REPUBLIC OF KENYA

High Court at Eldoret

Environmental & Land Case 712 of 2012

COUNTY COUNCIL OF NANDI.....PLAINTIFF

VS

EZEKIEL KIBET RUTTO & 6 OTHERS .....DEFENDANTS

RULING

(Application by 1st defendant to have plaintiff's suit struck out as being frivolous, vexatious and an abuse of the process of court; principles upon which the court will act in an application to strike out pleadings; plaintiff filing suit seeking orders to prevent defendants from interfering with certain land; 1st defendant filing application to strike out on allegation that suit land is not registered in name of the plaintiff but in name of a deceased person; allegation that plaintiff cannot agitate any claim on the suit land; reply by plaintiff that land escheated to government and allocated to plaintiff to hold in trust for the community; whether such pleading scandalous, frivolous and vexatious; definition of words scandalous frivolous and vexatious; pleadings held not to be scandalous frivoulous nor vexatious; application dismissed)

The application before me is that dated 22 February 2012 filed by the 1st defendant. It is an application brought under the provisions of Order 51 Rule 1 and Order 2 Rule 15(b) and (d)of the Civil Procedure Rules 2010. The said application seeks the following orders :-

1. That the plaint dated 11th May 2011 and filed on same date be struck out.

2. That costs of the entire suit and the said application be provided.

The grounds upon which the application is founded are as follows :-

(a) That the plaintiff is not the registered proprietor of L.R No. 1763/1 property known and described in the plaint as Dr. Bell's Farm.

(b) That the said farm is registered in the names of Fairfax Bell (Deceased).

(c) That the official search dated 3rd June 2011 clearly shows that the said farm is held by Fairfax Bell and is leasehold for 999 years from 1913.

(d) That the said official search from lands office does not show that the plaintiff holds the said land in trust.

(e) That the plaint is therefore incompetent.

The application is supported by the affidavit of Simon Kitur Advocate, who is on record for the 1st defendant. In the supporting affidavit it is deponed that the suit land L.R No. 1736/1 is registered in the name of Fairfax Bell for a period of 999 years from 1913. It is further deponed that the plaintiff holds no interest in the said land and therefore lack capacity to institute suit against the defendants. He has deponed that the registered proprietor is dead and the plaintiff holds no letters of administration to the estate. It is further deponed that in the plaintiff has no case against the defendants and therefore this suit

should be struck out.

The application is opposed by the plaintiff. Before I go into the details of the replying affidavit, I think it is prudent for me to set out the background to this application.

This suit was commenced by way of plaint filed on the 11 May 2011. The plaintiff, the County Council of Nandi has sued 7 defendants. The 1st defendant is the Chairman of the County Council of Nandi. The 2nd to 4th defendants are adults of sound mind. The 5th defendant is the Chairman of Kapkatoi Primary School. The 6th defendant is the Headmaster and Secretary of Kapkatoi Primary School. The 7th defendant is an adult of sound mind. I must say at this stage that the plaint as drawn is not very easy to follow and probably it could have done with some more refined drafting. Be as it may, it is pleaded that the plaintiff is the owner of the parcel of land known as L.R No. 1736/1 popularly known as Dr. Bell's Farm measuring about 49.3 acres. It is pleaded that the land is held by the County Council of Nandi in trust for the public. It is pleaded that the plaintiff allocated to ECD School a portion of the said land alongside Kapkatoi Primary School and Chepkoiyo Primary School on a "temporary occupation licence." It is pleaded that on 14th December 2010, the 1st defendant entered into a sale agreement for the sale of 3 acres of the suit land alleged to have been allocated to Nandi Gaa ECD Centre. The plaintiff has pleaded that this sale is irregular and tainted by corruption and that the whole transaction is fraudulent for the reason that public land cannot be sold to private individuals by the 1st defendant as Chairman of the County Council of Nandi. It is further pleaded "that on the 6th November and January 2010 the 3rd defendant allegedly entered into a sale agreement on behalf of Chepkoiyo Primary School to sell 2.0 acres to the 4th defendant…". This agreement, it has been pleaded, was also fraudulent. It is further pleaded that the 5th and 6th defendants purported to enter into an agreement to exchange a portion of the plaintiff's suit land with the 7th defendant. The plaintiff has contended that this exchange is irregular and illegal. The plaintiff has thus sought for orders to declare the allocations null and void and for orders to declare fraudulent the purported sale agreements "between the 1st defendant and the 2nd defendant and the 2nd defendant together with that of the 3rd defendant and 4th defendant". The plaintiff's claim against the 5th and 6th defendants is for an order declaring their exchange agreement with the 7th defendant null and void and also for an order that the 7th defendant is not entitled to occupy and possess the alloted portion. The plaintiff has also sought for an order of eviction against the 2nd , 4th and 7th defendants from the portions allegedly sold to them by the 1st and 3rd defendants and those exchanged by the 5th and 6th defendants with the 7th defendant. The plaintiff has also sought for orders of permanent injunction to restrain all the defendants from dealing with the portions allocated to the detriment of the plaintiff.

