



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

ELC NO.129 OF 2013

STEPHEN NDUNGU MBURU.....PLAINTIFF

VERSUS

CHOMBA WAHOME GICHUKI.....DEFENDANT

RULING

1. By a Notice of Motion dated **29th June, 2012** **Chomba Wahome Gichuki**, the defendant/applicant herein seeks the following orders *inter alia*;

That this court be pleased to strike out the plaint filed by the plaintiff with costs and enter summary judgment against him; that the plaintiff to vacate from the parcel of land known as *Bahati/Kabatini Block 1/1364* ("the suit property") or be evicted within 14 days in default, as well as the costs of the application.

2. The grounds upon which the application is premised are found in the body of the application and a supporting affidavit sworn by the applicant on the same date.

3. In his supporting affidavit, the defendant depones that he is the registered owner of the suit property (**CWG 1**) and that by virtue of that ownership he took out a financial facility and registered a legal charge over the title (**CWG 2**). Later in **2007**, the plaintiff entered into the suit property and commenced construction and cultivation therein. The defendant reported this matter to the police and the plaintiff was charged and convicted for forcible detainer and sentenced to one year imprisonment (**CWG3**). He further depones that there is a judgment that he is the owner of the suit property therefore the plaint should be struck out and summary judgment entered in his favour.

4. The application is opposed by the plaintiff, **Stephen Ndungu Mburu** vide his replying affidavit sworn on **1st October, 2012**. He depones that the application is *res judicata*, as there is another matter between the parties **Nakuru CMCC No 1202 of 2009 (SNM1)** which is still pending. Further, in criminal case **Nakuru 1667 of 1988 (SNM2)**, it was determined that the plaintiff was the rightful owner of the property and the defendant was convicted of unlawful and malicious destruction of property.

5. He further depones that he has lived on the suit property since **1983**, having acquired the land from his brother now deceased, who in turn acquired it from **Ndeffo Company Limited (SNM3)**; that he had been paying land rates for the suit property and attached a bundle of documents evidencing proof of ownership of the same by his brother (**SNW4**); that he had accompanied his late brother **George Nganga Mburu** to the Lands office where the Land Registrar amended the register to read his name and thereafter the land was transferred to him; that it was only later that he discovered that the defendant had fraudulently acquired title to the suit property and had charged the same to a financial institution; that whereas it was

true that he was convicted and sentenced to serve one year in jail for forcible detainer, he had since filed an appeal **HCA NO.1 of 2011 (SNM5)** which was still pending for hearing and determination.

6. In a further affidavit sworn on **24th October, 2012** the defendant deponed that the matter was not res judicata; that a criminal case could not confer title; that the criminal case was on **plot No. 1634 Engashura** and not the suit property and that the matter in **Nakuru CMCC No 1202 of 2009** was consolidated with **Nakuru CMCC No 241 of 2011** by consent of the parties (**CWG1**).

7. This application was urged by way of written submissions. The defendant filed his written submissions on **27th September, 2013** but the plaintiff did not file any submissions despite being given enough time by this court to do so.

8. Counsel for the defendant submitted in a nutshell that the suit was time barred as it was filed 12 years after the cause of action had accrued; that the title held by the defendant was a first registration which could not be impeached even if illegality or fraud was proved and that the title document claimed by the plaintiff was distinct from the one being claimed by the defendant as the plaintiff was claiming **Bahati/Engarusha Block 1/1364** while the defendant's parcel of land was **Bahati/Kabatini Block 1/1364**.

9. For those reasons the suit was frivolous, vain and very hopeless and should be struck out. He relied on the case of **DT Dobie v Muchina Mbaria**, where the court stated that a pleading should be struck out if it was patently hopeless and could not be revamped even by way of amendment.

10. He further relied on **Section 143** of the **Registered Land Act Cap 300** (repealed) and the cases of **Chacha vs. Manini (2002) 2 KLR 83** and **Gathiba v Gathiba (2001) KLR 208** to buttress his point that a first registration registered before the Registered Land Act (**Cap 300**) was repealed, whether obtained by fraud or not could not be cancelled.

11. Many suits have been filed in relation to the subject by the respective parties as alluded to in the submissions, both in the High court and in the Lower Court. To bring everything under one roof, counsels for the respective parties on **10th May, 2011** by consent, agreed that **Nakuru CMCC No. 1202 of 2009** be consolidated with **Nakuru CMCC No. 241 of 2011**. The latter was to be the lead file. A further consent was recorded on **4th May, 2012** that **Nakuru CMCC No. 241 of 2011** be transferred to the High Court and be consolidated with the instant suit.

