



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 499 of 2012

THE REGISTERED TRUSTEES OF THE BANNAKAROLI

BROTHERS KITENDEREDDE.....PLAINTIFF

VERSUS

ALEXANDER ROLAND WEIGEL.....DEFENDANT

AND

CITY COUNCIL OF NAIROBI.....THIRD PARTY

RULING

The application for determination is the Notice of Motion dated 3rd September 2012 brought by the Defendant under Order 2 Rule 15 (1) and Order 51 Rule 1 of the Civil Procedure Rules, 2010 and under Sections 1A, 1B and 3A of the Civil Procedure Act. The application is seeking orders that the Plaintiff's suit be dismissed for being vexatious and an abuse of court process, and that the costs of this application and the entire suit be awarded to the Defendant. The application is based on the grounds that the suit herein for an injunction sought is based on a letter from the Ministry of Lands which has been declared to be fraudulent, and that the Plaintiff has a valid licence over the suit premises from the City Council of Nairobi which has been authenticated.

The application by the Defendant is supported by an affidavit he swore on 31st August 2012, and oral submissions made by his Counsel during the hearing of the application on 19th November 2012. The Defendant's case is that the Honourable Justice Ang'awa had based orders of an injunction granted on 17th August 2012 on a letter purportedly issued by the Ministry of Lands and Settlement to the Plaintiff dated 14th July, 2011 which was annexed, and which he states is also set out in the Plaintiff's List of Documents dated 9th August, 2012 and annexed to its application dated 9th August, 2012. The Defendant states that he together with his Advocate conducted a search of the relevant file from which the aforesaid letter emanated, and were directed to one F. K. Karuri at the Ministry of Lands who is purported to have undersigned the said letter on behalf of the Commissioner of Lands. Further, that upon showing the aforementioned letter to the said Mrs. Karuri she stated that the letter was not genuine for several reasons that were given in the Defendant's affidavit, and denied ever writing the said letter.

The Defendant further stated that he applied to the Ministry of Lands through a letter from his Advocate dated 29th August, 2012 for a letter verifying the authenticity of the aforementioned letter of 14th July, 2011. The said letter was addressed to a Mr. Mburugu, to whom the Defendant had been referred by Mrs. Karuri as the person responsible for legal affairs in the Ministry of Lands. The Defendant claimed that the

said Mr. Mburugu upon perusing the purported letter of 14th July, 2011 furnished him with a letter dated 29th August, 2012 which sets out the fact that the letter purportedly issued to the Plaintiff on 14th July, 2011 was fraudulent. The Defendant annexed the two letters dated 29th August 2012. The Counsel for the Defendant also averred in his submissions that the Plaintiff had failed to authenticate the letter of 14th July 2011 despite orders given by Honourable Lady Justice Ang'awa that it does so.

The Plaintiff opposed the application in a replying affidavit sworn by its Executive Director, Hilary Kazoora, on 13th September 2012, wherein he also relied on his affidavit sworn on 9th August 2012 and Further Affidavit sworn on 17th August 2012 with regard to their application dated 9th August 2012. The Plaintiff's counsel also made oral submissions during the hearing of the application. The Plaintiff averred that its occupation of the suit property was sanctioned by the Office of the President by its letter of 17th June 1994 which was annexed, and that the Plaintiff has been in occupation of the suit property and running a school and other charitable functions to date. Further, that the allegations raised by the Defendant that the letter from the Ministry of Lands is a forgery requires further investigation and calling of the authors of the two letters from the Ministry of Lands, who have not filed any affidavits to support the allegations stated by the Defendant. It was submitted that these are matters that can only be solved after the main hearing.