Simultaneously with the Plaint, the plaintiff filed an application under certificate of urgency, for injunction, seeking to have the defendants restrained from dealing with the suit land pending the hearing and determination of the application inter partes and eventually pending the hearing and determination of the suit. The applicant first moved the court o 12/5/2011 ex-parte seeking interim orders pending the inter partes hearing of the application. The application was only certified as urgent and interim orders were not granted. In the meantime all the defendants were duly served but only the 1st defendant entered appearance and filed defence . The application for injunction came up on several occasions for the inter partes hearing of the said application but the same never quite took off. It is then that the 1st defendant filed the present application on 2 March 2012.

This application essentially seeks to have this suit struck out for the reason that the plaintiff does not hold title to the suit land. I mentioned earlier that the plaintiff filed a replying affidavit to the said application and I think that this is an opportune moment to set the same out. The replying affidavit of the plaintiff has been sworn by the Clerk to the County Council of Nandi. The gist of the plaintiff's reply is that Fairfax Bell died and there being no known beneficiary, the land L.R No. 1763/1 escheated to the Government. It is deponed that subsequently, the Government through the Central Agricultural Board proposed the subdivision of the said parcel into three portions being L.R No.1763/1, 1763/2 and 1763/3 . It is further deponed that L.R No.1763/1 was allocated to the Ministry of Natural Resources as a nature reserve and subsequently the conservator of forest donated it to the County Council of Nandi as a public utility. It is

therefore deponed that the land belongs to the plaintiff as a trustee of the public. The plaintiff has thus urged the court to dismiss the present application.

I have considered the application. I note that the same is principally brought under the provisions of Order 2 Rule 15. Order 2 Rule 15 provides that :-

15. *(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.

The subject application is specifically brought under the provisions of Order 2 rule15 (b) and (d). Under Rule 15 (b) the pleading must be *"scandalous, frivolous or vexatious"*. Under rule 15 1 (b), the pleading must *"otherwise be an abuse of the process of court."* Now these words *"scandalous, frivolous, or vexatious"* are not defined in the Civil Procedure Act nor the Rules. Neither is there a definition of a pleading which is *"an abuse of the process of court"*. It would appear that the drafters of the rules in their wisdom left the definition of these terms to be left for interpretation by the courts.

The provisions of Order 2 Rule 15 in the Civil Procedure Rules of 2010 are drafted in similar terms to the provisions of Order 6 Rule 13 of the former Civil Procedure Rules. They are also drafted in similar terms to the provisions of Order 18 Rule 19 of the The Supreme Court Practice Rules of England of 1992. The English authorities on the interpretation of their Order 18 Rule 19 are therefore of strong persuasive authority to our interpretation of Order 2 rule 15. So too our previous decisions with regard to the provisions of the former Order 6 Rule 13.

The first rule of interpretation is that words should be given their natural and ordinary meaning.

The Concise Oxford English Dictionary[1] informs that the word *"scandalous"* is derived from the word *"scandal"* which means *"an action or event regarded as morally or legally wrong and causing general public outrage."****[2]*** The word *frivolous* is defined as something *not having any serious purpose or value.* [3] (p570). *Vexatious* is something *causing annoyance or worry* and in law refers to an action *brought without sufficient grounds for winning, purely to cause annoyance to the defendant.*[4]

Black's Law Dictionary, 7th Edition, states the following on the word *scandal. "Scandal consists of the allegation of anything which is unbecoming the dignity of the court to hear,or is contrary to decency or good manners, or which charges some person with a crime not necessary to be shown in the cause, to which may be added any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous. The matter alleged, however, must be not only offensive, but also irrelevant to the cause, for however offensive it be, if it be pertinent and material to the cause the party has a right to plead it. It may be necessary to charge false representations, fraud and immorality, and the pleading will not be open to the objection of scandal, if the facts justify the charge."****[5]***

A scandalous matter is defined as a matter *that is both grossly disgraceful (or defamatory) and irrelevant to the action or defense*. [6]

The word *frivolous* is described as something *lacking a legal basis or legal merit; not serious; not reasonably purposeful*.[7]

As to the word *vex*, the same means *to harass, disquiet and annoy*. *Vexatious* is taken to refer to conduct, which is *without reasonable or probable cause or excuse; harassing; annoying.**[8]***

A *scandalous pleading* in my view is a pleading that attempts to put the other party into bad light. It attempts disparage the other party to the proceedings. Such pleadings border on defamation. However, such disparaging words attributed to the other party must not be in issue in the suit. If they are in issue in the suit, then of course the words cannot be scandalous. They must be disparaging pleadings which are completely irrelevant to the proceedings in issue.

A *frivolous pleading* in my view is a pleading that completely lacks a legal foundation. It is a pleading that discloses no cause of action and serves no purpose at all. For example if a litigant founds his cause of action on a law that has been repealed, then such pleading obviously lacks legal foundation and can be said to be frivolous.

A *vexatious pleading* in my view is a pleading whose only purpose is to annoy or irritate the other party to the suit. It may be, though not necessarily, a frivolous pleading or a scandalous pleading. Its main quality is that it stands out as a pleading only aimed at harassing the other party.

A pleading that is an abuse of the process of court in my view encompasses scandalous, frivolous, or vexatious pleadings but goes a little further to take care of situations that may not otherwise be encapsulated in the definition of the three preceding words. They can encompass situations where a litigant is using the process of court in the wrong way, not for purposes of agitating a right, but for other extraneous reasons.

The court through the provisions of Order 2 Rule 15 is given leeway to strike out pleadings that are *scandalous, frivolous , vexatious or otherwise an abuse of the process of court.* Before striking out such pleading, the court needs to make an examination whether such pleadings are scandalous, frivolous, vexatious or otherwise an abuse of the process of law. If they are, then a court would be perfectly entitled to strike such pleadings out because essentially it is not fair and neither is it worthy having a defendant shoulder the burden of such litigation. Courts have faced such applications on numerous occasions.

In the case of ***Law v Dearnley**[9]* **,** there was an application by the defendant to strike out the plaintiff's suit as being frivolous and vexatious and that they disclosed no cause of action. The plaintiff had as a result of betting transactions, in which he was acting as agent of the defendant, made certain payments to a bookmaker. These actions, according to the Gaming Act, 1892 of England, were declared void and that no action could be brought or maintained to recover any such sums of money. The court agreed that the suit was unmaintainable and allowed the application. The suit was arguably "frivolous" as it lacked legal basis, and "vexatious" as it would only harass and annoy the defendant.

The power to strike out pleadings is discretionary. However, it is a recognized principle that courts should be slow to strike out pleadings.

In ***Kemsley v Foot**[10]* the Court of Appeal in England stated that to strike out a pleading as frivolous should only be applied in "plain and obvious cases"[11]

In ***Lawrance v Lord Norreys**[12]* it was stated that :-

" It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of court. It is a jurisdiction which ought to be very sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved."[13]

In ***Wenlock v Moloney**[14]* the court stated that :-

"… this summary jurisdiction of the court was never intended to be exercised by a minute and

*protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way."**[15]***

In ***Ashmore v British Coal Corp**[16]* it was stated that :-

"The expression frivolous and vexatious in r 12(2) (e of the 1985 rules includes applications which are an abuse of process. Whether or not an application should be struck out on this ground is a matter for the discretion of the Tribunal…"[17]

In the above case, a matter had been tried as a test case and dismissed. The plaintiff now insisted to try her own case individually. The application to strike out the suit as being an abuse of process was allowed as in the view of the court it was an abuse of the court process to relitigate the same factual issues decided in the test case.

