



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC CASE NO. E66 OF 2021

GEOFFREY MUNENE NDUNGU.....PLAINTIFF

VERSUS

GEOFFREY KITHINJI ITHAI.....1ST DEFENDANT

HELLEN THOGORI NDUNGU.....2ND DEFENDANT

MARGARET MURINGI GATERU.....3RD DEFENDANT

JULIA MUTHONI NDUNGU.....4TH DEFENDANT

ANN WANGARI NDUNGU.....5TH DEFENDANT

DISTRICT LAND REGISTRAR.....6TH DEFENDANT

R U L I N G

1. Before me for determination is the 1st to 5th defendants/applicants Notice of Motion application dated 16th September 2021 made under Order 2 rule 15(1) (a),(b), (c), and (d) of the Civil Procedure Rules 2010. The applicants sought the following orders:

1. That the suit herein commenced by way of the plaint dated 19th August 2021 be struck out.

2. That consequently, the notice of motion application dated 19th August 2021 be struck out.

3. That costs of this application, costs of the entire suit and costs of the application for injunction be borne by the plaintiff/respondent.

2. The application was supported on the grounds set out in the body of the application and the supporting affidavit sworn by Hellen Thogori Ndungu, the 2nd defendant. She averred that the plaintiff/respondent instituted the present matter on the grounds that the suit parcel of land was the property of their late mother Esther Wabara Ndungu who was a shareholder in Ndeffo Company Limited. She averred that it was the plaintiff's case that the 2nd to 5th defendants registered the land in their name before selling it to the 1st defendant illegally. She averred that the suit is frivolous and vexatious as it does not measure up to a pleading that can be considered by the court on its merits. She averred that as per the attached copy of the green card, the defendants were the first registered owners of the suit property and therefore the claim that the land was owned by their late mother or Ndeffo Company was baseless.

3. She further averred that the 2nd to 5th defendants were registered as owners on 27th August 2009 and that at the time of their registration, interest in land was being registered under the repealed Registered Land Act Cap 300 Laws of Kenya, and that their registration being a first registration under the Act could not be challenged even if fraud was proved and the remedy of any party aggrieved by a first registration would be a claim for indemnity against the government.

4. She averred that even though the Registered Land Act was repealed, any rights, obligations, remedies, or liabilities arising therefrom that had accrued were not affected by the repeal of the Act. She contended that the plaintiff had no locus standi to institute the present suit as he failed to apply for a grant of letters of administration ad litem to enable him to file a suit for and on behalf of the estate of their late mother and she, therefore sought that the suit be struck out.

