land on 6/1/1999 for a term of 99 years with effect from 1/1999. That the 1st defendant without the authority of the plaintiff trespassed on the suit premises, by placing various construction materials on the suit premises.

10. In their respective defence and Counterclaim the 1st Defendant/Applicant laid claim to the suit premises averring that they have been in occupation of the same from the year 1991 to 1996 vide a project dubbed Garissa Water Supply project. The 2nd to 4th Defendants laid claim to the same by stating that the suit property is known as Title No. Garissa Block 5/75 under the Registered Land Act.

11. Pw1 Hussein Abdi Farah has testified and was cross-examined on the dates of the Companies registration.

12. **Order 2 Rule 15 of the Civil Procedure Rules** provides as follows;

Striking out pleadings [Order 2, rule 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.

(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

13. In **D.T. Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another [1980] eKLR, Madan JA**, stated:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it....”

14. I do note that the legitimacy of the plaintiff as a legal person at the time of acquisition of the suit property has been put to question. I have highlighted instances when the same has been raised and the current position of the case.

15. The plaintiff's capacity will considerably affect the legality of the title issued to it. This is however not the only consideration that the plaintiff has raised to assert his claim to the title. There is the issue of occupation of the suit premises and his averment that he was the first in time to occupy the same. The plaintiff has equally hold fort that even with the discrepancies raised pertaining to its formation and the issuance of title they still have a genuine title.

16. The defendants have equally raised their counterclaims for the courts determination. The counterclaims are to be determined simultaneously with the plaint. The determination will therefore ostensibly answer the question as to who between the plaintiff's and the defendants are the legal proprietors of the suit premises. This much shall be best determined at the close of the hearing by all the parties.

17. At the end, I do find that the 1st Defendant application dated 21st January 2021 lacks merit and the same is dismissed with costs.

READ, DELIVERED and SIGNED virtually at Garissa this 25th February, 2022

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Hon. E.C. Cheronno

ELC JUDGE

In the presence of:

1. Applicant/Advocate: Absent
2. Respondent/Advocate: Absent
3. Ijabo: Court Assistant