



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
CIVIL SUIT NO. 3016 OF 1978

MUNGAI NJOROGE..... PLAINTIFF

VERSUS

MAINA MUNENE.....1ST DEFENDANT

BERNARD CHIORI MURAGE.....2ND DEFENDANT

THE LAND REGISTRAR KIRINYAGA.....3RD DEFENDANT

THE ATTORNEY GENERAL.....4TH DEFENDANT

-AND-

JOSEPH NICHOLAS MURAGE.....INTERESTED PARTY

RULING

The application that is before the court for determination is a Notice of Motion dated 4th August 2011, brought by the Interested Party pursuant to the provisions of Order 2 Rule 15 (1) (b) and (d) of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The Interested Party is seeking orders that the Plaintiff's plaint herein dated 25th August, 1978, be struck out with costs to the Interested Party herein, and that the Inhibition Order issued by the Honourable Court against the suit premises be lifted.

The grounds for the application are that the 2nd Defendant who is currently the registered owner of LR NO. MWERUA/KABIRIRI/311 (the suit property herein), died on 15th June 1982. Further, that letters of Administration Intestate were subsequently granted vesting the suit land to Jerusha Mabuti Murage also deceased, and whose estate is currently being administered by the Interested Party upon letters of Administration Intestate being granted to him. It is further claimed that the suit herein has abated as both the 1st and 2nd Defendants from whom relief is sought died many years ago, and that no substitution of parties was ever applied for nor sought in this matter to replace the 1st and 2nd Defendants.

The Interested party claims that by virtue of the letters of Administration and Certificate of Confirmation Grant to the Estate of Jerusha Mabuti Murage, he is solely entitled to deal with the suit land and is prejudiced by the Inhibition Order against issued by the High Court, and that the Plaintiff has no interest in the suit property.

The detailed facts are contained in the Interested Party's supporting affidavit and supplementary affidavit sworn on 4th August 2011 and 27th October 2011 respectively. He has attached the copies of the title and certificate of official search with respect to the suit property, and of the letters of administration granted to him and to Jerusha Mabuti Marube and the certificates of confirmation of grant.

The Plaintiff opposed the application and filed a Notice of Preliminary Objection dated 24th October 2011 and a replying affidavit sworn on the same date. The grounds of objection to the application were as follows:

1. That the Applicant legal representatives of the 2nd Defendant having made an Application and having been made a party to the suit and the cause of action herein having survived the 2nd Defendant satisfies the provisions of order 24 rule 4 of the Civil Procedure Rules and therefore the suit against the 2nd Defendant cannot and has not abated.
2. That Order 24 rule 4 envisages that such application should be made by the legal representatives requesting so to be made a party which was rightly done by the Applicant.
3. That the 3rd and 4th Defendants are still parties to the entire suit, therefore the entire suit cannot be struck out.
4. That the grounds set out for dismissal does not meet the requirements under the provisions of order 2 rule 15.
5. That the Applicant's application is hopelessly misconceived, frivolous, totally devoid of merit and mala fides and should therefore be struck out with costs.

The Plaintiff stated in his replying affidavit that the inhibition orders sought to be removed were issued on 15th August 1980 after the 1st Defendant without his knowledge and consent sold the suit property to the 2nd Defendant. It was further stated that the sale occurred after the Plaintiff and 1st Defendant had entered into a contract for sale of part of the said land. The Plaintiff alleged that he had been living on the suit property for over 25 years, and that his current firm of Advocates came on record on 2nd June 2009 and made an application for the reconstruction of the court file which had gone missing. Further, that there is an earlier application on file dated 10th August 2010 that ought to be heard first.

These claims were contested by the Interested Party in his supplementary affidavit sworn on 27th October 2011, wherein he stated that the suit property is a rice paddy that cannot support any structure and he attached photographs of the said land. Further, that the court file went missing in 1980 and the Plaintiff only applied for its construction 27 years later. He also stated that the Plaintiff's counsel had in pleadings filed in court admitted to the suit having abated against the 1st Defendant who was also deceased.

Parties filed written submissions on both the Interested Party's Notice of Motion and Plaintiff's Preliminary Objection. The Interested Party's counsel in submissions dated 11th June 2012 argued that it is not disputed that the 1st and 2nd Defendants are deceased, and no application was made to enjoin the late Jerusha Mabuti Murage and the late Martha Gathoni who were the appointed administrators of the 2nd Defendant, neither was service of summons effected upon them. Further, that the suit property having been distributed to Jerusha Mabuti Murage ceased being part of the 2nd Defendant's estate, but could not be registered in her favour on account of the inhibition order registered by the Plaintiff.

Lastly, it was argued for the Interested Party that the suit herein has abated as no substitution has been made according to the law as provided in Order 24 Rule 4(3) of the Civil Procedure Rules. It was submitted by the Interested Party's counsel in this regard that it was in the Plaintiff's interest to apply for substitution of the Defendants within a year of their demise as he was the one adversely affected by the abatement of the suit, and he cannot be allowed to benefit from his indolence. The Interested Party's Advocate cited and relied on various judicial authorities for his arguments.

The Plaintiff's counsel in submissions dated 25th June 2012 admitted that the suit herein had abated against the 2nd Defendant. He however argued that the law allows an abated suit to be revived, and that

since the 1st Interested Party had moved the court to be enjoined in the suit, it was therefore implied that he was allowed to represent the interests of the 2nd Defendant and that the court had thereby revived the abated suit against the said Defendant. He further argued that the suit can only abate as against the 1st and 2nd Defendants who are natural persons, and not against the 3rd and 4th Defendants which are offices with perpetual succession.

