



THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

HIGH COURT CIVIL CASE NO.157 OF 1999

NGALYUKA MBOVA 1ST PLAINTIFF

MBELENZI KILONZO..... 2ND PLAINTIFF

NGWENZE MANGAO 3RD PLAINTIFF

MUTUKU MWAU 4TH PLAINTIFF

KITUTUI MANGOIA 5TH PLAINTIFF

VERSUS

ELIUK KIUMI..... 1ST DEFENDANT

ISAAC KIUMI..... 2ND DEFENDANT

KIOKI KIUMI..... 3RD DEFENDANT

RULING

Long time ago and to be precise, 9 years, the defendants filed a Chamber summons application seeking to have the plaintiffs' suit struck out for being an abuse of the process of the court, frivolous, vexatious and or that it was meant to delay the cause of justice. In the same vein, the defendants prayed for the costs of the application. The application was expressed to be brought under the then order VI rule 13(i) (b) (c) and (d) of the Civil Procedure rules, Section 3A of the Civil Procedure Act and all enabling provisions of the law.

The grounds in support of the application were that the plaintiffs had not obtained a grant a letters of Administration before instituting the suit. The plaintiffs had not given specific description of the land parcel the subject of the suit and that generally, the suit was vague and not based on law or fact.

In support of the application, the defendants through the 3rd defendant where relevant deponed that the plaintiffs had filed the suit against the defendants claiming that they were entitled to a parcel of land by virtue of the fact that the parcel of land had been litigated upon by one, **Mwololo Mbova** in SRMC A No.45 of 1986 and who had since passed on. By the time the suit was filed none of them had obtained a grant of letters of administration with regard to the estate of **Mwololo Mbova**, as such they had no *locus standi* to file the suit. Accordingly, the suit as filed was an abuse of the process of court and should be struck out. Further the land parcel, the subject of litigation had not been specifically described in the plaint to show its locality and generally, the plaint was vague about it.

Through **Kiluku Mung'ao** the plaintiffs responded to the application. Where pertinent they deponed that the land was inherited from their great grandfather, **Mbeti** over 100 years ago. **Mwololo Mbova** and **Musyoka Nthema** litigated over it on behalf of the family. They had been sued on behalf of the family and not as owners of the land. After **Mwololo Mbova** passed on, his share of the land automatically transferred to his sons. The land was held under Kamba customary law and the death of **Mwololo Mbova** did not affect the tenure. In those circumstances a grant of letters of administration was not necessary before they mounted this suit. This replying affidavit was filed on 24th July, 2003. From there the application went into self imposed limbo. It was not until 8th November, 2011 that it resurfaced and or was resurrected. The parties agreed to canvass the same by way of written submissions. Those written submissions were subsequently filed and exchanged. I have carefully read and considered them.

My take on the application is that under the then order VI rule 13(1) (b) and (c) of the Civil Procedure rules, the court had jurisdiction at any stage of the proceedings to order to be struck out or amended any pleadings on the grounds that they disclosed no reasonable cause of action or defence; or was scandalous, frivolous or vexatious; or could prejudice, embarrass or delay the fair trial of the action; or it was otherwise an abuse of the process of the court. The defendants have elected and rightly so in my view, to have the suit struck out on the grounds that it is scandalous, frivolous and vexatious as well as being an abuse of the process of court. Thus the application is properly mounted.

Looking at the plaint as filed, it is completely ambiguous and vague. I do not know whether this is my design and or deliberate. Though the plaintiffs in their prayers in the plaint seek the eviction of the defendants, they do not say that the land allegedly in their possession is theirs. All they state is that they;

“own a piece of land containing by measurements over 10 acres which they inherited through their grandfathers many years ago....”

They are not saying that they are the registered proprietors of the said piece of land.

You can only accuse a person of trespass if he enters your parcel of land without your permission and consent. However, the land must be truly yours. This is not the case here. The plaintiffs claim to have inherited the land from their grand fathers and not even their fathers. What happened to their father’s land if at all. Further, they do not specify what piece of land, the subject of the proceedings and its location. So that even if they were to succeed in their claim, the ensuing decree if at all would be difficult to execute since the specific details of the land parcel are not pleaded. Thus the court would have acted in vain. Ordinarily, courts do not act in vain.

