



Ndung'u (Suing as the administrator ad litem of the Estate of John Ndungu Mbugua) v Kinde Properties Limited (Environment & Land Case 357 of 2019) [2024] KEELC 5303 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5303 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 357 OF 2019**

**AA OMOLLO, J
JULY 11, 2024**

BETWEEN

DAVID KAMAU NDUNG'U (SUING AS THE ADMINISTRATOR AD LITEM OF THE ESTATE OF JOHN NDUNGU MBUGUA) PLAINTIFF

AND

KINDE PROPERTIES LIMITED DEFENDANT

RULING

1. The Applicant filed a notice of motion dated 30th June 2023 brought under the provisions of Order 50 rule 1; order 2 rule 15 (1) (a)- (d); order 7 rule 13 of the [Civil Procedure Rules](#) and sections 1A, 1B, and 3A of the [Civil Procedure Act](#). It seeks for the following orders;
 - i. That the Plaintiff's Amended Originating Summons as amended on 23rd November 2021 be struck out from the Court record.
 - ii. That the Plaintiff's suit against the Defendant as contained in the Amended Originating Summons as amended on 23rd November 2021 be dismissed.
 - iii. That the Defendant's Counterclaim dated 1st December 2022 do proceed for hearing as this Honourable court may deem fit.
 - iv. That this Honourable Court be pleased to award the Defendants the costs of the suit filed by the Plaintiff.
2. The Applicant stated that the issues raised in the Plaintiff's suit as contained in the Amended Originating Summons dated 23rd November 2021 pertaining to ownership of Dagoretti/ Riruta/ 770 herein after referred to as "the suit property" duplicate the exact issues raised in an earlier suit filed by way of an Originating Summons ELC. Case No. 1288 of 2007 (O.S); John Ndung'u Mbugua v Leah



- W. Muchohi (sued as the legal representative of the estate of Muchohi Gikonyo (deceased). In the former suit, a judgment dated 24th March, 2015, Nyamweya J, (as she then was) ruled that the property belonged to the estate of the late Muchohi Gikonyo.
3. That in ELC 1288 OF 2007, the Plaintiff then was the father to the present Plaintiff in the Amended Originating Summons dated 23rd November 2021 whereas the Defendant therein was the then owner and registered proprietor of the suit property. The Applicant stated that before institution of ELC 1288 of 2007, previously there had been two other suits, HCCC No. 3480 of 1985 Muchohi Gikonyo v Edward Riitho & 2 others consolidated with HCCC No. 364 of 1986 John Ndung'u Mbugua v Muchohi Gikonyo. Again John Ndung'u Mbugua is the deceased's father of the Plaintiff herein whereas Muchohi Gikonyo is the deceased husband of Leah Wanja Muchohi formerly the registered owner of the suit property as ruled vide a judgment dated 28th June, 1990 by Aluoch J, (as she then was).
 4. The Applicant further stated that by virtue of the sale and purchase as witnessed in the agreement for sale between Leah Wanja Muchohi and the Defendant dated February 28, 2019, it is the current registered proprietor of the suit property. Therefore, to the extent that Leah Wanja Muchohi is not a party to this suit, there can be no legal nexus between the Plaintiff and the Defendant. Accordingly, the Plaintiff has no cause of action against the Defendant nor locus standi as the Plaintiff cannot maintain any legal action against the Defendant in the absence of the person who sold to then suit property.
 5. In opposition of the Applicant's motion, the Plaintiff/Respondent filed a replying affidavit sworn by David Kamau Ndung'u on 1st November 2023. The Respondent contended that the application is brought in bad faith having been filed nearly 4 years after the institution of this suit. That it is a calculated scheme to further derail the just and expeditious determination of the suit.
 6. He deposes that the issues raised in the current suit are different and unrelated from those that were raised from the previous suit. He avers that the question before the court being not on proprietary history of the suit property but rather whether by the inflection of time the Plaintiff/Respondent has acquired a right and interest in the same. He deposes to having been in open, exclusive, peaceful and actual possession of the suit property without any interruption. That having developed the same by constructing permanent buildings he is the legal owner and the Defendant illegally acquired title.
 7. Further, that the Respondent's late father acquired the suit property from one Edward Riitho (now deceased) sometime in the year 1983 and was thereafter registered as the proprietor on 10th December 1985. He added that in this suit, he has raised issues on the manner in which the Applicant acquired the title of the suit property and sought a prayer for the court to determine whether the he was the legal owner of the suit property.
 8. In support of its motion, the Applicant filed written submissions dated 2nd January 2024 and in opposition, the Plaintiff filed submissions dated 27th February 2024. The Applicant submitted that Order 2 rule 15 sub rules 1 (a), (b), (c) and (d) of the *Civil Procedure Rules* (2010) provides that at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that it discloses no reasonable cause of action or defence in law, it is scandalous, frivolous or vexatious or it may prejudice, embarrass or delay the fair trial of the action or 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. That provisions of Order 2 rule 15 (3) further provide that so far as is applicable this rule shall apply to an originating summons and a petition.
 9. The Applicant stated that in subjecting the Respondent's amended originating summons to the above provided criteria and in reliance to the holding in the case of *Mercy Nduta Mwangi t/a Mwangi Ken'ara & Co. Advocates v Invesco Assurance Company Limited* (2019) eKLR, the suit discloses no



