



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 49 OF 2018

RAELI CHEPKURGAT CHELUGET.....1ST PLAINTIFF

JOHNSTONE KIPKOECH LANGAT.....2ND PLAINTIFF

LAURENCE KIMMUTAI LANGAT.....3RD PLAINTIFF

KENNETH KIPYEGON LANGAT.....4TH PLAINTIFF

(Suing as the joint administrator of the estate of Isiah Kiplangat Arap Cheluget – deceased)

VERSUS

WALTER EDWIN OMINDE.....1ST DEFENDANT

RULING

Walter Edwin Ominde, the 1st Defendant/applicant has come to court by way of an application dated 4/5/2020 praying that the suit herein be struck out for being statute barred under section 4 of the Limitation of Actions Act and that the suit be struck out from being scandalous frivolous and vexatious and that it will prejudice and embarrass the fair hearing of this case. That it will embarrass the fair trial and that it is an abuse of the process of the court.

The application is grounded on the fact that there are succession proceedings that affect the suit property thus Kericho High Court Case No. 14 of 2017 where the suit property is listed as an asset.

That the cause of action is founded on fraud over land sale agreement dated 9/6/2006 and is statute barred under Limitation of Actions Act.

That the deceased plaintiff raised the issue in Kisumu ELC No. 87 of 2015 Walter Edwin Ominde vs Isiah Kiplangat arap Cheluget where it is alleged that the deceased plaintiff never brought the issue of fraud to court.

It is alleged that the defendant took possession of the suit property upon execution and payment of the deposit on purchase of Kshs. 940,000 fenced and developed the property. The defendant holds a valid title to the land.

In the replying affidavit, the 2nd plaintiff states that the application is misconceived and that this court has no jurisdiction to determine issues of Succession.

Moreover, he states that the suit seeks to reverse an entry in the registry as it was fraudulent and irregular and therefore null and void.

The Respondent states that it was Mr. Chelagat who raised the issue of limitation and that was why the suit no. 87 of 2015 was withdrawn by the 1st defendant herein.

The issue as to whether the consent of the Land Control Board was signed by the deceased is before court and should be determined by the court after hearing the suit but not through application.

The questioned to be answered by this court is whether the pleadings by the plaintiff herein are scandalous vexatious and frivolous, a pleading is scandalous if it states (i) matters which are indecent; or (ii) matters that are offensive; or (iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or (iv) matters that are immaterial or unnecessary which contain imputation on the opposite party; or (v) matters that charge the opposite party with bad faith or misconduct against him or anyone else; or (vi) matters that contain degrading charges; or (vii) matters that are necessary but otherwise accompanied by unnecessary details.

The word “scandalous” for the purposes of striking out a pleading under Order 2 rule 15 of the *Civil Procedure Rules* is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous.

A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court’s time; or (v) when it is not capable of reasoned argument.

Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.

A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (iv) it is brought so that the party’s pleading should have some fanciful advantage; or (v). where it can really lead to no possible good.

Pleading tend to prejudice, embarrass or delay fair trial when (i) it is evasive; or (ii) obscuring or concealing the real question in issue between the parties in the case. It is embarrassing if (i) It is ambiguous and unintelligible; or (ii) it raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense; or (iii) it is a pleading the party is not entitled to make use of; or (iv) where the defendant does not say how much of the claim he admits and how much he denies.

A pleading which tends to embarrass or delay fair trial is described as a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action and lastly a pleading which is abuse of the process of the court really means in brief a pleading which is a misuse of the Court machinery or process.

A pleading is an abuse of the process where it is frivolous or vexatious or both.

In The Co-Operative Merchant Bank Ltd. vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999 the Court of Appeal stated as follows:

“The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue...A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The appellant’s defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did.”

47. In Yaya Towers Limited vs. Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000 the same court expressed itself thus:

“A plaintiff is entitled to pursue a claim in our courts however implausible and 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. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved...If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some ways an abuse of the process of the Court or is unarguable...Where the plaintiff brings an action where the cause of action is based on a request made by the defendant he must allege and prove inter alia, both the act done and the request made for doing such an act. In the absence of any request shown to have been made by the defendant in the particulars delivered of such allegation, it would not be possible for the plaintiff to prove any request made by the defendant and without this the essential ingredient of the cause of action cannot be proved and the plaintiff is bound to fail...No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”

I have considered the application, responses and rival submissions and the aforementioned authorities and do find that the 1st defendant in ELC No. 87 of 2015 never raised the issue of fraud and that he only pleaded limitation of time but the suit was withdrawn before determination.

The fact that the deceased defendant in 87/2015 pleaded the defence of limitation under the limitation of actions act does not imply that the case is also filed out of time. Moreover, the 1st Defendant has not pleaded limitation in this matter. The Plaintiffs herein have pleaded and

have raised the issue of fraud, irregularity which are not frivolous and vexatious. I do find the application misconceived as the plaintiffs raise many triable issues that border on fraud and illegality. The application does not address these issues but is intended to terminate the suit on a technicality. The same is dismissed with costs. Parties to take a hearing date for the main suit.

DATED AT KISUMU THIS 18th DAY OF MARCH, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE