



REPUBLIC OF KENYA

High Court at Kisumu

Environmental & Land Case 42 of 2012

CHARLES OCHOLA MUSINGO.....PLAINTIFF

VERSUS

1. MUHOLA MUTULA
2. VINCENT O. ODHIAMBO
3. OGUTU OGUTU.....DEFENDANTS

RULING

The applicant/first defendant – **MUHOLA MUTULA** or, as stated by himself, **HANINGTONE FREDRICK MTULA** – filed this application here on 18/12/2012.

The application is a motion on notice brought under Sections 3,13, 7 (e) 19 and 28 of the Environment and Land **COURT ACT, NO.19** of 2011, Order 2 Rules 14,15 (1) (b) and (d) of Civil Procedure Rules 2010, Sections 1A and B, 3A and 34 of Civil Procedure Act, Articles 22(1) and 2(a) and 159 (2) (a) and (b) of the Constitution of Kenya and all other provisions of law.

What is sought is dismissal of the plaintiff's case, with costs to be awarded to the 1st defendant. The application is premised on the grounds that the suit is scandalous, frivolous and vexatious and also an abuse of the court process, as the Court has no jurisdiction to entertain the suit.

The supporting affidavit of the 1st defendant introduces him as the administrator of the late Cecilia Hope Mtula who, it appears, was his wife and was disputing with the plaintiff over land parcel **E. UGENYA/KATHIENO 'B'/173**. It is clear the dispute was before the local Land Disputes Tribunal and ended with an order that the land (suit land hereafter) be sub-divided into two so that the late Cecilia could get her portion. As used to happen then, the tribunal's award was taken to court and adopted as Court's judgment.

Also apparent is that the plaintiff appealed against the findings of the tribunal but the appellate forum – **PROVINCIAL APPEALS COMMITTEE** – ceased to operate before finalizing the appeal. The position of 1st defendant is that as the fate of the appeal is unknown and in light of adoption of the tribunals first findings by a Court of law, the suit land ceased to exist. That being the position, 1st defendant deponed, the suit herein is a vain and desperate attempt to reinvent the suit land. That forms the basis for this application to dismiss the suit.

The plaintiff replied vide a replying affidavit filed on 6/2/2013. He deponed, inter alia, that the letters of administration referred to by 1st defendant must have been obtained without disclosing material facts to court. He also stated that 1st defendant has been Muholo Mtula to him. Further, the letters of Administration mentioned are not for administration of the deceased's estate.

The plaintiff continued to say that the suit land is his own, being the registered owner and with unchallenged title.

He maintained that the decision of the land tribunal is still subject of an appeal and with the appellate forum no longer existent, its matters became seized and vested in this Court. The second defendant – **VINCENT OTIENO ODHIAMBO** – also chipped in with a replying affidavit to the application. The response seems rather unusual as it is responding to 1st defendant while she herself is the second defendant. The application by 1st defendant was directed to the plaintiff, not 2nd defendant, and it is doubtful whether she should be responding to 1st defendant as if against him instead of swearing a supporting affidavit to back up 1st defendant's application for dismissal of the suit.

Be that as it may, the 2nd defendant's replying affidavit contains useful information concerning her position. In summary, she said she has nothing to do with the suit land. She owns, she said, **EAST UGENYA/KATHIENO 'B'/794** and the plaintiff is therefore non-suited against her. The input of 3rd defendant is lacking. The court heard the application on 26/2/2013 and the arguments advanced were between the 1st defendant and the plaintiff.

The 1st defendant's counsel reiterated that the suit is frivolous and vexatious and that the Court has no jurisdiction. The claim, it was argued, is already adjudicated upon and, under the statute that governs this court, jurisdiction is mandatorily ousted.

According to 1st defendant's counsel, a suit similar to this one was determined by Siaya Land Disputes Tribunal. It was then adopted as judgment of a Court of law.

This Court then should not entertain this suit.

