



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**ELC. NO. 124 OF 2014.**

**BEATRICE MBONE MASERA.....PLAINTIFF/RESPONDENT**

**=VERSUS=**

**JOSEPH HERMAN MUKASA SSEMUJU..... DEFENDANT/APPLICANT**

**R U L I N G.**

1. **JOSEPH HERMAN MUKASA SSEMUJU**, hereinafter referred as the Applicant, filed the notice of motion dated 1<sup>st</sup> April, 2014 seeking to have the suit filed against him by **BEATRICE MBONE MASERA**, hereinafter referred to as the Respondent, struck out and or dismissed with costs for reasons of lack of cause of action, being scandalous, frivolous, vexatious, obnoxious, waste of courts time, abuse of courts process and Respondent's lack of capacity. The Applicant also prays for judgment in his favour in terms of the counter claim. The application is indicated to be brought under Order 51 Rule 1, Order 2 Rule 15 of the Civil Procedure Rules, Section 3A, 1A and 1B of the Civil Procedure Act and articles 159 (1), 2(b), (d), (a) and 50 (1) (a), (e) of the Constitution. The Applicant has set out seven grounds on the application and filed an affidavit in support with several annexures sworn by himself on 1<sup>st</sup> April, 2015. The Respondent opposed the application and filed the replying affidavit sworn on 27<sup>th</sup> April, 2015. She deponed that the application is incompetent, bad in law, vexatious, frivolous and should be dismissed with costs.

2. The court heard the rival submissions of the Applicant in person and Mr.Ashioya, advocate for the Respondent, on the 15<sup>th</sup> May, 2015, which it has considered together with the affidavit evidence, pleadings filed herein and come to the following determinations:

3. **DETERMINATIONS.**

a. That order 51 Rule 1 of the Civil Procedure Rules deals with the procedure of filing and hearing the applications. Order 2 Rule 15 of the Civil Procedure Rules deals with the striking out of pleadings. It states as follows:

***“ 15 (1) At my 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 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 sub rule (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.”**

The provisions of sections 1A, 1B and 3A of the Civil Procedure Act sets out the overriding objective of the Act, duty of the court and the inherent powers of the court respectively. The provision of article 50 and 159 of the Constitution 2010 deals with fair hearing and judicial authority respectively.

- b. That the main basis of the Applicant's application is that the Respondent is not the registered proprietor of the suit land, Bukahyo/Bugengi/11113 and that the said land does not exist following the rectification of the register reverting it to the parent title Bukhayo/Bugengi/4735 by the Land Registrar pursuant to sections 79 (2) of the Land Registration Act 2012 on the 20<sup>th</sup> May, 2014. The Respondent has in response deponed that by the time she filed this suit, she was the registered proprietor of the suit land and that whatever short coming may exist may easily be dealt with through amendments.
- c. That this court and the Court of Appeal have in several decisions held that the courts discretionary power to strike out pleadings under Order 2 Rule 15 of the Civil Procedure Rules and the inherent powers of the court should only be exercised in the clearest of the cases and with extreme caution. The court should, as much as possible, aim to sustain the case before it so as to afford the parties the opportunity to be heard and a decision made on merit. This is indeed a constitutional obligation [see *Jane Wairimu Turanta –vs- Githae John Vickery & Another* [2013] eKLR, *D.T. Dobie & Co. Ltd. –V- Muchina* (1982) KLR 1, *Butte Gas & Oil Co. –vs- Hammer and Another* [1975] A 11 ER, 51]
- d. That looking at the pleadings filed herein, it is clear that the Respondent commenced this case through the plaint dated 5<sup>th</sup> June, 2014. The Respondent averred in paragraphs 3 and 4 of the plaint that she bought 1.5 acres of land parcel Bukhayo/Bugengi/4735 from Grace Real Mangala and Abraham Tuta Mumia on the 2<sup>nd</sup> May, 2013. The 1.5 acre portion was subdivided from the parent title and registered as Bukahyo/Bugengi/11113 in her names. The Respondent then went to take possession of the suit land on 6<sup>th</sup> May, 2014 and found Applicant's agents on it. She then filed this suit praying for eviction and injunction orders. The Respondent annexed a copy of the title deed and certificate of official search for Bukhayo/Bugengi/11113 which confirms that the suit land is a subdivision from Bukhayo/Bugengi/4735 and that it was registered in the her names on 2<sup>nd</sup> May, 2014. On the face of these documents, it would appear the Respondent had the capacity and cause of action to file the suit against the Applicant, as of 2<sup>nd</sup> May, 2014.
- e. That the Applicant filed his defence and counterclaim dated 9<sup>th</sup> July, 2014 on 16<sup>th</sup> July, 2014 in which he disputes the Respondent's claim and title to the suit land. The Applicant averred in paragraph 6 and 7 of the defence that the Respondent's registration with the suit land was fraudulently done and that that title to the suit land, and others subdivided from Bukhayo/Bugengi/4735, were on 20<sup>th</sup> May, 2014 cancelled by the Land Registrar under section 79 (2) of the Land Registration Act 2012. The Applicant annexed a copy of the certificate of official search for Bukhayo/Bugengi/11113 dated 20<sup>th</sup> May, 2014 which contains the following entry of 20<sup>th</sup> May, 2014;

