Katana & 125 others v Meuli (Environment & Land Case 65 of 2020) [2024] KEELC 4213 (KLR) (8 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4213 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 65 OF 2020

EK MAKORI, J

MAY 8, 2024

BETWEEN

THOMAS MKANGI KATANA & 125 OTHERS ..... APPLICANT

AND

FAIZA OSCAR MEULI ..... RESPONDENT

RULING

1. The applicants, in their Originating Summons filed on August 20, 2020, assert their possession of Plot No. 2057/III/MN, Plot No. 2058/III/MN, and Plot No. 4599/MN (Subdivision 3502/III/MN) for over 12 years. They maintain that their possession has been quiet, continuous, and adverse to the titles held by the defendant/respondent. This is the crux of their claim.

2. The applicants, therefore, approached this court to have the said titles registered in their favour under the doctrine of adverse possession.

3. In a strong response to the applicants' claim, the respondent has vehemently objected and filed a statement of defence on September 6, 2022. An application was also brought under order 50 rule 6 of the *Civil Procedure Rules* on April 17, 2023. The respondent alleges that the applicants' claim violates the doctrine of *res judicata*, as there have been previous suits over the same issues that were fully and finally settled. This objection underscores the seriousness of the legal dispute at hand.

4. The Court, in its wisdom, directed the parties to dispose of the application via written submissions. Both parties duly complied with this directive.

5. The significant issues I can frame for this Court's decision are whether the current suit offended the doctrine of *res judicata* and whether the suit ought to be struck out in limine or, in the alternative, allow the replying affidavit in place dated April 17, 2023 and deem the same duly filed. And who should bear the costs of the application?

6. The respondent (applicant in this application) refers to several past legal proceedings that he argues have already settled the issues raised in this case. In HCCC No. 931 of 1981, *Aisha Ali Mohammed v Pauline Kwinga*, the Court ruled in favor of Aisha Mohammed, the deceased mother of the defendant. In Misc. Application No. 104 of 1999 OS, Gideon Nassim Kiti v Aisha Mohammed and Another, the Court ruled that the suit properties belonged to Aisha Ali Mohammed before 1998 and that she had title deeds to the suit land. This ruling was reaffirmed in Civil Appeal No. 35 of 2013. The issues raised herein were also litigated in Mombasa ELC No. 270 of 2018. In a judgment delivered on February 27, 2023, the Court directed the defendant to take possession of the suit properties within 90 days after the judgment. The decision of the ELC has long been appealed to the Court of Appeal and is still pending determination in the Superior Court. The respondent has asserted that filing and propagating a matter which a Court of competent jurisdiction has resolved amounts to abuse of the Court process.

7. The replying affidavit alludes to the delay being due to the pendency of the matter cited before Naikuni J., whose outcome it was thought could affect the current one.

8. The applicants in the OS (respondents in this application) aver that they are strangers about the issues raised in the application to strike out their claim, stating that they have never been sued, sued themselves, or litigated with the respondent in the OS (applicants in this application) on the matters raised in the OS. They also aver that the suits cited have never affected their rights, and the allegations that Gideon Nassim Kiti litigated on their behalf are false. He has never been their representative, nor are they his agents, servants, or assignees.

9. The respondents in this application believe that the facts raised in this matter will demand a hearing because res judicata, as raised herein, cannot be determined before scrutinizing the facts in a hearing. This leads to the conclusion that the respondents have no nexus with the cases cited. In that regard, the decision in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 is mentioned - that where an issue must be probed through evidence, striking out pleadings cannot be followed.

