



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Case 203 of 2005

SUSAN WAIRIMU NDIANGUI.....PLAINTIFF/APPLICANT

VERSUS

PAULINE W. THUO.....1ST DEFENDANT/RESPONDENT

JOHN G. MBOTE.....2ND DEFENDANT/RESPONDENT

RULING

On 28th July, 2005, the applicant filed an application seeking injunctive orders to restrain the respondents from selling, disposing of, transferring or interfering with the plaintiff's/applicant's quiet possession of **DUNDORI/LANET BLOCK 5/303 KIAMUNYEKI "A"** or dealing with the said land in any manner whatsoever.

The court granted interim orders *ex parte* as prayed and fixed the application for inter partes hearing on 8/8/2005. But before the said application was heard, the respondents filed a notice of preliminary objection to the effect that the suit was an abuse of the court process and ought to be struck out with costs. I wish to pause here and point out that a preliminary objection should not be drawn in a manner that is vague and non disclosing of the point of law or issue that is intended to be raised. It should clearly inform both the court and the other party or parties in sufficient details what to expect. That way, the opposing party will not be taken by surprise and may either concede to the same or prepare himself to counter the objection and thus save time and enhance the quality of the legal output.

Mr. Githui for the respondents, in arguing the preliminary objection, submitted that there is pending in court a suit that raises substantially the same issues as in the present matter, that is **HCCC NO. 533 of 1999**. The said suit was between among others, the plaintiff/applicant and the representatives of the estate of Mukuru Mbote. He submitted that a suit which makes a party to fight a court battle twice was an abuse of the court process.

Mr. Githui also accused the applicant of having failed to make a full and frank disclosure of all the material facts at the time when she applied for the *ex parte* orders. For example, in the plaint, the plaintiff/applicant had stated that there was no other suit pending and in the verifying affidavit she had stated that what was deposed to therein was true and correct yet in paragraph 9 of the affidavit in support of the application, the plaintiff/applicant had admitted that there were other suits pending in the court. The defendant's/respondent's counsel further submitted that the plaint as drawn could not be a basis for an order of cancellation or nullification of the title deed for **Dundori/Lanet Block 5/303** as there was no provision in law which granted this court power to cancel a title, saying that Section 143 of the Registered Land Act provided only for rectification of the register by the court but only where fraud had been alleged and proved strictly. He relied on the case of ***MUSANGA VS NYATI [1984] KLR 425***.

Mr. Waiganjo for the applicant opposed the preliminary objection and saw it as having been raised with the intention of causing delay in the disposal of the matter. He submitted that the subject matter in **HCCC NO. 533 of 1999** was different from the subject matter herein, the former one being a business dispute whereas in the latter, the dispute was over ownership of the parcel of land in question, **Dundori/Lanet Block 5/303 Kiamunyeki "A"**. Another difference between the two suits was that the defendants/respondents in the present suit are not parties in the said case. He contended that the plaintiff/applicant had disclosed to the court that there was an issue relating to the suit land that was already in court but that other dispute arose out of the continued use of the land by the defendants/respondents.

Lastly, Mr. Waiganjo submitted that the plaintiff's/applicant's suit was sustainable insofar as the provisions of Section 143 of the Registered Land Act were concerned and in any event, the plaintiff/applicant could still amend the plaint to include particulars of fraud.

I have carefully considered the issues raised by advocates for the respective parties herein.

The first issue which I have to determine is whether the issues raised in this matter are substantially the same as those raised in **HCCC NO. 533 of 1999**. The second issue is whether there was full disclosure of all the material facts by the plaintiff/applicant in bringing the present suit and obtaining of the *exparte* orders that were granted on 29/7/2005 and the third issue for this court's determination is the propriety of this suit in light of the provisions of Section 143 of the Registered Land Act.

In **HCCC NO. 533 of 1999**, Susan Wairimu (the sole plaintiff/applicant in this matter) filed the suit together with Daniel Boragu and Susan Wairimu against George Gichimu, then the late Stephen Mbote applied to be joined as an interested party. Pauline Wangari Thuo and John Gathu Mbote who are the defendants/respondents in this suit are the administrators of the estate of Stephen Mbote Mukuru (deceased). The plaintiffs/applicants in **HCCC NO. 533 of 1999** alleged that they entered into a partnership with George M. Gichimu to start a mixed boarding school by the name **St. George's Grassland Academy** on **Plot No. 303** situate on Kiamunyeki Farm which was said to be owned by the plaintiff/applicant in this matter, Susan Wairimu Ndiangu. The plaintiffs/applicants therein alleged that there was fraud by the defendant/respondent in the running of the said partnership and prayed for orders, *inter alia*, compelling the defendant/respondent therein to render true and accurate statement of accounts and for share of profits of the said partnership.

