



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 682 OF 2013

IRENE MWIKALI MBONDO.....PLAINTIFF

VERSUS

SERAH MUTHIO MBONDO.....1ST DEFENDANT

PAUL MULEI MBONDO.....2ND DEFENDANT

RICHARD MUEMA MBONDO.....3RD DEFENDANT

RULING

This ruling is with respect to the Plaintiff's Notice of Motion dated 5th August 2013 seeking orders that the Defence filed herein by the 1st and 2nd Defendants be struck off, and judgment be entered for the Plaintiff as prayed in the Plaint. The main grounds for the application are that the Defence is scandalous, frivolous, vexatious and is only meant to prejudice, embarrass and delay the fair trial of this action. Further, that that the said Defence is otherwise an abuse of the process of court and ought to be struck out.

The 1st and 2nd Defendants in their Defence dated 17th July 2013 state that the Elijah Mbondo Nteketha (Deceased) (hereinafter "the Deceased") died in 1995 and did not transfer the suit property herein namely Matungulu/Kyaume/2340 to the Plaintiff. The Defendants alleged that the properties of the Deceased are yet to be distributed in Succession Cause No 193 of 1997 which is still pending.

The Plaintiff states that the suit property is a resultant parcel from the sub-division of the land parcel known as Matungulu/Kyaume/2237 which the Deceased transferred to the Plaintiff during his lifetime, and the Defendants therefore have no right to remain on the suit property. The grounds for the Plaintiff's Notice on Motion are elaborated in the Plaintiff's supporting affidavit that she swore on 5th August 2013, wherein she gives a detailed history of the subdivisions resulting in the suit property, and she attached copies of titles to the original parcels of land and resultant sub-divisions, as well as the mutation forms of the sub-divided parcels of land.

The Plaintiff also attached pleadings and orders given in Nairobi High Court Succession Cause No 193 of 1997 with regards to the succession of the Deceased's property, and in Machakos High Court Civil Suit N0. 212 of 1998 in which the Defendants herein sought to transfer the suit property to the administrators of the Deceased's estate alleging that it was part of the Deceased's estate.

The Defendants did not file any response to the Plaintiff's Notice of Motion.

The Plaintiff's counsel in written submissions dated 25th September 2013 argued that the applicable law

is Order 2 Rule 1 (b)(c)(d) of the Civil Procedure Rules. The counsel relied on the decision in Dr. Kiama Wangai vs John N. Mugambi & Another, (2012) e KLR on the meanings of the terms scandalous, frivolous, and vexatious, and on when a pleading will prejudice, embarrass and delay a fair term. The counsel demonstrated how the Defence herein is scandalous, frivolous and vexatious, and intended to embarrass the Plaintiff. Lastly, the counsel relying on the decisions in Thompson Kenya Ltd vs Air Kenya Aviation Ltd t/a Regional Air (2006) e KLR submitted that the onus was on the Defendant to show a reasonable ground of defence. Further, that the Defendants have failed to discharge this onus as they had failed to file a reply to the Plaintiff's Notice of Motion.

I have carefully considered the pleadings filed herein, together with the evidence and submissions made by the Plaintiff. There are two issues for determination. The first issue for determination is whether the Defences filed herein by the Defendants should be struck out for reasons that they disclose no triable issues. The second issue for determination is whether judgment can issue against the Defendants herein.

On the striking out of the Defences, the applicable law is Order 2 Rule 15 (1) of the Civil Procedure Rules which provides as follows:

“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. “

It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated In D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 at p. 9 by Madan, J.A.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.”

It is my view that the overriding principle to be considered in an application for striking out of a pleading is whether it raises any triable issues, and in this respect I am also persuaded by the judicial authorities cited by the Plaintiff's counsel which I have considered.. I hold this view because a pleading that raises triable issues confirms the existence of a reasonable cause of action, and it cannot consequently be said that the said pleading is scandalous, frivolous or vexatious.

In the present application, the Defendants in their Defence allege that the Plaintiff fraudulently transferred the suit property to herself without the deceased knowledge or consent, and the Defendants give as particulars of fraud that the Plaintiff transferred the suit property in 1996 when the deceased had already died, and before the grant of letters of administrators to his estate. Further, that the Plaintiff forged the transfer documents and consent of the Land Control Board, and that she connived to sell the suit property despite a prohibiting order dated 5.9.2006 placed on the suit property by the Court.

The Plaintiff in her Complaint dated 7TH June 2013, Reply to Defence dated 1ST August 2013 and supporting affidavit to her present Notice of Motion has on the other hand pleaded that the suit property is a sub-division of Matungulu/Kyaume/2237, which parcel of land was also a sub-division of Matungulu/Kyaume/2220 that was owned by the deceased. Further, that Matungulu/Kyaume/2237 was transferred to the Plaintiff by the deceased during his lifetime in 1994.