The counsel also gave a history of the transactions over the suit property to show that the 2nd Defendant was not a purchaser in good faith, and that this case should be decided on its merits and is not one for striking out. Lastly, he argued that various attempts had been made to join the 2nd Defendant's representatives after his death, but which were not successful because of the missing court file, and that Order 24 rule 4(1) does not put the onus of substituting the Defendant on the Plaintiff. The Counsel also cited various judicial authorities in support of his arguments.

The Intended 2nd Interested Party's counsel also filed submissions dated 9th July 2012 wherein he argued that the suit be allowed to proceed to trial given the allegations of fraud with regard to the acquisition of the suit property, and the parties be allowed to present their evidence and arguments.

I have read and carefully considered the pleadings, evidence and submissions made in this application. The first issue to be determined is whether the objections raised by the Plaintiff are on points of law, and if so whether they have merit and should be upheld. In the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**, it was held that

“a preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

Grounds 1 and 2 of the preliminary objection reproduced in the foregoing on the abatement of the suit have their basis in Order 24 of the Civil Procedure Rules. However, I find to the extent the Plaintiff is asking the court to exercise its discretion to hold that the joinder of the Interested Party amounted to a revival of the suit herein as against the 2nd Defendant, then the two grounds cease to be pure points of law and cannot be upheld. Ground 3 on the status of the 3rd and 4th Defendant being offices of perpetual succession is a pure point of law and is hereby upheld, as the suit cannot abate against the said Defendants.

On grounds 4 and 5 the Plaintiff has entered into the foray of the facts of the transaction which is the subject matter of this suit to argue that the Interested Party's application does not meet the requirements of Order 2 Rule 15 of the Civil Procedure Rules and is misconceived and frivolous. These grounds therefore do not fall within the province of a preliminary objection as they do not raise pure points of law and are therefore found not to be merited.

The upshot of the foregoing is that it is only ground 3 of the Notice of Preliminary objection that is upheld, and it is hereby found that that the suit as against the 3rd and 4th Defendant cannot in law abate.

The second issue to be determined is whether the Plaint herein should be struck out in the circumstances presented in the Interested Party's application. I note that the Interested Party in his application refers to a Plaint filed herein on 25th August 1978. However, upon perusal of the court file I note that the suit herein was commenced by way of Originating Summons dated 24th November 1978. I will however proceed to consider the substantive arguments despite the noted error in the application which I do not consider to be fatal.

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.”

The main ground for striking out the suit that is presented by the Interested Party is that the suit as against the 2nd Defendant has abated. This is admitted by the Plaintiff, who argues that the joinder of the Interested Party thereby revived the suit against the 2nd Defendant. I find that I must hold that the suit as against the 2nd Defendant has indeed abated, and has not been revived. This is for the reason that the provisions of Order 24 Rules 4 and 7 of the Civil Procedure Rules are clear that there must be an application to substitute a deceased Defendant or revive a suit that has abated, and orders given by the court to that effect. Such orders cannot be implied. There are no such orders of substitution of the 2nd Defendant or revival of the suit against him in the proceedings herein, and it therefore the finding of this court that the suit against the 2nd Defendant abated one year after his death on 15th June 1982.

This finding notwithstanding, the door is not yet firmly closed on proceedings and amendments by the Plaintiff that may give life to the suit herein. In addition given the allegations of fraud made by the Plaintiff and the Intended Interested Party as to the transaction which is the subject matter of this suit, there are outstanding triable issues to be decided herein.

Lastly, this court is also enjoined under Article 159(2) of the Constitution to dispense substantial justice and not to give undue weight to procedural technicalities. For these reasons, and having upheld ground 3 of the Plaintiff’s preliminary objection, I find that this is not a proper case for striking out of the Originating Summons dated 24th November 1978.

The third and final issue for determination is whether or not the orders of inhibition granted in the suit herein should be lifted. This court notes that the Interested Party was joined to this is suit and is a party to this suit on the strength of evidence that he holds letters of administration with regard to the suit property. Being a party to this suit, any orders made with regard to the suit property also bind him. I have perused the Originating Summons filed herein and note that there are orders sought for sub-division of the suit property and registration of the sub-divided portions in favour of the Plaintiff and the 1st or 2nd Defendant. I therefore find that given that the suit herein is still subsisting, there are other parties other than the 2nd Defendant who will be prejudiced by the lifting of the inhibition orders.

The Interested Party’s Notice of Motion dated 4th August 2011 is therefore declined for the reasons given

in the foregoing, and the costs of the application shall be in the cause.

I hereby also order pursuant to the provisions of sections 1A, 1B, 3A of the Civil Procedure Act and Order 11 of the Civil Procedure Rules that the Plaintiff herein takes the necessary steps to set this matter for hearing within 120 days of the date of this ruling, failing which the Interested Party and any other party shall be at liberty to apply for dismissal of the suit for want of prosecution.

In addition, upon the perusal of the pleadings filed herein I notice that the suit property is situated in Kirinyaga County. There is now an Environment and Land Court established in Kerugoya in Kirinyaga County. Pursuant to the provisions of sections 1A, 1B, 3A and 12 of the Civil Procedure Act, I accordingly hereby order that this suit and its court file be transferred forthwith to the Kerugoya Environment and Land Court, being the court with territorial jurisdiction over the suit property.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 21st day of March, 2013.

P. NYAMWEYA

JUDGE