



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 273 OF 2018

1. KAHIA TRANSPORTERS LTD

2. TRADE LEAD LTD.....PLAINTIFFS

VERSUS

1. CHUNKY LTD

2. CURLY WURLY LTD.....DEFENDANTS

RULING

1. The application for determination is the notice of motion dated 7TH October 2020 by the 3rd defendant/applicant brought under Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act and the inherent powers of the court. The application seeks to set aside the ex-parte orders issued on 24th July 2017 and for the plaint herein to be struck out and the suit dismissed with costs to the applicant. The application is premised on the grounds on the face of the motion and supported by the affidavit of Julius Kea Mbawa sworn on 7th October, 2020 and further affidavit sworn on 26th November, 2020.

2. The applicant's case is that he is one of the administrators of the estate of Mbawa wa Mbinu the registered owner of all that parcel of land being LR. NO. 224/V/MN, CR 4155 while the 1st defendant is the registered owner of the property comprised in TITLE NO. CR.7239/I (PLOT NO.MN/VI/909) and the 2nd defendant is the registered owner of the property comprised in the title CR 7964 (PLOT NO. MN/VI/910). That the said properties are situate in Kwale County and shares common boundary with the applicant's property. It is the applicant's contention that whereas the plaintiffs seek to rely on alleged title NO. CR.68639 (PLOT NO. MN/VI/5154) CR 68637 (PLOT NO.MN/VI/5154 CR.68273/(PLOT NO.MN/VI/5141) in respect of property purportedly situate in Mombasa County in order to lay claim over the defendants property, the applicant states that the said plaintiffs' titles are *ab initio* illegal, unlawful and non-existent. The applicant avers that the Director of Surveys in a report established that the Deed Plans procured by the plaintiffs were irregularly and illegally acquired as well as overlap the defendants parcels of land PLOT NO. MN/VI/909 and MN/VI/910. The applicant has annexed copies of a determination by the National Land Commission dated 18th December, 2015, letters dated 18th April 2018, 30th April 2019 and 15th September, 2020 and surveyors report. The applicant submitted that the application ought to be allowed on the inherent power of the court to strike out suit and that the plaintiffs have no locus standi for this suit to proceed to full hearing. The applicant's counsel relied on the case of **Kenya Power and Lighting Company Ltd v- Benzene Holdings Ltd Ha Wyco Paints (2016)eKLR**; **Stephen Somek Takwenyi and Another -v- David Mbuthia Githare and 2 Others Nairobi (Milimani) HCCC No. 363 of 2009**; **Juletabi African Adventure Limited and Another -v- Christopher Michael Lockly (2017)eKLR**; and case of **Beatrice Mberu Maser -v- Joseph Herman Mukasa Ssemuju(2015)eKLR**.

3. In opposing the application, the plaintiffs filed a replying affidavit sworn by Osman Ahmed Kahia on 13th November, 2020. The plaintiffs argue that the orders were issued in respect of the 1st and 2nd defendants and the applicant is not their attorney, hence the application is misplaced. That the applicant was never served with the said orders of 24th July, 2017 nor has he explained how he came into possession of the same and cannot purport to act for the 1st and 2nd defendants to whom the orders were directed to. The plaintiffs deny that their properties have overlapped that of the 1st and 2nd defendants PLOT NOS. LR. NO. 909 and 910/VI/MN and stated that the basis of the matter herein is the 1st and 2nd defendants entering and excavating the plaintiffs' parcel of Land known as PLOT NOS. 5141, 5153 and 5154/VI/MN, Mombasa. That unless the issue of ownership are resolved there is need to preserve the status quo till the matter is resolved. The plaintiffs aver that the 1st and 2nd defendants' titles are forgeries while the plaintiffs' titles are genuine. The plaintiffs have annexed copies of the Order dated 24th July, 2017, Report by Edward Kiguru Land Surveyors, Investigation Report by the National Land Commission, report by the Ministry of Lands and Physical Planning and pleadings in ELC No. 92 of 2020. It is the plaintiffs contention that there is no good reason or ground to justify the setting aside of the orders of 24th July 2017 before the full trial of this matter.

4. The plaintiffs submitted *inter alia*, that this being a case where both the plaintiffs and the defendants are claiming to be the rightful owners

of the suit properties, the status quo ought to be maintained by having the orders issued on 24th July, 2017 in force till the matter is resolved by full trial. The plaintiffs relied on the case of **Kenya Ports Authority & Another –v- Kaba Investments Ltd & 8 Others (2019)eKLR**. The plaintiffs submitted that they are the registered owners of the suit property and hold legal and valid titles that have not been cancelled. That they have a right to bring the instant suit and have *locus standi*. They also relied on the case of **Grace Mwakiria Mugambi-v Philip Kimani (2018)eKLR** and submitted that the suit ought not be struck out and dismissed, this being a case where there exists competing titles on the same properties. That it is imperative that the court gets the opportunity to hear all the parties concerned in a trial, evaluate all the documents produced by both parties before determining who holds the correct and genuine title. That the suit discloses a reasonable cause of action and it is not an academic exercise nor an abuse of the court process. That the applicant who seeks to have the suit struck out has no right to make the application as he has absolutely no interest in the suit property. The plaintiffs' counsel relied on the case of **Mohamed Sheikh Abdullahi & Another –v- National Land Commission & 3 Others; Kenya Deposit Insurance Corporation (Receivers of Dubai Bank of Kenya Limited & Another (Interested Party) (2019) eKLR** and **DT Dobie & Company Ltd –v- Joseph Mbaria Muchina & Another (1980)eKLR**.

