REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL CASE 97 OF 2001 (O.S)'

TEBELGA CHEPNGENO TELE.....1ST PLAINTIFF

TABLULE TELE.....2ND PLAINTIFF

VERSUS

KIPKOSGE TELE.....DEFENDANT

RULING

The defendants filed an application under Order VI Rules 13 (1) (b) and 16 of the Civil Procedure Rules seeking to have the plaintiffs' suit struck out on the grounds that the same was frivolous. The grounds in support of the application are that the defendants' contend that parcel No. Kericho/Kapkatet/1390 which is the subject matter of the suit ceased to exist on the 14th November, 2001 prior to the filing of the originating summons on the 28th November, 2001. The defendants further stated that the decision of the Land Control Board granting consent for mutation could only be nullified through Judicial Review and not by way of Notice of Motion application in an originating summons for adverse possession. The application is supported by the annexed affidavit of Kipkoskei Arap Tele, the 1st defendant. The application is opposed. The plaintiffs filed grounds in opposition to the application. They also relied on an affidavit which was filed Tabelga Chepngeno Tele on the 12th May, 2006.

At the hearing of the application, I heard the submissions made by Mr. Oboso on behalf of the defendants. He submitted that the suit ought to be struck out because the subject matter of the suit ceased to exist once consent was granted by the Land Control Board for the sub-division of the said parcel of land. He submitted that the prayers sought by the plaintiffs to be declared to be in adverse possession of a parcel of land, cannot be granted since the parcel of land in question was no longer in existence. He submitted that the plaintiffs abused the due process of the law when they sought to have the consent of the Land Control Board set aside in these proceedings instead of filing an appropriate application for Judicial Review. Mr. Oboso submitted that it was clear that the plaintiffs' suit lacked merit and its continued pendency before this court would delay the just determination of the matter in dispute between the plaintiffs and the defendants. He urged this court to allow the application with costs.

Mr. Siele for the plaintiffs opposed the application. He submitted that the defendants had not established that the title in respect of LR No. 1390 was no longer in existence. He submitted that the Land Control Board which allegedly granted consent for the suit land to be subdivided was not properly constituted by the time it purported to have granted the said consent to subdivide. He further submitted that the issues contained in the defendant's application were already on record and would be comprehensively dealt with in an application which was filed earlier by the plaintiffs seeking appropriate reliefs from this court. He submitted that the advocate on record for the defendants was improperly on record and was not therefore authorized to argue the application on behalf of the defendants because he had not filed his notice of change of advocates. He submitted that the suit filed by the plaintiffs was properly in court and in fact directions had been issued by the court on the 20th March, 2002 converting the originating motion into a normal suit. He submitted that the matters in dispute involved land and should ideally disposed off in a full trial. He urged the court to dismiss the defendant's application with costs. I have considered the rival submissions made by the learned counsels for the plaintiffs and defendants. I have also read the pleadings filed by the parties to this application. The issue for determination by this court is whether the defendants have established that the plaintiffs' suit is so hopeless that it should be struck out as being frivolous. The principles to be considered by this court in determining whether or not to allow an application for striking out are well settled. In DT Dobie & Co. (K) Ltd, vs. Joseph Muchina [1982] KLR 1 Madan J.A. held at

page as follows:

"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross examination in the ordinary way".... No suit should 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 the case before it".

In the present application, the defendants are alleging that the suit land, which is the subject matter of this suit, is no longer in existence since the title in respect of the said parcel of land ceased to exist when the land was subdivided. Mr. Oboso submitted that the originating motion was filed after the Land Control Board had granted consent to the said subdivision. On the other hand, Mr. Siele submitted that the defendants had not established that the said parcel of land had ceased to exist. I have looked at the pleadings filed by the plaintiffs in this suit. The plaintiffs are claiming a specific portion of the original parcel of land known as Kericho/Kapkatet/1390 by virtue of the fact that they are in possession of the said parcel of land. It is clear that the dispute between the plaintiffs and the defendants is not a simple dispute which can be said to only involve issues of the physical title to land. It involves possession of land. It is also clear that the issues in dispute between the plaintiffs and the defendants has been festering for a very long time.

Although the defendants have submitted that the original parcel of land known as Kericho/Kapkatet/1390 ceased to exist when the same was subdivided, in my considered opinion, that is a matter which can be cured by amendment. I agree with Mr. Siele that the matter in dispute is land. The Court of Appeal has severally held that land disputes being very sensitive in this country should ideally be determined on merits and not on mere technicalities. I am sure that if this court were to allow the defendants application and strike out the plaintiffs' suit, the plaintiffs would in one way or the other still seek the resolution of the dispute either before this court or before another forum.

It is therefore only right that this court should have the dispute between the plaintiffs and the defendants involving the suit land determined on merits. I do not agree with Mr. Oboso that the fact that a number of a title of a parcel of land has been changed implies that the people who are in occupation of a specific portion of the said parcel of land cannot ventilate their case before this court on adverse possession. The lacunae in the plaintiffs' suit can be rectified by amendment.

The upshot of the above reasons is that the defendant's application to strike out the plaintiffs' suit lacks merit and is hereby dismissed with costs.

DATED at Kericho this 22nd day of March, 2007

L. KIMARU

JUDGE