



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL & LAND CASE 410 OF 2011

AGWU OKIWE OKALI.....PLAINTIFF

VERSUS

SURESH SOFAT.....1ST DEFENDANT

CITY COUNCIL OF NAIROBI.....2ND DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3RD DEFENDANT

SADHANA SURESH SOFAT.....4TH DEFENDANT

RULING

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

The said orders of 18th October 2011 restrained the 1st Defendant from constructing and/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 1st Defendant/Respondent on the 19th day of October, 2011.

The next application is by the 1st Defendant and dated 31st October 2011. The 1st Defendant seeks orders to discharge and/or set aside the said order of this Court made on 17th October, 2011. The grounds are that 1st 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 1st 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 14th November 2011 averred that service was properly effected on all parties herein and that there existed a cause of action against the 1st Defendant. The Plaintiff then filed another application dated 5th 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 18th October, 2011.

The 4th Defendant thereupon filed an application dated 9th December 2011, seeking to have the Amended

Plaint filed herein on 23rd 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 2nd Defendant for approving the building plans in respect of the property being constructed on L.R No. 214/544. Another application dated 9th December 2011 was also filed by the 1st Defendant, seeking that the Plaintiff 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 24th 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 Plaintiff 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 1st Defendant has a remedy in terms of costs. The 1st Defendant's application dated 9th December 2011 is accordingly dismissed.

The second issue is whether the Amended Plaintiff 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 Plaintiff without leave of the court, and the 4th Defendant's application dated 9th December 2011 therefore fails.

The third issue for consideration is whether the orders made on 17th October 2011 and issued on 18th 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 1st 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 14th May 2009. After perusal of the Plaintiff's application for the impugned injunction dated 12th August 2011, I note that the 1st Defendant is sued in his capacity as owner of LR 214/544. In light of the new evidence provided by the 1st 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 1st Defendant.

The Plaintiff submitted that the 1st 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 1st Defendant's application dated 30th October 2011 is hereby allowed, and the orders granted by this court on 17th October 2011 are hereby set aside.

The effect of setting aside of the orders of 17th October 2011 is that the *status quo ante* thereby reverts, and to this extent the Plaintiff's applications dated 26th October 2011 and 5th 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 _____23rd_____ day of _____July_____, 2012.

P. NYAMWEYA

JUDGE