12. I have carefully read the pleadings and the affidavits in support thereof together with the submissions by the defendant. I find the issues for determination as follows :

- I) whether the Plaintiff should be struck out
- ii) whether summary judgment should be entered and the Plaintiff ordered to vacate the suit property.
- iii) Costs

13. **Order 2 Rule 15(1)** of the Civil Procedure Rules provides:-

“At any stage of the proceedings a court may order to be struck out or amended any pleading on the ground that-

- (a) it discloses no reasonable cause of action; 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 court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

14. What is frivolous and vexatious was defined by **Ringera J** (as he then was) in the case of **Trust Bank Limited v Amin Company Ltd & Another** (2000) KLR 164 as:

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action”

15. With all due respect to the defendant, this suit cannot be said to be frivolous or vexatious. As is evident from the history between the parties, this dispute has been ongoing for over 20 years and should be determined as soon as possible. Further the issues raised by the defendant in this application about the two distinct titles and the issue of first registration are weighty issues that can only be determined during trial. The objective of consolidating the three suits by the parties themselves was for the expeditious disposal of this matter. Striking out the suit at this stage will defeat all the efforts that have been made by the various courts and the parties themselves to bring this matter to conclusion. Furthermore the issues in this suit are weighty issues that must go to full trial which I don't find frivolous, vain and hopeless. Finally when **Criminal Case No. 5102 of 2007** went on appeal before my sister **Wendoh J**, she advised that since a criminal matter could not determine ownership to land, the parties should move to a civil court as that was the proper forum to decide the dispute between them. I believe that is the reason why the current suit was instituted in 2011.

16. I have had the benefit of perusing through the successful appeal lodged by the Plaintiff **Stephen Ndungu Mburu V Republic [2012] eKLR** against his conviction for the offence of forcible detainer in **Criminal Case No. 5102 of 2007** delivered by my sister, **Wendoh J**. where she said, **“The appellant claims to have been in possession of the land since 1983. Indeed the Land Registrar said that as early as 16/10/1986, the appellant had registered a caution on the said land. Further to that, in 1988, the complainant was charged with the offence of malicious damage to the appellant’s property in CRC No. 1667/1988. The complainant was charged with damaging the appellant’s house and property which he had built on the said land.**

With all these facts in mind, it is evident that the complainant and appellant have had a claim over the said plot since the 1980s which dispute has not been resolved. There was therefore no basis for the respondent to charge the appellant with an offence of forcible detainer when in 1988, the appellant was deemed to be the owner of the land. This is a civil claim over who is the owner of the suit property and it is not in the domain of the police to decide on ownership. It is only a civil court which can determine ownership once the parties present their evidence before it. The appellant had not been charged with the offence of forgery of the title deed. The titles are said to be genuine documents and the court in its judgment went on to question how the appellant obtained it. As noted above, it seems that only Ndeffo Company Ltd and the Land Registrar are able to answer the question of who owns the land and how the two titles came about. That was not for the police to take sides and allege that one of the holders of the title deeds was doing so unlawfully.”

17. Similar views were expressed in the case of **James Theuri Wambugu v Mellen Mbera [2014] eKLR**

“The plaintiff has contended that the defendant was heard during the criminal case proceedings. My answer to that is that the purpose of the said criminal proceedings was not to determine the ownership of the suit property but the guilt of the defendant. The defendant having lodged an appeal against the determination in the said criminal case which is still pending hearing, the same is not binding on her in these proceedings by virtue of the provisions of section 47A of the Evidence Act, Cap. 80 Laws of Kenya.”

18. In my view, this is not one of those cases that is so hopeless that it plainly discloses no reasonable cause of action and is so weak beyond redemption and incurable by amendment. It should be given a chance to go to full trial. See the case of **DT Dobie & Co vs Muchina (1982) KLR 1** where the court held:

“The power to strike out should be exercised only 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 opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly 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

19. On the second issue for determination, the defendant has prayed for summary judgment. **Order 36 Rule I (b) of Civil Procedure Rules**, addresses summary dismissal in relation to land. it provides;

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

(a).....

(b) 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 defence the plaintiff may apply for judgment for the amount claimed or part thereof and interest, or for the recovery of the land and rent or mesne profits.”

20. In the instant case, a defence was filed on **1st December, 2011** even before this application was filed. Further as noted earlier the issues in this suit are triable issues where both parties lay claim to the suit property. This is not a matter that can be determined summarily as these triable issues will require the production of documents and calling of witnesses during trial. For these reasons I cannot grant this prayer for summary judgment. Similarly, on the prayer for eviction of the plaintiff, I cannot grant such a prayer at this stage as it would amount to deciding the suit at this interlocutory stage. For those reasons the Notice of Motion dated **17th September, 2012** fails and is hereby dismissed with costs.

21. From the facts in this case, both the plaintiff and the defendant claim to have been allocated the same land by **Ndeffo Company Limited** and each has their respective title deeds. The company that allocated the suit property and the Land Registrar who issued the two titles are critical players in this suit and must be brought on board. To this end, I hereby direct that **Ndeffo Company Limited** and the **Nakuru District Land Registrar** be enjoined as parties to this suit to assist the court untangle this Gordian knot as regards the ownership of the suit property.

Dated Signed and delivered in open court at Nakuru this 19th day of September 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Githui for the defendant

Ms Kilach holding brief for Mr Mongeri

Emmanuel Maelo : Court Assistant

L N WAITHAKA

JUDGE