REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT KITALE

Civil Suit 41 of 2004

MOSES WATAYI KITERESI.....PLAINTIFF/RESPONDENT

V E R S U S

DANIEL WANYONYI.....1ST DEFENDANT

ROSINA MUSAMIA.....2ND DEFENDANT

DIRECTOR OF SURVEYS.....3RD DEFENDANT

R U L I N G

The 1st and 2nd defendants have moved the court by way of a chamber summons, brought pursuant to the provisions of Order 6 rule 13 (1) (a), (b) and (d) of the Civil Procedure Rules. Through that application, the applicants seek the striking out of the suit, as they believe that the suit discloses no reasonable cause of action. They also believe that the suit was frivolous, scandalous, vexatious, and that it was otherwise an abuse of the process of the court.

The applicants view was that the case against them was to be discerned from paragraph 6 of the Plaint, in which it is said that they had been sued for having lodged a complaint on behalf of Shangalamwe Farm.

In effect, the applicants feel that the suit against them was of a representative nature, as they were sued in their capacity as members of the said Shangalamwe Farm.

Notwithstanding that position, the applicants pointed out that the plaintiff had not obtained leave of the court to bring a representative action. Furthermore, the plaintiff is faulted for failing to obtain the directions of the court, as provided for in Order 1 rule 8 of the Civil Procedure Rules.

Had directions been sought and obtained, the applicants believe that the plaintiff would then have been required to issue notices to all the members of Shangalamwe Farm, about the existence of this suit.

In any event, the 2nd defendant says that she had never been an official of Shangalamwe Farm. Therefore she submits that she ought never to have been sued.

Thirdly, the applicants submitted that the plaint did not disclose any cause of action against them. Their reason for so saying was that the act of lodging a complaint with the District Surveyor could not constitute a cause of action, even if the said report was false.

Then again, the applicants noted that the District Surveyor who is accused of creating a road on the plaintiff's property, is not a party to this suit. Instead, it was the Director of Surveys who had been sued.

According to the applicants, the person who ought to have been sued was the Attorney General, as the Director of Surveys was not a legal entity who could sue or be sued.

Finally, the applicants submitted that if the District Surveyor had wrongly created a road on the plaintiff's property, the plaintiff should have invoked judicial review.

In answer to the application, the plaintiff first said that it was fatally defective, as the applicants had filed two supporting affidavits, whereas none was admissible pursuant to Order 6 rule 13 (1) (a) of the Civil Procedure Rules.

The plaintiff also insisted that the applicants had not been sued in any representative capacity.

Thirdly, the plaintiff points out that his is a declaratory suit, aimed at setting the record straight, so that it is made clear that the alleged access road did not exist on his property, as had been asserted by the defendants.

The plaintiff also submitted that the Director of Surveys was the correct party to be sued, because it is on his instructions that the District Surveyor undertakes work.

Having given due consideration to the application, I take the following view of the matters raised.

First, the Director of Survey is not a party to this application. He has not sought the striking out of the suit. He has not said that the plaintiff should not have sued him, or that the suit, if any, should have been directed against the Attorney General.

Therefore, in so far as the applicants do not purport to act for him, I hold that the applicants have no capacity, in law, to make a case for the Director of Survey.

Accordingly, whether or not the Director of Survey is a legal entity capable of suing and of being sued, is an issue that I decline to express a view on, in this application, as the persons who raised it had no locus to do so.

In the same vein, whether or not the District Surveyor only undertakes work on the instructions of the Director of Survey, and whether or not that is what happened in this matter, will be a question of evidence and law, to be led by the parties concerned. Until and unless it is raised appropriately, it remains a hypothetical question, which the court is not supposed to adjudicate upon.

Meanwhile, Order 1 rule 8 of the Civil Procedure Rules provides as follows;

" (1) ***Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested.***

(2) The court shall in such case direct the plaintiff to give notice of the institution of the suit to all such persons either by personal service or, wherefrom the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under subrule (1) may apply to the

court to be made a party to such suit."

That rule was given some consideration by Court of Appeal in ***DESAI V PATEL & CIVIL***

ENGINEERING SERVICES & 13 OTHERS [2001] KLR 120. The court said that;

*" **As it stood, the suit was clearly a representative suit and the first respondent ought to have (assuming he had sued correct parties) applied under Order 1 rule 8 of the Civil Procedure Rules for directions to the effect that the plaintiff (the first respondent here) gives notice of institution of the suit to all members either personally or by public advertisement if personal service was not reasonably practicable."***

The question that must first be addressed in this case is whether or not the suit is a representative one.

The applicants say that it is representative because they had been sued as members of Shangalamwe Farm. On the other hand, the plaintiff insists that the defendants had been sued in their personal capacities.

The applicants pointed out that in paragraph 6 of the plaint, they were described as persons who had lodged a dispute with the District Surveyor, alleging that the plaintiff had closed an access road. The said dispute was said to have been lodged by the applicants, on behalf of the members of Shangalamwe Farm.

Does that render this suit a representative action?

If one looks at paragraph 9 of the plaint, one may say that when the plaintiff asserts that members of Shangalamwe Farm have no right of access through his land, that implies that he has issues against the said members of the farm.

