



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Environmental & Land Case 449 of 2009

JOSEPH KIMATA WACHIRA1ST PLAINTIFF

KENJE WINSTON CO. LTD2ND PLAINTIFF

VERSUS

WILSON WAITHAKA GITAUDEFENDANT

RULING

This ruling is given with respect to the Defendant's application dated 30th November 2009, which application was heard on 5th December 2011. Mr. Nchogu appeared for the Plaintiffs, while Mr. Esuchi appeared for the Defendants. The Advocates asked the court to rule on the basis of the pleadings and submissions filed. The Defendant in addition to the grounds stated in the said application relied on the supporting affidavit sworn by Defendant on 30th November 2009, and written submissions dated 15th March 2010. The Plaintiffs relied on written submission dated 28th May 2010.

The Defendant is seeking substantive orders that the Plaintiffs' suit be struck out with costs. The grounds for the Defendant's application are that the Plaintiffs' suit is incurably defective at law, frivolous and is otherwise an abuse of the process of the court. The Defendant also states that the suit is *subjudice*, as there are pending before this Court cases involving same subject matter and same parties. These cases are Nairobi High Court Civil Case No. 131 of 2007 (Wilson Waithaka Gitau –v- Kenje Winston Co. Ltd) and Nairobi High Court Civil Case No. ELC 297 of 2009 (Wilson Waithaka Gitau –v- Joseph Kimata Wachira).

The Defendant avers that he has always been the *bona fide* owner of the land Reference Number 7418/30 (the suit property) situated at North East of Ruiru Town, and that on 20th December 1996 the 2nd Plaintiff herein illegally transferred to itself the said suit property. That on finding out about the illegal transaction the Defendant filed Nairobi High Court Civil Case No. 131 of 2007 against the 2nd Plaintiff, and the said case is still pending in this Court awaiting formal proof.

The Defendant further avers that while the said suit was still pending, the 1st Plaintiff started offering the suit property for sale to third parties, and he consequently filed Nairobi High Court Civil Case No. ELC 297 of 2009 against the 1st Plaintiff on 22nd June 2009. The Defendant also avers that the 1st Plaintiff has wrongfully enjoined the 2nd Plaintiff who has got no legal capacity. The Defendant has annexed to his supporting affidavit sworn on 30th November 2009, copies of the pleadings in Nairobi High Court Civil Case No. 131 of 2007 and Nairobi High Court Civil Case No. ELC 297 of 2009. The Defendant's Advocate also reiterated the above arguments in the written submissions dated 15th March 2010.

The Plaintiff did not file any replying affidavit in opposition, but his Advocate in the written submissions dated 28th May 2010 contended that the issues raised in the Defendant's application can be dealt with conclusively at the hearing of the suit filed herein.

After consideration of the pleadings filed in this case and the written submissions by the parties, the main issue for consideration is whether the suit filed herein by the Plaintiffs is frivolous or vexatious, or an abuse of the process of court in light of the pending suits instituted by the Defendant, to justify its striking out.

It is settled law that the power of the Court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. In *D.T.Dobie & Company (Kenya) Ltd. v. Muchina*[1982] KLR 1 at p. 9 Madan, J.A. said:-

“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.”

I do not find the Plaintiffs' suit frivolous or vexatious, as there is a purported sale and transfer of the suit property between the Defendant and 1st Plaintiff, which is an issue that needs to be determined at full trial. On the issue of abuse of the court process, the suit herein was filed by the Plaintiff on 8th September 2009. From the a perusal of the pleadings provided as evidence by the Defendant, I find that Nairobi High Court Civil Case No. 131 of 2007 (Wilson Waithaka Gitau –v- Kenje Winston Co. Ltd) was filed on 24th May 2007, while Nairobi High Court Civil Case No. ELC 297 of 2009 (Wilson Waithaka Gitau –v- Joseph Kimata Wachira) was filed on 23rd June 2009. Section 6 of the Civil Procedure Act (Cap 21) is therefore applicable, as the Defendant's suits were commenced prior to the suit herein.

Section 6 of the Civil Procedure Act has two main aspects in its application. The first is that the matter in issue should directly and substantially be the same in the two suits. The second aspect is that the parties must be the same in the two suits. On this aspect I do find that the Plaintiffs in this suit are sued by the Defendant under the same names and title in Nairobi High Court Civil Case No. 131 of 2007 and Nairobi High Court Civil Case No. ELC 297 of 2009. The subject matter in the suit herein is also the same subject matter in the two suits filed by the Defendant, namely ownership of the suit property. There is therefore a clear abuse of the court process by the Plaintiffs.

In light of the findings stated in the foregoing, this Court finds that it has no jurisdiction to substantively hear the suit herein, and must stay this proceedings pursuant to section 6 of the Civil Procedure Act, pending the hearing and determination of the proceedings in Nairobi High Court Civil Case No. 131 of 2007 and Nairobi High Court Civil Case No.ELC 297 of 2009. Prayer (a) of the Defendant's application dated 30th November 2009 is however denied, since section 6 of the Civil Procedure Act does not grant this Court powers to strike out pleadings.

The costs of the application shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____16th____ day of ____February____, 2012.

P. NYAMWEYA

JUDGE