**“ Order. No dealing until Civil Suit No. 167/2014 C.M.C. BSA is finalized. Entry 1, 2, & 3 is null and void. Title reverted back to 4735.”**

The entries referred to as 1 and 2 relates to the registration and issuance of title of the said land to the Respondent on 2<sup>nd</sup> May, 2014, while entry 3 is a restriction pending some police

investigations. The Applicant had also filed an affidavit sworn by Gilbert Ondari Ondigo, a Land Registrar, on 24<sup>th</sup> June, 2014. It is deponed in the said affidavit, especially paragraphs 10, 12, 16 and 17 that on the 20<sup>th</sup> May, 2014, the Land Registrar cancelled the registers of the subdivisions that had been done from Bukhayo/Bugengi/4735. Those subdivision were Bukhayo/Bugengi/11112 to 11115 and they reverted back to the parent register parcel Bukhayo/Bugengi/4735.

- f. That the exercise of the powers granted to the Land Registrar under section 79 (2) of the Land Registration Act 2012 in this instance meant that the parcel known or described as Bukhayo/Bugengi/11113 ceased to exist upon the register being cancelled on 20<sup>th</sup> May, 2015. There is no indication that any of the affected parties or interested persons have successfully challenged the Land Registrar's decision of 20<sup>th</sup> May, 2014.
- g. That the foregoing findings leads the court to only one conclusion that by the time the Respondent prepared her plaint dated 5<sup>th</sup> June, 2014 and filed in court on 6<sup>th</sup> June, 2014, the suit land she described as Bukhayo/Bugengi/11113 did not exist. The court also find that the suit land having ceased to exist on 20<sup>th</sup> May, 2014, there was no such land registered in the names of the Respondent by the time and date the plaint herein was prepared and filed in court. It follows therefore that the Respondent filed this suit against the Applicant over a nonexistent parcel of land . This is to say the least scandalous, frivolous and an abuse of the courts process. The Respondent had no capacity to file this suit nor did she have any cause of action against the Applicant as the suit land described in the plaint ceased to exist on 20<sup>th</sup> May, 2014.
- h. That the copy of the certificate of official search for parcel Bukhayo/Bugengi/4735 shows that the land was registered in the names of Grace Rael Mangala in 7<sup>th</sup> September, 2008. It is to this register that the suit land described as Bukhayo/Bugengi/11113 was reverted to following the Land Registrar's decision on 20<sup>th</sup> May, 2014. The said Grace Rael Mangala is not a party in this case and the land registered in her names is not the subject matter of the Respondent's claim against the Applicant. In view of the foregoing findings, and the fact that the suit land did not exist at the time this suit was filed, the court finds that this is not an appropriate suit that can be reasonably sustained in court through amendments. The application for the suit to be struck out has merit and is allowed as prayed.
- i. That the Applicant had also prayed for judgment to be entered in terms of the counterclaim. The court has noted that the counterclaim dated 9<sup>th</sup> June, 2014 has three other Defendants apart from the Respondent herein. There is no indication whether the three other Defendants in the counter claim were aware of this application. The counterclaim is date stamped but there is no evidence to confirm whether the requisite filing fee has been paid. The court was only able to trace duplicate receipt No.6033106 dated 16<sup>th</sup> July, 2014 of Kshs.250/= for filing of defence, verifying affidavit and annexures. This amount did not include the fee for filing of the counterclaim and until the fee is paid , the court cannot recognize the counterclaim dated 9<sup>th</sup> July, 2014 as a duly filed suit. The court will grant the Applicant the opportunity to avail evidence of payment of the filing fee for the counterclaim before pronouncing itself on the related prayer.
- j. That accordingly the court hereby strikes out the Respondent's/Plaintiff's plaint dated 5<sup>th</sup> June, 2014 and filed on 6<sup>th</sup> June, 2014 with costs to the Applicant/Defendant.

It is so ordered.

**S.M. KIBUNJA,**

**JUDGE**

**DATED AND DELIVERED ON 18<sup>TH</sup> DAY OF JUNE, 2015.**

**IN THE PRESENCE OF.;**

**PLAINTIFF/RESPONDENT.....ABSENT.....**

**DEFENDANT/APPLICANT.....PRESENT.....**

**COUNSEL...MR. ASHIOYA FOR PLAINTIFF/RESPONDENT.....**