



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

LAND & ENVIRONMENTAL COURT

ELC NO. 1748 OF 2007

HENRY ORYEM OKELLO.....1ST PLAINTIFF

ERISANWERO OPIRA.....2ND PLAINTIFF

VERSUS

SUKHDEV SINGH LALY.....1ST DEFENDANT

LAZARUS KIBUI NDEGWA.....2ND DEFENDANT

RULING

The Applicant herein, 2nd Defendant Lazarus Kibui Ndegwa has moved the Court by way of Notice of Motion dated 22nd February, 2013 brought under Section 1A,1B and 3A of The Civil Procedure Act, Order 1 Rule 10 (4), Order 2 Rule 15, Order 13 Rule 2, Order 4 rule 5 and Order 24 Rule 3(2) of the Civil Procedure Rules 2010, The Oaths and Statutory Act Cap 15 Laws of Kenya and all the enabling provisions of the law.

The Applicant sought for Orders that, the Complaint herein dated 15th February 2006, be struck out with costs to the 2nd Defendant; that the Plaintiff by himself, his agents, and assigns or otherwise howsoever be restrained from interfering on a parcel of Land known as LR No. 209/8000/136 original No. 209/8000/41/1 or in any other way or until the disposal of the suit or until further Orders and also for costs of the application.

The application was supported by the grounds on the face of the application and on the Supporting Affidavit of Lazarus Kibui Ndegwa. Among the grounds in support of the application are that the suit herein offends the provisions of the Law and in particular the Civil Procedure Act and Rules made there under and therefore the suit herein, is incompetent, scandalous and vexatious in law.

The same is also prejudicing, embarrassing and may delay trial of the suit and it is also an abuse of the Court process. The application was opposed by the 1st Plaintiff herein, Henry Oryem Okello who put in grounds of opposition and a Replying Affidavit sworn on 9th April, 2013.

The 1st Defendant SUKHDEV SINGH LALY supported the Notice of Motion through his Replying Affidavit sworn on 29th April 2013. The parties herein canvassed the application by way of Written Submissions.

I have carefully considered the Affidavits and the Written Submissions filed in Court in support and in opposition of this Notice of Motion. I have also considered the quoted provisions of Law. The Applicant has sought to strike out the Plaintiff's suit and also for injunctive Orders. The Court has variously dealt with the issue of striking out pleadings. The Court has also held in various cases that *"Pleadings should only be struck out in clear cases and such application should be made as soon as possible after service of the Defence"*.

There is no doubt the suit herein, was filed in the year 2006. The 2nd Defendant sought to be enjoined in the suit in the year 2008. A Ruling in his favour was given by Justice Mbogholi Msagha on 13th October, 2009. The suit was thereafter set for hearing. Various, the 2nd Defendant has filed several Interlocutory applications which have culminated in various rulings. One such Ruling was issued by Justice Ougo on 26th June 2012, where the Judge declined to strike out the Plaintiff but ordered the Plaintiff to file a fresh Replying Affidavit. In the case of **Ndei Vs Mathira Dairymen's Cooperative Society Ltd (1982) KLR 266**, the Court held that:-

"An application for striking out pleadings should be made promptly and as a rule before the close of the pleading; or the Court in its discretion may decline to exercise its jurisdiction" .

In the Instant Case, the 2nd Defendant/Applicant came into the matter on 13/10/2009. He did not file the application for striking out the suit immediately. He filed out when the main suit had been given a hearing date for 26/4/2013.

The 2nd Defendant/Applicant informed the Court that, what led him, to file the Instant application is the disclosure in the Replying Affidavit filed in Court on 16th April, 2013 by the 1st Plaintiff herein. That the 1st Plaintiff disclosed that the 2nd Plaintiff herein died in the year 2003. That fact was also admitted by the 1st Plaintiff in his Replying Affidavit and Submissions. However, 1st Plaintiff submitted that he filed the suit as a personal representative of the estate of the late **Labule Okello Lutwa** alias **General Tito Okello**. He relied on section 81 of the Succession Act Cap 160 Laws of Kenya which reads as follows:-

"Upon the death of one or more of the several executors or administrators to whom a grant of representation has been made, all powers and duties of the executors or administrators shall become vested in the survivors or survivor of them" .