I have perused the evidence attached by the Plaintiff. There is a title deed issued to the Deceased on 11th December 1990 with respect to Matungulu/Kyaume/2220, and a consent by the Kangundo Division Land Control Board granted to the said Deceased dated 2/6/1993 to subdivide the said parcel to three portions. The proprietorship section of the title to Matungulu/Kyaume/2220 shows that the title was closed on 4/1/1993 upon subdivision of the said parcel of land to new numbers being 2237,2238 and 2239.

The Plaintiff has also provided a copy of her title to Matungulu/Kyaume/2237 issued to her on 8th December 1994, and a mutation form of the said parcel of land dated 5th June 1996 sub-dividing it to five portions namely 2339,2340,2341,2342, and 2343. The proprietorship section of the title to Matungulu/Kyaume/2237 shows that the title was closed on 15/7/1996 upon subdivision of the parcel of land to new numbers being 2339 to 2343. The Plaintiff also provided a copy of her title to the suit property issued to her on 15th July 1996, and another title to the said property issued to Peter Mulwa Mbithi and Adelaide Mbaika Mbithi on 5th April 2013.

I have also perused the pleadings and orders attached by the Plaintiff filed and issued in Nairobi High Court Succession Cause No 193 of 1997 and in Machakos High Court Civil Suit N0. 212 of 1989. The Defendants in their Defence deny that a consent was entered in Machakos High Court Civil Suit N0. 212 of 1998 to withdraw the suit therein. I have perused the consent order purported to have been issued by the said court on 15th September 2006 to this effect produced as evidence by the Plaintiff. I note that it does not indicate which judge gave the said orders, nor is it certified as a true copy by the Deputy Registrar of the High Court at Machakos.

The Defendants also allege that there was a prohibition order issued in Nairobi High Court Succession Cause No 193 of 1997 with respect to the suit property, and that the said prohibition and succession cause are still pending. The Plaintiff attached a certified copy of the order of prohibition prohibiting any charge, sale, transfer and/or registration of any dealing relating to the suit property issued by the said court on 22nd June 2006. She also attached an order alleged to have been given by the court in the said succession cause on 23rd December 2011 and issued on 14th December 2011 marking the suit as settled and ordering the removal of the prohibition order against the suit property.

I note that the said order purported to have been issued on 14th December 2011 is not certified as a true copy of the original by the Deputy Registrar of the High Court at Nairobi and there are also anomalies as regards the parties to the succession cause in the said order who appear to be the same parties in

Machakos High Court Civil Suit N0. 212 of 1998. I have perused the court record of Nairobi High Court Succession Cause No 193 of 1997, and note that there is no application by the Plaintiff to lift the prohibition orders on the suit property or orders granted by the court to this effect on record, The suit is also still pending. I have accordingly forwarded the said orders to the Presiding Judge of the Family Division of the High Court in Kenya for further investigations and confirmation as to their authenticity.

It is thus my finding that while it appears that the suit property may have been transferred to the Plaintiff during the deceased lifetime, there may outstanding issue about the said transfer as raised in Machakos High Court Civil Suit N0. 212 of 1998, and the authenticity of the orders lifting the prohibition of sale of the suit property is doubtful. There are thus triable issues raised by the Defendants in their Defence which is accordingly not amenable to striking out.

On this issue of whether summary judgment can issue against the Defendants, Order 36 Rules 1 and 2 of the Civil Procedure Rules provide as follows in this regard:

1. (1) In all suits where a plaintiff seeks judgment for—

(a) a liquidated demand with or without interest; or

(b) the recovery of land, with or without a claim for rent or *mesne* profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared but not filed a defence, the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or *mesne* profits.

(2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.

(3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.

2. The defendant may show either by affidavit, or by oral evidence, or otherwise that he should have leave to defend the suit.

It was held by the Court of Appeal in this regard in **Gurbaksh Singh & Sons Limited vs Njiri Emporium Ltd, (1985) KLR 695** that an application for summary judgment cannot be allowed or applied in cases where a detailed defence has been filed, as the court cannot ignore the defence filed and proceed with the case by way of summary procedure. This court cannot likewise ignore the 1st and 2nd Defendants' Defence which is still on record, and will need to consider the triable issues it raises. The Plaintiff's suit is therefore not amenable to summary judgment.

The Plaintiff's Notice of Motion dated dated 5th August 2013 accordingly fails, and the costs of the said Motion shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___21st___ day of ___January___, 2014.

P. NYAMWEYA

JUDGE