5. The plaintiff/respondent filed a replying affidavit sworn on 1st October 2021 where he deposed that the suit herein is meritorious and raises legal issues that the court can deal with. He deposed that he had filed a certified copy of the register of Ndeffo Company Limited which showed that one of the members was Esther Wabara Ndungu, their deceased mother, who was allocated parcel 3386 which upon registration was given land parcel No. **Bahati/Kabatini Block 1/3386**.
6. The plaintiff averred that the applicants have not produced any documents to show that they were shareholders of Ndeffo Company Limited which allocated them the suit property and he has therefore established that the defendants acquired the suit property fraudulently. He further averred that his interest in the suit property is based on the fact that he is the son of the late Esther Wabara Ndungu and that no succession proceedings had been filed for her property to be transmitted to her children.
7. He averred that the first registration can be canceled by the court based on fraud and that the green card carries information that emanates from other primary documents such as registers of membership of land buying companies. He averred that the suit is not scandalous as it raises triable issues of fraud and the 1st to 5th defendants application should be dismissed.
8. The application was canvassed by way of written submissions. The 1st to 5th defendants/applicants in their submissions gave the factual basis of their application and addressed the court on the following issues: whether the plaintiff had the locus standi to file the present suit; whether there was registration of the suit property in favor of Ndeffo Limited; whether the registration in favor of the 2nd to 5th defendants can be impeached on the basis of fraud.
9. On whether the plaintiff has the locus standi to file the present suit, the 1st to 5th defendants submitted that the plaintiff admitted that the suit property was initially land parcel No. 3386 and was allocated to their late mother as a member of Ndeffo land buying company and that they have not been able to file a succession cause in respect to their mother's estate. They further submitted that suits relating to the property of deceased persons ought to be presented by personal representatives as provided for under **Section 82** of the Law of Succession Act.
10. The 2nd to 5th defendants/applicants relied on the case of **Margaret Wanjiru Mburu & 3 Others -v- Kenya Commercial Bank & 2 Others[2012] eKLR** where the court stated as follows:
- “The law of Succession Act at Section 79 provides that the Administrator to whom Letters of Grant have been issued shall be the legal representative of the deceased for all purposes of that grant, and subject to any limitation imposed by the grant, all the property of the deceased shall vest in the legal representative. As already stated, the administrator is the only person vested with the duty to collect all free property belonging to a deceased person and the statutory right to bring suit for recovery of any property forming part of the estate. The beneficiaries have no such right.”(emphasis supplied).
11. They further submitted that the plaintiff ought to have applied for a grant of letters of administration *Ad Litem* to enable him to file the present suit and that in the absence of such grant, the plaintiff lacked locus to institute the instant suit.
12. On whether there was registration of the land in favor of Ndeffo Limited, the defendants submitted that the plaintiff contention is that the suit property was initially plot number 3386 and was allocated to their mother as a member of Ndeffo land buying company and was later registered as **Bahati/Kabatini Block 1/3386**. It was further submitted that as per the green card, Ndeffo Company Limited had never been registered as the owner of the suit property and there was no evidence to show the correlation of the plot allocated to their mother and the one registered.
13. On whether the registration of the 2nd to 5th defendants can be impeached on the basis of fraud, it was submitted that they were registered as owners of the suit property in 2009 when the Registered Land Act was in force. That though the Act was later repealed and replaced by the Land Registration Act and the Land Act 2012, the substantive land rights that had already accrued remained unaffected. They relied on **Section 143(1)** of the Registered Land Act (repealed) and submitted that they were the first registered owners of the suit property and therefore they acquired indefeasible title. They contended that even if the plaintiff proved fraud against them, the register could not be rectified and therefore the only remedy available to the plaintiff is to claim indemnity out of monies provided by parliament.
14. The plaintiff/respondent in his submissions identified four issues for determination; whether the plaintiff had a cause of action, whether the plaintiff's suit was frivolous, vexatious, and an abuse of the court process; whether the plaintiff had locus standi; and whether there was a conflict of interest in regard to the advocate for the defendants.
15. On whether the plaintiff has a cause of action, he submitted that the pleadings sought to be struck out that raise a reasonable cause of action to warrant the suit to be sustained. The plaintiff submitted, he had attached a certified copy of the register of Ndeffo Farmers Company Limited which showed the deceased Esther Wabara Ndungu was member number 1981 and was allotted parcel 3386 which was later registered as **Bahati/ Kabatini Block 1/3386**.
16. The plaintiff further submitted that the 2nd to 5th defendants were registered as owners of the suit property without doing succession which puts to question the validity of the title they purportedly transferred to the 1st defendant. The plaintiff contended that the 2nd to 5th defendants had not shown how they acquired the suit property and that was an issue that needed to be ventilated at a full trial. The court's power to strike a suit should be exercised sparingly as was held by the court in the case of **D.T Dobie & Co (Kenya) Ltd -vs- Muchina (1982) KLR 1** where the Court of Appeal at page 9 stated as follows:

“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.”

17. On whether the plaintiff's suit is frivolous, vexatious and a waste of the court's time, the plaintiff submitted that his case raises triable issues and if it was struck out at this stage, he would be denied the right to adduce and prove his case against the defendants. On the issue, the plaintiff relied on the case of *Blue Shield Insurance Co Ltd vs Joseph Mboyy Oguttu [2009] eKLR* where the court stated as follows:

“The principles guiding the court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A (as he then was) cited with approval the case of D.T Dobie(supra) in an application which was seeking striking out of a plaint on grounds that it did not disclose a reasonable cause of action against the defendant stated “The power to strike out should be exercised after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”

18. The plaintiff relied on other cases and submitted that the power to strike out pleadings should be used sparingly. On whether the plaintiff had locus standi, the plaintiff submitted that this matter is purely an environment and land court matter as the 2nd to 5th defendants are children of Esther Wabara Ndungu (deceased) and they had sold the suit property to a third party which the succession court cannot determine. The plaintiff further added that being beneficiary of the late Esther Wabara Ndungu's estate and he had locus standi to bring the suit.