The Plaintiff also claimed that if the alleged letter from the Ministry of Lands dated 14th July, 2011 was a fraud as stated, the Director of Physical Planning could not have deposited the Development Plan for public inspection as provided for under the Physical Planning Act, and the Plaintiff annexed a copy of a Notice of Completion of Part Development Plan dated 28th August 2012 from the Director of Physical Planning in this regard. Also annexed was a letter from the Commissioner of Lands dated 17th November 2011 addressed to the Director of Physical Planning asking him to prepare the necessary plans. Counsel for the Plaintiff further submitted that the Defendant should have applied for review of the orders of Honourable Justice Anga'wa and not for striking out of the suit.

I have carefully read the pleadings in this suit, and have also given due consideration to the evidence and the submissions made by the learned counsels appearing. The issue to be determined is whether the Plaintiff should be struck out in the circumstances presented in the Defendant's application. The law on striking out of pleadings is stated in Order 2 Rule 15 of the Civil Procedure Rules and in various judicial decisions. Order 2 Rule 15(1) provides that:

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court,

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

The salient principles that apply to striking out of pleadings are that this is a draconian measure to be employed sparingly, and the grounds for striking out must be plain on the face of the pleadings and from the facts alleged by the parties. This was stated by the Court of Appeal in D.T.Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 as follows at page 9:-

“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.”

The origin of the Defendant’s application is the Plaintiff and application both dated 9th August 2012 and filed by the Plaintiff on 13th August 2012. The Plaintiff in the said Plaintiff claimed to have been allocated the suit property namely L.R UNS Plot. No. B ODONGO KIBERA by the Provincial Administration in 1994, wherein they have established and are running a school, until the Defendant threatened to evict them. The prayer in the said Plaintiff is for an order restraining the Defendant from trespassing on, evicting them from, or transferring the suit property. Similar prayers for a temporary injunction were sought in the application dated 9th August 2012 and granted by Honourable Justice Ang’awa on 17th August 2012.

The Plaintiff has relied on two main documents to show its claim. The first is a copy of an allocation letter by the Provincial Administration dated 17th June 1994. The said letter reads as follows:

“Bro. Peter M. Orioro
Brothers of St. Lwanga
P.O. Box 39580
NAIROBI

RE: TEMPORARY CLASSES

Refer to your letter Ref not written dated 15th June 1994 on the above subject within Kibera Slums. You are hereby authorized to put up temporary classes for an informal school within the slums.

Please note that the structures must be temporary in nature just like the slums until you are allocated any other space by the Commissioner of Lands as discussed.

(J.K. SELIM)
DISTRICT OFFICER
SOUTHERN DIVISION
KIBERA”

It is clear from the said letter that there was no allocation of any parcel of land and furthermore, nor is there is any reference to the suit property therein.

The disputed letter from the Commissioner of Lands dated 14th July 2011 on its part reads as follows:

“Ref. 91082532/114
BROTHERS OF ST CHARLES LWANGA
(BANNAKAROLI BROTHERS)
P.O. BOX 76510-00508
NAIROBI

Dear Sir,

Re: UNS PLOT NO ‘B’ ODONGO KIBERA

We received your application on 9th May 2011 for the above plot. So far we have done the sketch of the plot. We did site inspection and we are processing your documents for the plot so that you can legally own the plot for the community projects. Please bear with us.

Your obedient servant,

F.K. Karuri

For Commissioner of Lands”

This is also clearly not an allocation letter, but an update of action being taken by the office of Commissioner of Lands with regard to an application by the Plaintiff dated 9th May 2011. It is also clear from the letter from the Commissioner of Lands dated 17th November 2011 addressed to the Director of Physical Planning that the said Director was being requested to “prepare the necessary plans to allow for issuance of letters of allotment to the school”.

From the Plaintiff’s pleadings and evidence it is plainly obvious that there is no valid allocation of the suit property to it by any relevant authority, and this suit is therefore premature. It is also not one which can be redeemed or cured by any sort of amendment save by the Plaintiff producing evidence of valid allocation, and until then it would clearly be a waste of precious judicial time and an abuse of the court process to proceed with this suit. For this reason the suit herein is hereby struck out with costs to the Defendant.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____11th____ day of ____December____, 2012.

P. NYAMWEYA

JUDGE