



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 131 OF 2020(OS)

REHEMA KAZUNGU BAYA.....PLAINTIFF

VERSUS

TULIP DEVELOPMENT LIMITED...DEFENDANT

RULING

1. Before me for determination is the Notice of Motion dated 18th November, 2020 by the Defendant seeking for orders that the suit herein be struck out with costs. The application is premised on grounds that the suit herein is frivolous, scandalous and vexatious as the Plaintiff has previously filed two suits namely, ELC No. 82 of 2017 and ELC No.120 of 2017 against the Defendant seeking similar reliefs as those sought herein and that the said suits are still pending in court. That the suit is otherwise an abuse of the court process. That the Plaintiff is guilty of material non-disclosure and deliberate concealment and distortion of facts having failed to disclose the existence of the aforesaid suits pending in court and manipulating a copy of the title to conceal entries numbers 7, 8 and 9 with a view to hoodwink and mislead this court.

2. The application is supported by the affidavit of Iqbal Valli Hussein a director of the Defendant sworn on 18th November, 2020. The deponent has annexed copies of the pleadings in ELC No. 82 of 2017 and ELC No. 120 of 2017 as well as a ruling in ELC Case No. 120 of 2017. The Defendant contends that Case No. 82 of 2017 is still pending in court and that an alleged withdrawal by the Plaintiff's counsel was not effective as the suit had already been fixed for hearing and could only be withdrawn by consent of the parties or with leave of the court. It is deposed that on 17th February, 2017, the Plaintiff was called by the police to give a statement of what she knew about the property in view of some fraudulent entries at the land registry relating to the title and gave a detailed statement confirming that she was on the land with the permission of the owner. A copy of the said statement has been annexed. That the Plaintiff's allegation that she has been in adverse possession for over 12 years is accordingly false. The Defendant has also annexed a copy of the title whose entries is alleged to have been manipulated.

3. The Defendant submitted that the suit herein is an abuse of the court process having been filed during the pendency of ELC No. 82 of 2017 and ELC No. 120 of 2017 filed by the Plaintiff against the same Defendant herein and seeking substantively similar reliefs as those in the previous suits. The Defendant's counsel cited the provisions of Section 6 of the Civil Procedure Act and relied on the case of **Republic – v- Registrar of Societies – Kenya & 2 Others Ex-parte Moses Kirima & 2 Others (2017)eKLR**. The Defendant further submitted that the Plaintiff is guilty of non-disclosure of material facts and relied on the case of **Aviation & Airport Services Workers Union (K) –v- Kenya Airport Authority & Another (2014) eKLR**. The Defendant submitted that the Plaintiff's conduct amounts to forum shopping and is only interested in accomplishing improper purposes that is collateral to the determination of their rights, if any, and should be deprecated by this court. The Defendant urged the court to dismiss the suit with costs.

4. In opposing the application the Plaintiff filed a replying affidavit sworn on 7th December, 2020. The Plaintiff avers *inter alia*, that she was neither aware that ELC Case No. 82 of 2017 had been withdrawn nor another suit No. 120 of 2017 filed. The Plaintiff states that she only learnt of the withdrawal of case No. 82 of 2017 when she appeared before the OCS Nyali on 20th September, 2020 and was asked why she had refused to vacate the suit land LR. NO. MN/I/3220 yet she had withdrawn the suit against the Defendant. That on perusal of the court file, she confirmed that the suit No. 82 of 2017 had been withdrawn by the Plaintiff's former advocate without her approval. That she then filed the current suit instead of seeking to reinstate the suit that was withdrawn. The Plaintiff further states that suit No. 120 of 2017 was filed without her consent. The Plaintiff states that she filed a complaint with the Advocate's Complaints Commission against her former advocate for purporting to withdraw and file suit on Plaintiff's behalf without instructions. A copy of the complaint letter has been annexed. The Plaintiff maintained that she was not guilty of non-disclosure because she was not cognizant of the filing of suit No. 120 of 2017. The Plaintiff urged the court to be guided by Article 159 of the Constitution and order consolidation of the two suits instead of striking out the current one.

5. The Plaintiff submitted that she cannot be held liable for concealment when she was not aware of suit No. 120 of 2017, and relied on the case of **FM –v- EKN (2019)eKLR** and **Patriotic Guards Ltd –v- James Kipchirchir Sambu (2018)eKLR** and urged the court to use its discretion to allow the suit proceed and be heard on merit.

6. I have considered the application and the rival submissions filed. I have also perused the pleadings herein. The main ground of the application is that the Plaintiff's suit is *sub judice* and therefore an abuse of the court process because the Plaintiff had previously filed two other cases namely, ELC No 82 of 2017 which was later withdrawn and ELC No. 120 of 2017 which is pending, though the Plaintiff states the same was filed without her consent. At this stage, the court will only consider legal issues that go to the root of whether there is a competent suit before court and/or whether the court should strike out the suit.

7. Section 6 of the Civil Procedure Act provides as follows:

“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

8. In the case of **Republic –v- Registrar of Societies –Kenya & 2 Others (supra)**, it was held that:

“.....Therefore for the principle to apply certain conditions precedent must be shown to exist: First, the mater in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; proceedings must be between the same parties under whom they or any of them claim, litigating under same title; and such suit or proceeding must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed..... ”

9. It is clear from the above provisions of law and cited cases that the doctrine of *sub judice* entails same parties/similar subject matter in various suits in same or different courts. In this case, there is no denial that there were other previous suits involving the parties herein, to wit ELC No. 82 of 2017 and ELC No. 120 of 2017. It is also apparent that ELC NO. 82 of 2017 was withdrawn, though the Plaintiff avers that the withdrawal was done without her consent or instructions. The Plaintiff also avers that ELC No. 120 of 2017 as filed without her consent. Applying the principles of *sub judice* as discussed hereinabove I find and hold that this suit offends the doctrine of sub judice. The Defendant has applied to have the current suit struck out because of the pendency of those previous suits. I note, however, that the words used in the marginal notes under Section 6 of the Civil Procedure Act are “stay of suit”. Therefore, even if a successful plea of *sub judice* has been proved, the appropriate remedy is not to strike out the suit herein as the Defendant has asked me to do. Instead, the viable order that commends itself is for this suit to be stayed pending the determination of ELC No. 82 of 2017 and/or ELC No.120 of 2017. This is so because the alleged withdrawal of ELC No. 82 of 2017 and filing of ELC No. 120 of 2017 are subject to controversy as submitted to by the Plaintiff.

For that reason, this court cannot safely arrive at a finding that the filing of the current suit is an abuse of the court process.

10. For the foregoing reasons, I am inclined to dismiss the notice of motion dated 18th November 2020 and decline to strike out the suit. Instead, I order that this suit be stayed until the previous cases are determined. The Plaintiff shall meet the Defendant's costs of this application.

11. It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY DUE TO COVID-19 PANDEMIC THIS 11TH DAY OF MARCH, 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE