



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 275 of 2012

JOHN NGANGA NJOROGE.....PLAINTIFF

VERSUS

MARY NJERI KABUNDI..... DEFENDANT

RULING

The Defendant filed an application dated 1st October 2012 seeking an order that the Plaintiff herein be struck out and dismissed with costs for failure to disclose that there has been a previous suit between the parties herein over the same subject matter. Further, that no reasonable cause of action has been disclosed herein. The application is brought under section 1, 3, 3A and 63 of the Civil Procedure Act and Order 2 Rule 15(1) (b), (c) and (d) of the Civil Procedure Rules.

The grounds for the application are that the suit herein is an abuse of process of court as the Plaintiff has in the past litigated in High Court Civil Suit No. 113 of 2008 (O.S), and the continuance of the present is scandalous, frivolous and vexatious. Further, that the Plaintiff herein having bought the parcel of land that is the subject of this suit during the subsistence of High Court Civil Suit No. 113 of 2008 (O.S) and existence of a restriction on dealings in the said land, cannot have gotten better title than that held by the Vendor.

The application is supported by an affidavit sworn by the Defendant on 1st October 2012 wherein she deponed that on or about the 18th day of January 2010 the Plaintiff herein sought to be enjoined in HCCC 113 of 2008 (O.S). The Defendant averred that it was thereafter agreed by consent that the Plaintiff and other interested parties await the outcome of the HCCC 113/2008 (O.S), and the said parties consequently withdrew from the suit. The Defendant herein is the applicant in HCCC 113 of 2008 (O.S) and has sued one Christine Mithiri who sold the suit properties to the Plaintiff. The Defendant claims that the Plaintiff has chosen to move the court again without disclosing his participation in the earlier suit, and annexed copies of the pleadings in HCCC 113 of 2008(O.S) as evidence.

The application herein is not opposed. There is an affidavit of service sworn by one Nicholas F. O. Onyango on 15th January 2012 verifying that the application together with the hearing date was served on the Plaintiff on 3rd December 2012. There was also no attendance by the Plaintiff in court during the hearing of the application on 17th January 2012. The Defendant's Counsel made oral submissions during the said hearing and argued that the Plaintiff has filed a witness statement by the said Christine Mithiri wherein she admits to the pending case in HCCC 113 of 2008(O.S). Further, that the Plaintiff has also admitted that the suit property herein is a sub-division of the property that is the subject of the pending case.

I have read and carefully considered the pleadings, evidence and submissions made in this

application. The issue to be determined is whether the Plaintiff should be struck out in the circumstances presented in the Defendant's application. The law on striking out of pleadings is stated in Order 2 Rule 15 of the Civil Procedure Rules and in various judicial decisions. Order 2 Rule 15(1) provides that:

(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 salient principles that apply to striking out of pleadings are that this is a draconian measure to be employed sparingly, and the grounds for striking out must be plain on the face of the pleadings and from the facts alleged by the parties. This was stated by the Court of Appeal in D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 as follows at page 9:-

“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.”

An examination of the Plaintiff dated 8th May 2012 shows that the suit property herein which is L.R Ndumberi/Riabai/3822 is registered in the name of the Plaintiff, who is seeking orders of eviction against the Defendant and of mesne profits. The Plaintiff concedes in his Plaintiff and in the witness statements he filed in court that the suit property herein is a sub-division of Ndumberi/Riabai/1705, and he claims to have purchased the same from one Christine Mithiri in 2009. The Defendant on the other hand claims to have been in exclusive and uninterrupted use and occupation of the suit property since 1978, and that the suit property is the subject of a previous and pending suit in HCCC 113 of 2008(O.S), in which the Plaintiff has participated.

I have perused the court record in HCCC 113 of 2008(O.S), and confirmed that the Defendant herein did file an Originating Summons dated 20th March 2008, seeking ownership of L.R Ndumberi/Riabai/1705 by way of adverse possession. This suit was filed before the purported sub-division and sale of the suit property to the Plaintiff herein. I have also confirmed the Plaintiff herein was one of the applicants in an application by way of Chamber Summons dated 18th January 2010 in HCCC 113 of 2008(O.S) seeking to be joined as Defendants. The said application was withdrawn by consent on 8th February 2010.

It is therefore the position that although the suit property herein is part of the suit property in HCCC 113 of 2008(O.S), the Plaintiff herein is presently not a party in that suit, even though the findings in HCCC 113 of 2008(O.S) will most definitely affect the outcome in the present suit. The question as whether the transfer of the suit property to the Plaintiff in the aforesaid circumstances was lawful is therefore a triable issue herein that ought to be heard and decided on. It is therefore my finding that this is not a clear case for striking out of the pleadings, and the Defendant's remedy lies elsewhere.

This finding notwithstanding, I do concur with the Defendant's argument that the Plaintiff and suit herein is an abuse of the process of court, and it is my opinion that the Plaintiff ought to have proceeded in in HCCC 113 of 2008(O.S), having been previously aware of the Defendant's claim therein. However, since the suit herein is already filed and cannot be struck out for the reasons given in the foregoing, and since

the parties in the suit herein and in HCCC 113 of 2008(O.S) are different, the appropriate course of action in the circumstances is to consolidate the suit herein with HCCC 113 of 2008(O.S). This will facilitate a more expeditious and efficient determination of all the issues arising from the fact that the suit property in the two cases is the same. I therefore hereby order as follows pursuant to the provisions of sections 1A, 1B, 3A and 63(e) of the Civil Procedure Act:

1. That the suit herein be consolidated with HCCC 113 of 2008(O.S) for purposes of hearing and determination together, and the lead file for purposes of recording of proceedings shall be that of with HCCC 113 of 2008(O.S).
2. That pending the hearing and determination of the consolidated cases hereinabove or until further orders, the Plaintiff herein shall not sell, transfer, lease or otherwise dispose of the property known as L.R Ndumberi/Riabai/3822 and shall not interfere with the Defendant's occupation of the said property.
3. The Plaintiff shall meet the costs of this application.

Dated, signed and delivered in open court at Nairobi this ____5th____ day of ____February____, 2013.

P. NYAMWEYA

JUDGE