19. On the issue of cancellation of illegally procured title on the basis of indefeasibility of title, the plaintiff relied on various cases and submitted that a title, whether a first registration or not can be impeached if there is proof of fraud or misrepresentation. The plaintiff in conclusion submitted that the application had no merit and should be dismissed with costs.

20. After reviewing the application, affidavits and submissions filed, the singular issue for determination is whether the applicants have made out a case to warrant the suit by the plaintiff to be struck out. **Order 2 Rule 15** of the Civil Procedure Rules provides as follows:-

“(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.

21. Having regard to the above provision, it is clear that the court can order to be struck out or the amendment of any pleading if it discloses no reasonable cause of action or defence in law, if it is scandalous, frivolous or vexatious, if it may prejudice, embarrass or delay the fair trial of the action or if it is an abuse of the court process. **Order 2 Rule 15 (2)** provides that no evidence is admissible under subrule 1(a) and it should therefore be evident from the pleadings sought to be struck out that no reasonable cause of action has been disclosed.

22. The court in the case of *D.T Dobie & Co (Kenya) Ltd vs. Muchina (Supra)* held that the court's power to strike out pleadings should be exercised cautiously because the court is not at the interlocutory stage fully apprised of the merits of the case which can only be done through discovery and oral evidence at the trial.

23. I will first address the issue of whether the plaintiff herein had the locus standi to file this suit. If the plaintiff lacked locus he could not initiate a competent suit. The plaintiff in the plaint alleges that the suit property originally belonged to the late Esther Wabara Ndungu who was the plaintiff's, 2nd, 3rd, 4th and 5th defendants mother. That the suit property was transferred to the 2nd, 3rd, 4th and 5th defendants names illegally and later transferred to the 1st defendant's name. The plaintiff's case is further that their late mother was a member of Ndeffo Company Limited where she was allocated land parcel number 3386 and after she died, they were unable to agree on the filing of a succession cause and the distribution of the suit property.

24. It is clear and evident from the plaint, that the plaintiff seeks to recover the suit land for the benefit of the estate of his deceased mother, Esther Wabara Ndungu. Prayers (c) and (d) of the plaint make this even more evident:-

(c) An order that the title deed for Bahati/Kabatini Block1/3386 currently held by the 1st defendant cancelled and title issued in the name of Esther Wabara Ndungu.

(d) An order that the 1st, 2nd, 3rd, 4th and the 5th defendants co-operate with the plaintiff to file a succession cause in respect of the deceased Esther Wabara Ndungu to facilitate the distribution of parcel 3386.

25. The court of appeal in the case of *Trouistik Union International & Another v Jane Mbeyu & Another (2008) IKLR (G&F) 730* stated as follows:

“To determine who may agitate by suit any cause of action vested in the deceased at the time of his death, one must turn to section

82 (a) of the law of succession Act. That section confers that power on personal representatives and on them alone”

26. Section 82 of the Law of Succession Act provides for the powers of personal representatives as follows:

Personal representatives shall, subject only to any limitation imposed by their grant, have the following powers—

(a) to enforce, by suit or otherwise, all causes of action which, by virtue of any law, survive the deceased or arising out of his death for his personal representative;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:

Provided that—

i. any purchase by them of any such assets shall be voidable at the instance of any other person interested in the asset so purchased; and

ii. no immovable property shall be sold before confirmation of the grant;

27. The estate of a deceased person can only be represented in any legal proceedings by a person who is granted letters of administration to do so. The plaintiff admits that he did not seek letters of administration to enable him to file this case and so he had no locus standi. Under Section 80 (2) of the Law of succession Act, a grant take effect from the date of its issue and cannot have retrospective application. Section 80 (2) provides:-

“A grant of letters of administration, with or without the will annexed, shall take effect only as from the date of the grant”

28. Since the plaintiff lacked the requisite legal capacity to institute and maintain the present matter on behalf of the deceased estate, the suit is incompetent and was filed in abuse of the process of the court. The suit was null and void abinitio. The same is hereby ordered struck out.

28. The parties shall bear their own costs of the application and the struck out suit.

RULING DATED SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 10TH DAY OF

FEBRUARY, 2022

J M MUTUNGI

JUDGE