5. I have considered the application and the rival submissions. The issues for determination are whether the ex-parte orders of injunction issued on 24th July, 2017 should be set aside and whether the plaintiffs' suit should be struck out and/or dismissed.

6. Upon perusing the notice of motion dated 24th July 2017 which was brought under certificate of urgency, and upon reading the supporting affidavit and annexures thereto, this court on 24th July, 2017 certified the application as urgent and allowed the application in terms of prayers 1 and 2 thereof. The applicants were directed to serve the application for inter-partes hearing on a date to be given at the registry on priority basis. The application was then fixed for hearing on 19th September, 2017. However on 3rd August 2017, the 1st and 2nd defendants brought an application under certificate of urgency seeking to set aside the ex-parte orders made on 24th July, 2017 and for the plaint to be struck out and the suit dismissed with costs to the defendants. The court directed that the defendants' said application be served for hearing on 19th September, 2017. Several other applications have been filed thereafter, including application for joinder of interested parties. The record indicates that on 1st April, 2019, the parties agreed that the interested parties be joined to the suit and further agreed that all pending applications be abandoned in favour of taking a hearing date for the main suit. Later, pursuant to an application dated 26th November, 2019, the applicant herein sought to be enjoined to the suit as a 3rd defendant. The matter was scheduled for hearing on 14th October, 2020. Interestingly, one week to the hearing date, the current application was filed by the applicant herein

7. The jurisdiction of the court to set aside an order of injunction is outlined under Order 40 Rule 7 of the Civil Procedure Rules which provides as follows:

“Any order for an injunction may be discharged or varied or set aside by the court on an application made thereto by any party dissatisfied with such order.”

8. In this case the orders issued on 24th July, 2017 were directed to the 1st and 2nd defendants. The 1st and 2nd defendants together with the plaintiffs and the interested parties had agreed to abandon all pending interlocutory applications in favour of hearing the main suit. This is a case where both the plaintiffs and the 1st and 2nd defendants are each claiming ownership of the suit property and either party hold what they regard as the genuine title. Injunctive orders are equitable reliefs granted at the discretion of the court. Further, the court will warn itself that at the time of granting interlocutory injunctive orders, including at the ex-parte stage, it is not dealing with the disputed facts to finality but only determining whether a party is deserving of injunctive orders. The court will also take into account that injunctive orders are issued whenever the suit property is in danger of disposition or alienation before the issues in dispute have been resolved. A party also seeks injunctive relief when he/she feels that his/her right has been infringed or threatened. In this case, I see no reason why an application to set aside the ex-parte orders has been brought when the parties themselves had agreed to have all pending applications abandoned in favour of the hearing of the main suit. I am not persuaded that the applicant has demonstrated why the interim orders of injunction should be set aside. A court of law only exercises its discretionary power to set aside an ex-parte order to avoid an injustice or hardship resulting from the existence of such order. As already stated, the said orders were directed to the 1st and 2nd defendants herein none of whom have complained about the existence of those interim orders. Indeed they were party to the agreement that the parties abandon all interlocutory applications in favour of having the main suit heard and determined. It is not clear how the orders are affecting the applicant who in any case the orders were not directed to. I am not satisfied that the justice of this case will be attained by setting aside the orders issued by the court on 24th July, 2017.

9. The other issue for determination is whether the plaint herein should be struck out and the suit dismissed. The principles which guide courts in determining an application for striking out pleadings are well settled.

In the case of **D.T. Dobie & Company (Kenya) Ltd –v- Muchina (1982)KLR**, the Court of Appeal stated as follows:

“.....the power to strike out should be exercised only after the court has considered all facts; but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case. The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is beyond redemption and incurable of amendment. As long as a suit can be injected with life by amendments, it should not be struck out.”

10. In the case of **Yaya Towers Limited –v- Trade Bank Limited (In liquidation) (2000)eKLR**, the Court of Appeal expressed itself as follows:

“A plaintiff is entitled to pursue his claim in our courts however improbable his chances of success unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial. It cannot be doubted that the court has inherent jurisdiction to dismiss that which is an abuse of the process of the court....”

11. In this case, both the plaintiffs and the defendants are claiming to be owners of the suit properties. Both claim to hold genuine titles and accuse the other of holding fraudulently procured titles. The court has to determine as to who the genuine owner of the suit properties are. For now, it is the plaintiffs' words against the defendants' words. It is only after trial that the truth will come out. This can only be possible by sustaining the plaintiffs' suit and subjecting it to full trial. Given the above positions, and in particular the fact that the plaintiffs are holding titles in respect of the suit properties, I find that this is not a case fit for striking out.

12. The upshot is that the 3rd defendant's notice of motion dated 7th October 2020 lacks merit and the same is hereby dismissed with costs to the plaintiffs.

13. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 22ND DAY OF MARCH, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE