REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL SUIT NO. 181 OF 2012

KENNEDY M. KASSAMANI.....
PLAINTIFF/RESPONDENT

VERSUS

KHAMISI IDDI MUSUNGU

JUMA ALI ALOBA …….
DEFENDANTS/APPLICANTS

LUCY MMBONE OKWOMA

RULING

Before me is an application brought by way of Notice of Motion under Order 2 rule 15 and Order 4 rule 5 of the Civil Procedure Rules 2010 as well as Section 1A, 1B and 3A of the Civil Procedure Act (|Cap.21) of the laws of Kenya. It was filed on 24/4/13 by the 1st defendant/applicant. The orders sought are that the 1st defendant's names be deleted from the proceedings herein. Secondly, that costs of the application and the suit be provided for.

Six grounds were listed on the application. The application was filed with a supporting affidavit sworn by the applicant Khamisi Iddi Musungu on 24/4/13.

The application is opposed and a replying affidavit was filed by Kennedy Mukhoma Kassamani on 8/7/13.

At the hearing of the application, Mr. Anyona, learned counsel who appeared for the applicant stated that the name of the applicant was not on the documents of ownership of the land. Since he was not the owner of the subject land, he should be removed from the list of defendant. In counsel's view, the replying affidavit to the application was based on falsehoods.

Mr. Masake, learned counsel who appeared for the plaintiff/respondent stated that this application was an afterthought. The suit against the applicant raised triable issues regarding boundaries to the land. It was therefore in the interests of justice that the matter be heard and determined on merits. Counsel submitted that the matter had a long history.

In response, Mr. anyona for the applicant stated that there was no delay in bringing the application. In addition no objection had raised with regard to the entries in documents of title obtained from the Lands Office.

I have considered the application, documents filed and the submissions of counsel on both sides. This is

an application to strike out the name of a defendant. The powers of the court regarding striking out of a party are enumerated under Order 2 rule 15 of the Civil Procedure Rules 2010. The said rule provides as follows -

15 (1). At any stay 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 deny a fair trial of the action; or

(d) It is otherwise an abuse of the process of 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."

It is clear from the above provisions of the Civil Procedure Rules .that an applicant for striking out pleadings or a party under Order 2 rule 15 of the Civil procedure Rules. has to choose between option (a), (b), (c) or (d) of sub rule 1. An applicant cannot mix or use more than one option in such an application.

Under ground (c) of the application, the applicant claims that the suit disclosed no reasonable cause of action against the defendant. Under ground (d) he stated that the claim was scandalous, frivolous or vexatious or was meant to embarrass the defendant. Under ground (e) he stated that the suit was an abuse of court process.

The above mixture of reasons contravened the mandatory provisions of the Civil Procedure Rules. In the result the application was rendered fatally defective. It should be noted that under rule 15 (1) (a), an affidavit or evidence should not have been filed with the application. Though the applicant has stated that the action against him did not disclose a reasonable cause of action, he went ahead and filed an affidavit to support the application, contrary to the requirements of sub rule 1 (a). That affidavit was evidence and contravened the law. It was filed wrongly because the applicant mixed the grounds contrary to the requirements under the rules.

If I am wrong on the above, I am still of the view that the application will not succeed. This is because, from the documents filed, this matter has had a long history. The applicant was the objector in Land Disputes Tribunal case No. 18 of 1990. The plaintiff herein brought documents in respect of that claim way back in 2012. It therefore follows that justice will require that the plaintiff and the 1st defendant be allowed to tender evidence on their respective positions on the subject land. The fact that the applicant was not the registered owner of the land at the time the suit was filed, does not mean that there cannot be a case against him. Land, as an asset, can change ownership from time to time. Sometimes, especially these days, there is wrong or fraudulent registration of land. It is only through tendering evidence that the truth regarding the real ownership of the subject land and how it has changed hands will come out for determination by the court on merits.

In my view, where a defendant wants his name to be struck out from the list of parties in proceedings, he or she has to establish a very clear position that he is not connected with the proceedings therein. Otherwise, an award of costs will ultimately compensate him adequately.

In conclusion, I find no merits in the application. The same is dismissed. I however order that costs be

in the cause.

Dated and delivered at Kakamega this 4th day of April, 2014

George Dulu

J U D G E