But, at the same time, in paragraph 5 of the Plaint, it is expressly stated that the 1st and 2nd defendants;

*" **are Chairman and Secretary of Shangalamwe Farm and are proprietors of L.R. NO.5389/7 which land borders that of the plaintiff."***

Furthermore, in the prayers sought in the Plaint, it is clear that the plaintiff wants a permanent injunction to restrain the defendants, their servants or agents from trespassing on the suit land. No orders are sought expressly against the other members of Shangalamwe Farm, save to the extent that the trial court might declare that the creation of an access road on L.R NO.5389/8 is null and void. Such a declaration would not be an order directed at the members of Shangalamwe Farm only. The orders, if granted, would be effective as against the whole world. In effect, no reliefs are sought against members of Shangalamwe Farm.

That fact, coupled with the express pronouncement in the Reply to Amended Defence indicate that the plaintiff does not purport to have a representative action against the members of Shangalamwe Farm. Therefore, there is no need for the court or the defendants insisting otherwise.

In the result, members of Shangalamwe Farm are entitled to assume that no orders can be made expressly against them, by virtue of their being members of that farm.

Next, I ask myself if the application was fatally defective, for having relied on two supporting affidavits, notwithstanding the fact that it had invoked Order 6 rule 13 (1) (a) of the Civil Procedure Rules.

In the case of ***DESAI V PATEL T/A SANDPIPERS CONSTRUCTION & CIVIL ENGINEERING SERVICES & 13 OTHERS (above-cited),*** the Court of Appeal quoted with approval, the following words in the case of ***MELIKA VS MBUVI, CIVIL APPEAL NO.267 OF 1997;***

*" **We accept that the particular sub-rule of rule 13 of order VI of the Civil Procedure Rules, under which an application to strike out is made, should be specified and that, when the application has been brought to strike out a pleading on the only ground of it disclosing no cause of action, no***

affidavit evidence may be relied upon. We at the same time note that there is no bar to such an application to strike out a pleading being based on any or all the grounds mentioned in the rule, provided that such grounds have been specified."

In this application, the applicants specified the three grounds upon which they were seeking the striking out of the plaint. In total, they specified three grounds including subrule (1) (a).

As the Court of Appeal said, there is no bar to relying on more than one ground. Also, it is only if an applicant was relying on subrule (1) (a) alone that he is not permitted to rely on affidavit evidence. In the circumstances, the application is not defective, as had been asserted by the plaintiff.

Another issue that arose is as regards the disclosure of a cause of action.

In my understanding of the claim against the applicants, it is to the effect that they caused the District Surveyor to create an access road on the Plaintiff's property, whereas no such road ought to be there. In other words, it is not simply the question of lodging a complaint (or dispute, as the plaintiff calls it), that the plaintiff takes issue with. Ultimately, the plaintiff seeks a declaration that there should be no access road through his farm. And, the applicants were cited as the two persons who initiated the action which led the District Surveyor to create the access road.

In a ruling delivered on 9/5/2006, the Hon. Karanja J. said;

" According to the surveyor, the sub-divided parcels i.e. No. 6 and 7 are the ones which were supposed to provide the access road. The defendants/respondents cannot therefore be allowed to forcefully demarcate the access road inside the plaintiff's land. After considering all the affidavits for and against the application along with the said annexetures and PW1's (Surveyor) testimony, I am satisfied that the plaintiff has established a prima facie case with a probability of success."

As my learned sister judge has already held that the plaintiff had established a prima facie case with a probability of success, and as that holding has not been reviewed or upset on appeal, I find no basis in law for contradicting that holding. If I were to conclude that the plaint discloses no cause of action against the applicants, I would have negated the ruling dated 9/5/2006.

Being a court of concurrent jurisdiction, I find no justification in contradicting a holding which has not been challenged directly by the parties who now appear to be seeking a reversal thereof through a side – wind.

If the 2nd defendant is not an official of the Shangalamwe Farm, should not the case against her be struck out, in any event?

Had I come to the conclusion that this was a representative action, I would have had no hesitation in striking out the suit as against the 2nd defendant, on the grounds that she was not one of the parties to be sued on behalf of the Shangalamwe Farm. But, for now, it is noted that the plaintiff alleges that the 2nd defendant is one of the proprietors of L.R NO.5389/7, which land is said to border the plaintiff's land. Therefore, it is conceivable that even though the 2nd defendant was not an official of the Shangalamwe Farm, the plaintiff may yet sustain a claim against her personally, by virtue of the alleged ownership of land which borders the plaintiff's property.

In the result, I decline to strike out the plaint. In doing so, I have reminded myself that the power to strike out a pleading is not to be exercised lightly. Indeed, the court ought only to exercise that power if it is persuaded that the pleading is so hopeless that there was no need to continue having it hanging over the head of the opposite party, as the case would ultimately fail.

In this case, the court had already concluded that the plaintiff had established a prima facie case with a probability of success. Therefore, I cannot, in all fairness, countermand that finding.

The application is dismissed with costs.

Dated and Delivered at Kitale, this 21st day of January, 2008.

FRED A. OCHIENG

JUDGE

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