



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**Civil Suit 410 of 2011**

**AGWU OKIWE**

**OKALI.....PLAINTIFF**

**VERSUS**

**SURESH SOFAT.....1<sup>ST</sup>  
DEFENDANT**

**CITY COUNCIL OF**

**NAIROBI.....2<sup>ND</sup> DEFENDANT**

**NATIONAL ENVIRONMENT MANAGEMENT  
AUTHORITY.....3<sup>RD</sup> DEFENDANT**

**SADHANA SURESH SOFAT.....4<sup>TH</sup>  
DEFENDANT**

**RULING**

There are a number of applications before the court brought by the Plaintiff, 1<sup>st</sup> Defendant and 4<sup>th</sup> Defendant. The first application dated 26<sup>th</sup> October 2011 was filed by the Plaintiff seeking orders for committal to civil jail for disobeying orders issued on 18<sup>th</sup> October 2011, and for summons to issue to the 1<sup>st</sup> Defendants to appear in person to show cause why he should not be cited for contempt of court.

The said orders of 18<sup>th</sup> October 2011 restrained the 1<sup>st</sup> Defendant from constructing and/or or continuing with construction of structures on land reference No. 214/544, which structures border and directly overlook the Plaintiff’s property being Land Reference Number 214/573, pending the *inter partes* hearing and determination of this suit. The Plaintiff claims that the said Order was extracted and served personally upon the 1<sup>st</sup> Defendant/Respondent on the 19<sup>th</sup> day of October, 2011.

The next application is by the 1<sup>st</sup> Defendant and dated 31<sup>st</sup> October 2011. The 1<sup>st</sup> Defendant seeks orders to discharge and/or set aside the said order of this Court made on 17<sup>th</sup> October, 2011. The grounds are that 1<sup>st</sup> Defendant/Applicant was never served with any court papers or documents as alleged except for a photocopy of the order that was left at his office in his absence. The 1<sup>st</sup> Defendant/Applicant also stated that he has been wrongly sued and is not the owner of the suit property, but only an agent.

The Plaintiff in his replying affidavit to this application sworn on 14<sup>th</sup> November 2011 avered that service was properly effected on all parties herein and that there existed a cause of action against the 1<sup>st</sup> Defendant. The Plaintiff then filed another application dated 5<sup>th</sup> December 2011, seeking orders that pending the hearing and determination of this suit, police enforcement be provided to enforce this Court's Order issued on the 18<sup>th</sup> October, 2011.

The 4<sup>th</sup> Defendant thereupon filed an application dated 9<sup>th</sup> December 2011, seeking to have the Amended Plaint filed herein on 23<sup>rd</sup> November 2011 joining her as a Defendant be struck out on the grounds that no leave was obtained from the court, and that the Plaintiff's cause of action is against the 2<sup>nd</sup> Defendant for approving the building plans in respect of the property being constructed on L.R No. 214/544. Another application dated 9<sup>th</sup> December 2011 was also filed by the 1<sup>st</sup> Defendant, seeking that the Plaint herein be struck out on the grounds that he has been wrongly sued and enjoined in the action as he is not the owner of L.R No. 214/544.

The Parties filed written submissions and made oral submissions at the hearing of the above-stated applications on 24<sup>th</sup> April 2012. I have read and carefully considered the pleadings, evidence and submissions by the parties to this application. The first issue to be decided is whether the Plaint filed herein should be struck out. I agree with the Plaintiff's submissions that the power of the Court to strike out pleadings should be used sparingly and cautiously, as was stated in **D.T.Dobie & Company (Kenya) Ltd. v. Muchina[1982] KLR 1**. The Court should not be quick to strike out pleadings if the defect complained of can be cured by amendment. It is the view of this court that the Plaintiff should be given the opportunity to present his case, and in the event of any misjoinder the 1<sup>st</sup> Defendant has a remedy in terms of costs. The 1<sup>st</sup> Defendant's application dated 9<sup>th</sup> December 2011 is accordingly dismissed.

The second issue is whether the Amended Plaint ought to be struck out for want of leave of the Court. The Plaintiff argues that no such leave was required as the pleadings had not closed, as allowed under Order 8 Rule 1 of the Civil Procedure Rules. Order 2 Rule 13 provides that the pleadings shall close fourteen days after service of a defence or of a reply to defence and counterclaim as the case may be. After perusal of the court record, no defence has been filed by any of the Defendants, and it is therefore the case that the pleadings are still open. It is the finding of this Court that the Plaintiff was therefore within procedure to file the Amended Plaint without leave of the court, and the 4<sup>th</sup> Defendant's application dated 9<sup>th</sup> December 2011 therefore fails.

The third issue for consideration is whether the orders made on 17<sup>th</sup> October 2011 and issued on 18<sup>th</sup> October 2011 should be set aside. The application seeking this order is brought under Order 40 Rule 7 that allows this court to discharge or set aside any orders for injunctions. In addition under Order 45 of the Civil Procedure Rules this court can review any orders where there is the discovery of new evidence or on account of some mistake or error on the face of the record.

The 1<sup>st</sup> Defendant argued *inter alia* that he has been wrongly sued as he is not the owner of LR 214/544 and brought evidence to show that he transferred the said property to Sadhana Suresh Sofat, which transfer was registered on 14<sup>th</sup> May 2009. After perusal of the Plaintiff's application for the impugned injunction dated 12<sup>th</sup> August 2011, I note that the 1<sup>st</sup> Defendant is sued in his capacity as owner of LR 214/544. In light of the new evidence provided by the 1<sup>st</sup> Defendant about the ownership of the said property, I find that this court is entitled to review the said orders and finds that no *prima facie* case had been established by the Plaintiff to warrant the injunction against the 1<sup>st</sup> Defendant.

The Plaintiff submitted that the 1<sup>st</sup> Defendant was estopped from denying he was owner because of representations made, however in an application for an interlocutory injunction the onus is upon the applicant to show that on the basis of evidence presented he or she has a *prima facie* case, and estoppel cannot be pleaded by an applicant to escape from this onus. The 1<sup>st</sup> Defendant's application dated 30<sup>th</sup> October 2011 is hereby allowed, and the orders granted by this court on 17<sup>th</sup> October 2011 are hereby set aside.

The effect of setting aside of the orders of 17<sup>th</sup> October 2011 is that the *status quo ante* thereby reverts, and to this extent the Plaintiff's applications dated 26<sup>th</sup> October 2011 and 5<sup>th</sup> December 2011 therefore fail.

The costs of the applications considered herein shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this \_\_\_\_23<sup>rd</sup>\_\_\_\_ day of \_\_\_\_July\_\_\_\_, 2012.

**P. NYAMWEYA**

**JUDGE**