It would appear that the basis of the plaintiffs’ alleged ownership of the parcel of land if at all, is the court case wherein **Mwololo Mbova** a descendant of **Mbeti** litigated over the same and retained it in the family. If that be the case, couldn’t the said **Mwololo Mbova** have been the proper plaintiff. What became of him? However, reading through the pleadings and the ruling by **Nambuye J.** dated 14th November, 2002, it is common ground that **Mwololo Mbova** passed on. As the plaintiffs’ claim to the land springs from the actions of **Mwololo Mbova**, they could only mount this suit through the estate of **Mwololo Mbova**. That means that they ought to have obtained a grant of letters of Administration intestate before they filed this suit. Thus this suit is a non-starter as the plaintiffs have no grant of letters of administration intestate to allow them to litigate over the subject matter as same is allegedly an inheritance previously owned by a deceased person, **Mwololo Mbova**. Indeed this was one of the grounds upon which, **Nambuye J.** dismissed the Plaintiffs’ application in which they had sought an order that the defendants jointly and severally be restrained from constructing buildings on the land the subject of the dispute or in any way interfering with the Plaintiffs’ quiet possession of the land and or cutting down trees and other vegetation as it would change the nature of the land.

Commenting on the aspect of a grant of Letters of Administration intestate, the **Nambuye J.** delivered herself thus;

“... Thirdly, it is stated that one Mwololo Mbova litigated on behalf of the family and succeeded but he has since died. It means that since the rights of the applicants stem from the success of Mwololo Mbova who was (sic) since died, in order for the applicants to pursue these rights to their logical conclusion, they need to step in the shoes of Mwololo Mbova and the only way they can do that is for them to take out succession proceedings to the estate of Mwololo Mbova. There is no mention that succession proceedings have been taken out to that effect..”

The plaintiffs did not challenge this holding by way of an appeal or had it reviewed and or vacated. Much as the holding is not binding on me, nonetheless in my view, it is a sound holding based on law. It would be absurd for me to hold otherwise as I am being invited to do by the plaintiffs’ submission that a grant of letters of administration intestate to the estate of **Mwololo Mbova** was not required before the institution of the suit since the suit he prosecuted resulted in the award of land was against members

of the same family from different houses. I would add that the law with regard as to how a suit touching on the deceased should be handled, does not stop to apply merely because the parties are members of the same family. In other words merely because of membership of the same family does not dethrone/oust the provisions of the Law of Succession Act.

Earlier on, the judge had also commented on the ambiguity in the plaint with regard to the description of the parcel of land, the subject of the suit. She stated and I quote:

“... secondly, the description of the land is not clearly given it is only the location, sub-location village given and that means that the land could be located anywhere in that area. It has transpired that the land is unregistered and so since it is said to be 10 acres, the neighbours (sic) should have been given so that it can easily be identified...”

I could not agree more.

From all the foregoing, it is quite clear that this suit is frivolous and abuse of the process of court. I do not think that any court properly directing itself to the plaint as filed, will treat it with any seriousness. Indeed it is hopeless and oppressive to the defendants. It is intended to cause the defendants unnecessary anxiety, trouble and expense, lacking in foundation with no hope of success. To my mind, the suit is but a sham. See generally the case of **Ari Credit & Finance Company Limited –versus- Trans Asia Trading Company Limited & 2 others, HCCC No.1057 of 1995 (UR)** on the questions of when a pleading is scandalous, frivolous, vexatious and an abuse of the process of court.

The power to strike out a pleading is of course, drastic and must be exercised sparingly, with the restraint and caution. It should be invoked in the clearest of the cases. If a pleading sought to be struck out can be imbued with life by amendment, then the application for striking out ought to be rejected. Indeed order VI rule 13(i) (d) does provide that the court faced with such an application may order that the suit be stayed or dismissed or judgment to be entered accordingly, as the case may be. This is a window the plaintiffs should have exploited by seeking to amend the plaint. The issues that have formed the basis upon which the application is bound to be allowed were raised in **Nambye J’s** ruling way back on 14th November, 2002. The plaintiffs have had ample time and opportunity to move the court as appropriate to amend the plaint. They did nothing. If anything they went to sleep. Nor have they expressed their intention to amend the plaint in their replying affidavit and or written submissions.

Having considered anxiously this matter, I have nonetheless come to the conclusion that this suit is frivolous, scandalous and an abuse of the process of court. To allow it to remain alive will serve no useful purpose rather than to be a mere statistic in our so called back log of cases in this station. The end result therefore is that the defendants’ application dated 24th February, 2003 succeeds. Accordingly, the plaintiffs’ suit is struck out with costs to the defendants.

Ruling dated, signed and delivered in Machakos this 15th day of March, 2012.

ASIKE-MAKHANDIA

JUDGE