The leading authority in Kenya is ***DT Dobie & Co vs Muchina**[18]* . In the said case it was stated that :-

*"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."**[19]*** (at p9)

In our case, can the plaintiff's plaint be regarded as scandalous, frivolous , vexatious or an abuse of the process of court? In other words, does the suit make some disparaging pleadings that demean the character of the defendants and which are irrelevant to the suit? Does the pleading raise any reasonable cause of action? Is the pleading only aimed at annoying the defendants without disclosing some sort of right? I do not think so.

It will be discerned that in the plaint the plaintiff has pleaded that it is the owner of the land parcel L.R No. 1763. The 1st defendant has now argued that the plaintiff's cause of action is scandalous, frivolous , vexatious and an abuse of the process of court. The reason for the 1st defendant saying so is because in the view of the 1st defendant, the plaintiff is not the registered owner of the suit land and that the suit land is owned by Fairfax Bell who is deceased. The said Fairfax Bell may be deceased, but that fact does not necessarily mean that any suit not filed by the administrators of the estate of Mr. Bell is a scandalous, frivolous, or vexatious suit. The replying affidavit has made depositions that the land escheated to the government and was placed in the hands of the County Council of Nandi as trustees for the community. Various documents have been annexed to the replying affidavit which demonstrate that the Government through the Ministry of Lands is alive to the fact that Mr. Bell died and there are proposals to sub-divide the land to accommodate various interests including allowing some of the land to be under the County Council of Nandi as a nature reserve.

Without determining the issue whether the plaintiff has a legitimate case that will succeed on merit, I cannot say that there is no demonstration of some sort of right that may be agitated by the County Council of Nandi. Whether the County Council of Nandi has a legal right to the land, or is entitled to sue on the same is something that will have to be determined at the trial. I would not wish to make a very close examination at this stage of the plaintiff's case to determine whether it will succeed or not.

It is however clear to me that the County Council of Nandi filed this suit, not to annoy anyone, but to attempt to preserve the land in the hands of the public. In the view of the County Council , the land was being violated by the actions of the defendants. I think I will be exercising my discretion in the wrong way if I am to hold that the plaint herein is frivolous, vexatious or scandalous. I am not of the view that the suit as drawn reaches the high threshold of being a suit that is an abuse of the process of court.

I cannot therefore allow this application to succeed. I hereby dismiss the same with costs to the plaintiff.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 12TH DAY OF FEBRUARY 2013.

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET.

No appearance for M/s Kipkosge Choge & Co Advocates for the plaintiff/respondent.

No appearance for M/s S.K Kitur & Co Advocates for the 1st defendant/applicant.

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[1]Concise Oxford Dictionary, 11th Edition.

[2]Ibid, page 1282.

[3]Ibid, page 570.

[4]Ibid, page 1609.

[5]Black's Law Dictionary, 7th Edition at page 1345, referring to Eugene A. Jones, *Manual of Equity Pleading and Practice*, 1916 (p50-51).

[6]Ibid.
[7]Ibid, at p 677.

[8]Ibid, at p 1599.

[9]*Law v Deanley* (1950) All E.R. 124.

[10]*Kemsley v Foot* (1951) All E.R 331
[11]Ibid, at p333.

[12]*Lawrance v Lord Norreys* (1886-90) All E.R.

[13]Ibid, p 863.

[14]*Wenlock v Moloney* (1965) 2 All E.R.
[15]Ibid, p874.

[16]*Ashmore v British Coal Corporation* (1990) 2 All E.R 981.

[17]Ibid, p984.

[18]*D.T. Dobie vs Muchina* (1982) KLR 1.
[19]Ibid, p9.