- reasonable cause of action. That the Respondent deliberately failed to disclose to this court the existence and outcome of HCCC No. 3480 of 1985 Muchohi Gikonyo v Edward Riitho & 2 Others as consolidated with HCC No. 364 of 1986 John Ndungu Mbugua v Muchohi Gikonyo where the issues pertaining the Plaintiff/Respondent late father's alleged acquisition of the suit property from the late Edward Riitho were raised and adjudicated upon.
10. Further, that in the judgment delivered by Justice J. Aluoch (as she then was) on 28th June 1990, the court made a declaration that the late Muchohi Gikonyo (from whose estate the Defendant purchased the suit property) had acquired an absolute title to the subject property from the said Edward Riitho by way of adverse possession and ordered the late John Ndung'u Mbugua (the father of the Plaintiff in the instant suit) to transfer the subject property to Muchohi Gikonyo.
 11. That after the said judgement, the Respondent's late father, initiated ELC Case No. 1288 of 2007 (O.S), alluding to having acquired title to the suit property by way of adverse possession and on 24th March 2015, Justice P. Nyamweya (as she then was) dismissed the said Originating Summons.
 12. The Applicant also submitted that the Amended Originating Summons is brought under the provisions of Order 37 rule 3 of the Civil Procedure Rules which pertains to Originating Summons taken out by a purchaser or vendor of immovable property for the determination of questions which may arise in respect of requisitions, or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale and there being no relationship of vendor and purchaser as between the Plaintiff herein and the Defendant, the Plaintiff/Respondent lacks any cause of action as against the Defendant/Applicant.
 13. The Applicant stated that this court should uphold the doctrine of stare decisis to avoid relitigating issues that have already been determined and in support cited the Supreme Court in Lasbir Singh Rai & 3 Others v. TarZochan Singh Rai & 4 Others Petition No. 4 of 2012 (2013) eKLR and case of Mercy Nduta Mwangi t/a Mwangi Keng'ara & Co. Advocates v Invesco Assurance Company Limited (2019) eKLR.
 14. It also referred to Order 7 rule 13 of the Civil Procedure Rules which provides that if, in any case in which the Defendant sets up a counterclaim, the suit of the Plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with, the Defendant/Applicant urged the Court to issue orders for the hearing of the its Counterclaim dated 1st December 2022.
 15. The Respondent submitted that the application is incurably defective because the Applicant cites it is brought under Order 2 Rule 15 (a), (b), (c) and (d) of the Civil Procedure Rules but instead rely on all the subrules. That in reliance to the case of Pakaja Limited v Trustees of Mombasa Simba Sports Club & 3 others; Singh Sabha Community (Interested Party) [2022] eKLR, the court analyzed a similar application stated that, the 1st Defendant has cited Order 2 Rule 15 (1)(a), in its application for striking out pleadings, however Subrule 2 clearly states that the same does not require evidence to be adduced.
 16. He submits that an application to strike out a suit for not disclosing a cause of action does not allow the Applicant to produce any evidence. Thus, the court should be able to proceed with the pleadings, which are the Plaintiff and defence as they are to arrive at its determination. Therefore, the provision of Order 2 Rule 15 (1) (b) (c) and (d) of the Civil Procedure Rules, 2010 requires evidence to be offered but in this application, the 1st Defendant has combined Sub - rule 1 (a) (b) (c) and (d) thus inappropriate. In support of their argument, he cited the Court of Appeal in Olympic Escort International Co. Ltd & 2 others v Perminder Singh Sandru & another (2009) eKLR.
 17. The Respondent also submits that the motion is incurable defective premised on Pakaja Limited v Trustees of Mombasa Simba Sports Club & 3 others; Singh Sabha Community (Interested Party) *supra*



and Nzioka J in *Milenium Chuma Limited v Platinum Steel Limited* supra and it will be a great injustice for the Court to proceed and adjudicate on the same.

18. He argues that striking of suit is such a draconian and drastic decision on litigation which should be resorted to sparingly. He supported the argument with the case in *Spinners and Spinners Limited v Kimilili Wholesalers (K) Limited* [2021] eKLR among others. That the purported purchase by the Applicant and the transfer of the suit property took place during the pendency of an application before the Court of Appeal in Civil Application (NAI) NO. 366 of 2018 (UR 299 of 2018) concerning the same property against the estate administrators of the late Muchohi Gikonyi.
19. From this last statement of the submissions that the suit property was sold during the pendency of an application against the estate of Muchohi Gikonyi reveals that the Respondent was aware of the existence of ELC 1288 of 2007 (O.S) where his father was the plaintiff. The fact that they appealed confirms the orders issued were adverse to them. The O.S was taken out by John Ndungu Mbugua – deceased on 13th November 2019 before his demise and substitution by the administrator of of his estate. This confirms that his claim is brought a party who actively litigated in ELC (O.S) 1288 of 2007 and HCC 364 of 1986.
20. That Applicant has enumerated in details that the cause of action in the previous suits stated relates to the same subject matter (property). The Respondent does not deny this fact. Thus the cause of action now been generated has been heard and determined on its merits. Litigation must have an end hence the reason the principle of res judicata was legislated as a law. Under section 7 of the *Civil Procedure Act*, which states thus;

“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.”

Explanation(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

21. The argument by the Plaintiff that striking out is a draconian mechanism that ought to be used sparingly cannot be a ground to litigate matters without an end. It is also true that applications brought under Order 2 rule 15(1)(a) should not be accompanied by any evidence. The Applicant has not pleaded evidence other than disclosing the existence of previous cases which were determined between the same parties over the same subject matter. Besides, the application was also premised under paragraphs b, c, d of the said order so that the objection would not defeat the application.
22. The Applicant started that the Plaintiff does not have a cause of action against it for failure to join the person who sold to him the land. The Plaintiff/Respondent did not express himself of intention to amend to include the seller, probably because he was aware of the former suit and it would be difficult to demonstrate the cause of action here is different from the cause of action in the former suit.
23. I find merit in the application and grant the orders sought. The counter-claim by the Applicant shall be set down for hearing on a mutual date to be given at the time of delivery of this ruling.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF JULY, 2024

A. OMOLLO



JUDGE