In the present suit, the plaintiff/applicant claimed that she was the lawful allottee of the aforesaid **Plot No. 303** also known as **Dundori (Lanet Block 5/303 Kiamunyeki "A"** but alleged that on or about 15th July 1997 the late Stephen Mbote Mukuru unlawfully allowed a title deed to issue to himself. She therefore sued the administrators of the said deceased person seeking a declaration that she was the owner of the said premises, an order canceling and or nullifying the said title deed and an injunction to restrain the defendants from disposing of the land or interfering with her quiet possession of the land.

In my view, the issues raised in the two matters are not substantially the same as would entitle this court to hold in favour of the respondent. They may relate to more or less the same parcel of land but the prayers therein are entirely different. I therefore overrule the first limb of the preliminary objection.

Turning to the second limb of the preliminary objection, there is no dispute that in all proceedings and particularly in *exparte* proceedings, there should be full and frank disclosure to the court of all the relevant facts of the matter as known to an applicant and failure to make such a disclosure may result in discharge of any *exparte* orders that may have been granted, see **THE MV LILIAN S VS CALTEX OIL (KENYA) LTD** [1989] KLR 1.

In the present suit, the plaintiff/applicant stated in paragraph 13 of her plaint that:-

"There is no other suit pending in any court in Kenya over the subject matter herein between the parties herein."

In the affidavit which the plaintiff/applicant swore in support of her application for injunction, she deposed in paragraph 9 as follows:-

“That later the partners of the said school disagreed giving rise to numerous suits currently pending in court (annexed herewith are copies of the pleadings marked SWN 6)”.

In my view, the above deposition is not entirely true. In **CMCC No. 2344 of 1995**, the subject matter of the dispute was the same **Plot No. 303** at Kiamunyeki Farm, just as in the present case. The plaintiff/applicant was **Stephen Mbote Muruku (now deceased) Vs George Gichimu**. The parties are not the same as in the present suit before the court but the subject matter is the same. But the parties and the subject matter in **HCCC No. 533 of 1999** are different from those in the present suit. I do not know whether **CMCC No. 2344 of 1995** is still on going or not but the plaintiff/applicant seemed to indicate that the same was still pending in court.

However, the fact that the plaintiff/applicant chose to exhibit copies of all the pleadings in the various matters that are related to the suit herein demonstrates her **bona fides** and she cannot be accused of deliberately failing to make frank disclosure of any relevant facts that were within her knowledge. Her duty was to make full and fair disclosure of any material that she considered to be relevant and which she thought the court was entitled to know as it dealt with the application. It is the court which determines what is material. I am therefore satisfied that the applicant made a full disclosure of the relevant material facts and that the ex parte orders were properly granted.

What is the propriety of the case in light of the provisions of Section 143 of the Registered Land Act? The said provision of the law states as follows:-

“143(1) Subject to subsection (2) the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake.

(2) The register shall not be rectified so as to affect the title of a proprietor who is in possession and acquired the land, lease or charge for valuable consideration, unless such proprietor had knowledge of the omission, fraud or mistake in consequence of which the rectification is sought, or caused such omission, fraud or mistake or substantially contributed to it by his act, neglect or default”.

I have perused the pleadings filed by the parties and noted the averments made by both of them with regard to the manner in which they respectively claim rightful entitlement to the suit premises. In my view, these are not issues which can be resolved by way of a preliminary objection, bearing in mind what was stated by Sir Charles Newbold, P in **MUKISA BISCUIT CO. VS WEST END DISTRIBUTORS LTD** [1969] E.A. 696 at Pg. 701 that a preliminary objection raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. Such an objection cannot rightly be taken if the facts have to be ascertained by way of taking evidence.

While I am alive to the provisions of Order VI Rule 8 of the Civil Procedure Rules which require all pleadings to contain the necessary particulars of any claim, defence or any other matter pleaded including particulars of misrepresentation, fraud or breach of trust, I am equally alive to the well accepted legal principle that the power to strike out pleadings should be exercised only after the court has considered all the facts in a matter. In **D.T. DOBIE & COMPANY (KENYA) LTD VS MUCHINA** [1982] K.L.R. 1, Madan JA stated that the court should aim at sustaining rather than terminating a suit and that a suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. That cannot be said of the plaintiff's/applicant's suit herein. In any event, I have already expressed my view that the last limb of preliminary objection should not have been raised as it required evidence to be adduced before its determination.

All in all, I overrule the preliminary objections and dismiss the same with costs to the plaintiff/applicant. Counsel should proceed to fix a hearing date for the substantive application dated 28/7/2005.

DATED, SIGNED AND DELIVERED at Nakuru this 21st day of September, 2005.

D. MUSINGA

JUDGE

21/9/2005

Ruling delivered in the open court in the presence of Mr. Waiganjo for the respondent and Mr. Githui for the respondent.

D. MUSINGA

JUDGE

21/9/2005