The opposing side posed the argument that the outcome of the previous proceedings was about issuing separate title deeds after sub-division of the suit land **BUT NOT** about barring the plaintiff from use or enjoyment of the suit land. The plaintiff's counsel also said that an appeal against the tribunal's findings is still pending. And the plaintiff is complaining about denial of utilization of the suit land, not about earlier orders given.

BUT Counsel for 1st defendant attacked the plaintiff's arguments saying, inter alia, that the appeal mentioned is nowhere to be seen. He also questioned the plaintiff's right to utilization of land already ordered to be subdivided.

This Court has considered the application, the replying affidavits, and arguments of both learned counsels. Before making its comments and observations however, it is necessary to have a look at the law sought to be relied upon. That law is in the Environment and Land Court Act, 2011 Civil Procedure Act and Rules (Cap 21) and the Constitution of Kenya, 2010. No decided case law was availed.

Among other things, the law invoked emphasizes the need for quick, fair and proportionate resolution of disputes, the need to give appropriate remedies (like the specific performance or dismissal asked for in this case), the need to downplay procedural technicalities, and the need to embrace alternative dispute resolution where possible.

That law also urges the necessity of striking out pleadings where a reasonable cause of action is not disclosed or due to frivolous and vexatious nature of the action or where there may be delay or embarrassment of the fair trial of the action. Striking out, the law says too, may take place where the suit is found to be an abuse of the Court process.

And from a Constitutional perspective, the need for an aggrieved person to move to Court to enforce an infringed, threatened, or denied fundamental right was underscored with the court being enjoined to entertain and determine such action without delay.

This, in short, is a summation of the labyrinth of laws said to provide succour to the plaintiff's application.

The Court has to consider all these provisions in light of the scenario emerging from the pleadings, the application and the arguments proffered by both learned counsel. Thereafter, a decision follows.

One clear thing that emerges is that the suit as filed does not allude to past disputes between the parties. The cause of action is based on encroachment and/or trespass. The story about past disputes and possible mischief on the part of the plaintiff only emerges from the defence. The application itself is based on all these and, without giving the plaintiff ample opportunity to give his side of the story, the court is asked to dismiss the suit. And based on this too, the Court is told it has no jurisdiction.

Dismissal of a suit, though sometimes necessary, is not given very enthusiastically by a court of law in interlocutory stages. When applied for, the Court must look at the suit as filed and decide whether the plaintiff must be denied a hearing by dismissing the suit. All this is done bearing in mind that denying any litigant a hearing should always be a move of the last resort.

This Court has already pointed out that the suit as filed is prima facie one of encroachment or trespass. That is the Kernel of the plaintiff's case and is to be found at paragraph 4 of the plaint.

The prayer sought is one of permanent injunction, not ownership. The issue of ownership comes from the defence. The mention of earlier orders also comes from defence.

It could well be that the 1st defendant is very sure that the plaintiff is up to some mischief. **BUT**, pray, why doesn't he let the mischief come out by letting the plaintiff's case see the light of day? All due regard is given to the law cited. But the Court needs to be let into the whole picture. Looking at the suit as filed, it is not possible to say that the Court lacks jurisdiction. The issues raised by the 1st defendant can only be properly considered if all sides avail evidence. Hearing then becomes absolutely necessary.

The Court's desire is to give a judgment on the merits and not a technical final outcome reached by denying one side a hearing. The merits of the 1st defendant's application are not fully ascertainable at this stage and it would be remiss of the Court to dismiss the plaintiff's case without giving him a hearing. For these reasons, the 1st defendant's application is hereby dismissed with costs in the cause.

A.K. KANIARU – JUDGE

16/5/2013

16/5/2013

A.K. Kaniaru – Judge

Dianga – C/C

Plaintiff/Respondent – Present

1st defendant/applicant – absent

Other defendants – Absent

M/s Olel for Plaintiff

Ochieng Nyamogo for 1st defendant/applicant

COURT: Ruling on application filed on 18/12/2012 read and delivered in open COURT.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

16/5/2013

AKK/vaa