10. This Court and the Superior Courts have held that striking out pleadings is a draconian measure and should be the last resort. Courts should strive to sustain suits. In *Meya Agri Traders Ltd v Elgon House [2010] Ltd* (Civil Appeal 15 of 2020) [2023] KECA 574 (KLR) (26 May 2023) (Judgment), the Court of Appeal held as follows:

> " The power of the trial court to strike out pleadings is enshrined under order 2 rule 15(1) of the *Civil Procedure Rules*, which provides as follows:
>
> "At any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that—
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> B.it discloses no reasonable cause of action or defence in law; or
>
> C.it is scandalous, frivolous, or vexatious; or
>
> D.it may prejudice, embarrass, or delay the fair trial of the action or
>
> E.it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."
>
> 21. This power is a discretionary power of the trial court. However, as rightly submitted by the appellants, striking out of pleadings is a draconian tool which must only be deployed by courts in the clearest of incidences. In our view, if a pleading raises a triable issue, irrespective of whether it will succeed or not, the

suit ought to be allowed to proceed to trial. On the contrary, where a pleading is of no substance or ground, mere denial, fanciful and or is of some ulterior motive the court should not shy away from invoking its powers to strike out such a suit. Invoking the power to strike out pleadings must be in adherence to the well laid down principles requiring that it be exercised sparingly and in clear and obvious cases. A pleading may only be struck out if the elements contained in order 2 rule 15(1)(a), (b), (c), and (d) of the *Civil Procedure Rules* are in existence. To buttress our views on this issue, we refer extensively to the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another*[1980] eKLR thus:

> "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". (Sellers, L.J. (*supra*)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right. If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.No suit ought to 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 a case before it. On the other hand, if there is a point of law which merits a serious discussion the court should be asked to proceed under order XTV" rule 2."

11. The applicant in this application alleges a history of cases filed and mainly litigated by Gideon Nassim Kiti, who has always lost to the applicant or his representatives. The most recent one is Mombasa ELC No. 270 of 2018 (judgment by Naikuni J. dated 27 February 2023). Nassim is said to have been litigating on behalf of the respondents or that they fall under his tutelage as their representative.

12. The doctrine of res judicata is based on the principles that if a suit has been heard and issues have been tried thoroughly and finally settled, the reopening of another matter on the same issues is untenable because litigation has to come to an end in one way or another. It saves costs to parties and lessens the rigmaroles of seeking redress in our justice system. It abhors abuse of the Court process by decreeing that litigation replayed over and over again on already litigated and settled issues has to be halted by the Courts once raised and proven - see the case of *E.T v Attorney General & another* [2001] eKLR:

> " The rationale behind the doctrine of res judicata and issue estoppel is that if the controversy in issue is finally settled, determined, or decided by the court, it cannot be reopened. The rule of res-judicata is based on two principles; there must be an end to litigation and the party should not be vexed twice over the same cause.

52. The general principle of *res-judicata* is captured in section 7 of the *Civil Procedure Act*, which provides that:-

7. No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court.

53. For the operation of the doctrine of res judicata first, the issue in the first suit must have been decided by a competent court. Second, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in the suit where the doctrine is pleaded as a bar. Third, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title (see the case of *Karia and another v Attorney General & others* [2005] 1 EA 83, 89)."

13. I have carefully perused the judgment of Naikuni J., which is said to be the latest on the issues pitting the parties herein. The judge delved into the history of the suit properties and found that one Gideon Nassim Kiti was a trespasser who ought to be evicted from the suit properties No. 567, 568, and 569 situate in Kikambala, together with the sub-divisions of parcels 2057, 2058, and 2062/III/MN, all being sub-divisions of Land Reference No. 284/III/MN.

14. In the judge's in-depth analysis, I did not see anywhere in the judgment where he alluded to the fact that Gideon Nassim Kiti was litigating on behalf of the respondents in this application and that the said judgment and other proceedings in the past were to bind the respondents in this application. The issue of res judicata will not apply here.

15. On the admission of the affidavit in reply dated April 17, 2023, the same is allowed and deemed properly filed.

16. The application dated April 17, 2023 succeeds partially by allowing the replying affidavit dated April 17, 2023 to be duly deemed filed but dismissing it insofar as it seeks to strike out the plaint—costs in the cause.

Dated, signed, at Malindi on this 8th day of May 2024. Since the Court was not sitting, a soft copy be transmitted via email to the advocates on record

E. K. MAKORI

JUDGE

MALINDI ELC CASE NO 65 OF 2020 (O.S) RULING Page **2** of **2**