The Plaintiffs herein filed the suit in their capacity as the personal representatives of **Labule Okello Lutwa**. However, that is not stated in the heading of the Plaintiff. It is also evident that, the second Plaintiff died in the year 2003. That was before the instant suit was filed. By provisions of Section 81 of the Succession Act, the 1st Plaintiff would still have filed the suit alone as the surviving personal representative of the estate of **Labule Okello Lutwa**. He ought to have stated in the Plaintiff that he was suing as a Legal Representative of the Estate of the deceased herein.

The applicant herein, stated that the suit is brought under Section 1A of the Civil procedure Act which deals with overriding objective of the Act and the Rules is to facilitate the **just expeditious, proportionate** and affordable resolution of Civil disputes.

Section 1B of the same Act provides that:-the Court has a duty in furthering the overriding objective to handle all matters presented before court with the following aims; the just, determination of proceedings and also timely disposal of the proceedings.

Section 3A of the Civil Procedure Act also gives the Court the inherent power to make Orders that are necessary for the ends of Justice or to prevent abuse of the Court process. The Court is also guided by Article 159 of the Constitution, specifically Article 159 (2) (d) which provides that:-

"In exercising judicial authority, the Court and tribunals shall be guided by the following principles; Justice shall be administered without undue regard to procedural technicalities" .

In the instant suit, though the Plaintiff filed the suit unprocedurally, I find that, for the Court to achieve the just determination of the case herein, it should not strike out this suit. The defects or unprocedural way that the Plaintiff used to file the suit can be corrected through an amendment. In the case of **Parklands Properties Ltd Vs Patel (1981) KLR 52**, it was held:-

“Instead of striking out a pleading, which offends the rules of pleading; It may in the discretion of the Court, be amended in certain circumstances”.

The Plaintiff herein has brought the suit on behalf of the Estate of **Labule Okello Lutwa** . The Plaintiff herein should amend the Plaintiff to reflect the true position and should therefore leave out the name of the deceased personal representative. The surviving Personal Representative can rely on Section 81 of the Succession Act. For the above reasons, the Court declines to strike out the suit as prayed by 2nd Defendant. The Court Orders the plaintiff herein to amend the suit according to state that he is a legal representative suing on behalf of the Estate of the decease herein.

The 2nd Defendant has brought numerous applications herein. These Interlocutory applications have constituted to the delay in the full trial of this suit. The 2nd defendant cannot escape blame for the delay in determination of the suit. The issues that he has raised about the **will** and **assets** can be canvassed in full trial.

2nd Defendant has sought for restraining Order. He has not established that he will suffer irreparable loss which cannot be compensated by damage or that he has a prima facie case with high probabilities of success as was held in the case of **Giella Vs Cassman brown Ltd 1973 EA 358**.

I find no reason why I should issue injunctive Orders. This is an old matter which should be determined expeditiously. The Plaintiff to move accordingly and amend the Plaintiff and set the matter down for hearing. The 2nd Defendant should avoid filing various Interlocutory applications. This action is indeed an abuse of the Court process.

Having now carefully considered the Notice of Motion dated 22/2/2013, the Court finds that, the said application offends the provisions of Section 1A of the Civil Procedure Act on the overriding objective of the Act. The upshot is that, this Court declines to allow any of the Orders sought therein. The said Notice of Motion is hereby dismissed. Costs in the Cause.

Dated, Signed and delivered this 19TH day of **July, 2013**.

L N GACHERU

NVI.

In the Presence of:-

..... for the Plaintiff/Applicant

..... for the Defendant

L N GACHERU

JUDGE