



**Barasa v Omwenga (Environment & Land Case 56 of 2021)
[2023] KEELC 17081 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17081 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 56 OF 2021**

JM ONYANGO, J

MAY 3, 2023

BETWEEN

MARTIN WAMALWA BARASA PLAINTIFF

AND

PETER OKIABERA OMWENGA DEFENDANT

RULING

1. The Defendant/Applicant filed a Notice of Motion dated 21st April, 2022 pursuant to Order 2 Rule 15 (d) of the *Civil Procedure Rules* seeking an order that the Plaintiff's suit be struck out for being an abuse of the court process.
2. The application is premised on the grounds outlined on the face of the Notice of Motion and the Applicant's supporting affidavit sworn on the 21st day of April 2022. The gist of the application is that land parcel number Nzoia /Moi's Bridge Block 1 (Nzoia Sisal)/3582 is part and parcel of land parcel number Nzoia /Moi's Bridge Block 1/3406 as there are no records at the Lands office to support the creation of parcel number 3582. That the same was thus fraudulently created to frustrate the enforcement of the decree CMCC no 1454 of 2004.
3. The Plaintiff/Respondent opposed the application through his Replying affidavit sworn on the 7th July 2022 in which he maintains that he is the registered proprietor of land parcel number Nzoia /Moi's Bridge Block 1 (Nzoia Sisal)/3582 which is separate and distinct from land parcel number Nzoia Moi's Bridge Block 1/3406. He contends that he has never been sued in respect to parcel number 3582 and that his right to be heard would be curtailed if he was condemned unheard.
4. The background of this case is that Samwel Nyariba Nyakeri sued Peter Okiabera Omwenga (the defendant herein) in Eldoret CMCC no 1454 of 2004. In its judgment delivered on 19th May, 2008 the court ordered that the plaintiff (Samwel Nyariba Nyakeri) be evicted from the parcel of land at Matunda known as Nzoia Moi's Bridge Block 1/3406 and that the same be transferred the Defendant



(Peter Okiabera Omwenga). The said judgment was affirmed by the Court of Appeal on 1st March, 2018.

5. When Peter Okiabera instructed auctioneers to evict the Samwel Nyariba Nyakeri from land parcel number 3406 on 29th October, 2021 they found the plaintiff herein Martin Barasa Wamalwa who claimed that he was occupying land parcel number Nzoia /Moi's Bridge Block 1 (Nzoia Sisal)/3582 which is a sub-division of parcel number 3406. Martin Barasa Wamalwa then instituted this suit against Peter Okiabera Omwenga seeking a declaration that he is the rightful owner of land parcel number Nzoia /Moi's Bridge Block 1 (Nzoia Sisal)/3582. He also seeks a permanent injunction restraining Peter Okiabera Omwenga from dealing with land parcel number 3582.
6. In his Defence the Defendant Peter Okiabera Omwenga avers that after the Court of Appeal decreed that land parcel number 3046 belongs to him, Samwel Nyariba Nyakeri attempted to illegally and unprocedurally sub-divide parcel number 3406 and created two parcels known as Nzoia /Moi's Bridge Block 1 (Nzoia Sisal) 3574 and 3582. It is his contention that the said titles exist only on paper and that on the ground the said titles are superimposed on land parcel number 3406. He further contends that the plaintiff is colluding with Samwel Nyariba Nyakeri to defeat the course of justice.
7. It is against this background that the Defendant has filed the instant application seeking to have the suit struck out for being an abuse of the court process.
8. The application was disposed of by way of written submissions and both parties filed their submissions.

Plaintiff's Submissions

9. It was submitted for the Defendant/Applicant that while CMCC no 1454 was pending, the court issued an order stopping any dealings on land parcel number Nzoia Moi's Bridge Block 1/3406. Furthermore, there was a charge over the title in favour of National Bank of Kenya which was only discharged on 27.6.2018. He adds that there are no mutation forms for parcel number 3406 and that parcel number 3582 only exists on paper while on the ground it is part of parcel number 3406. It is therefore counsel's contention that land parcel number 3406 could not have been sub-divided to give rise to parcel number 3582 and the entries on the title for parcel 3582 are fraudulent.

Defendant's Submissions

10. On the other hand, learned counsel for the Plaintiff submitted that the plaintiff's case does not meet the threshold for abuse of court process. He relied on the cases of *Public Drug Company v Breyrile Cream Company* 347 and *Jadesimi v Okotie Ebbubuh* [1986] 1NWLR (PT16) 264. He maintained that the Plaintiff was the registered proprietor of parcel number 3582 and under Section 26(1) of the [Land Registration Act](#) no 3 of 2012 his title was *prima facie* evidence that he is the absolute owner thereof. He argued that if the Defendant intends to challenge the plaintiff's title, evidence has to be adduced at a hearing. He submitted that the import of the Defendant's application was to determine the suit on an application yet the issues raised by the Defendant could only be determined after a full hearing.
11. He further submitted that the plaintiff was not a party in CMCC no 154 of 2004 Civil Appeal no 46 of 2015 and therefore the orders issued in those cases are not applicable to him.

Analysis And Determination

12. Having considered the pleadings, application, rival submissions and authorities relied on by counsel the singular issue for determination is whether the Plaintiff's suit ought to be struck out for being an abuse of the court process.



13. According to Black's law Dictionary Sixth Edition 1891-1999 P.990 abuse of court process is defined as-
- “Everything which is contrary to good order established by usage that is a complete departure from reasonable use. “An abuse is done when one makes an excessive or improper use of a thing or employs such a thing in a manner contrary to the natural legal rules for its use”.
14. In the case of *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal no 25 of 2002 [2009] eKLR 229, the Court of Appeal stated as follows:-
- “The term abuse of court process has the same meaning as abuse of judicial process. The employment of judicial process is regarded as an abuse when a party uses the judicial process to the irritation and annoyance of his opponent and the efficient and effective administration of justice. It is a term generally applied to a proceeding, which is wanting in bonafides and frivolous, vexatious or oppressive’.
15. The same court relied on the Nigerian Case of Karibu-Whytie J SC in *Sarak v Kotoye* [1992] 9 NWLR 9pt 264) 156 at 188-189 where the concept of abuse of judicial process was defined as follows:-
- “The concept of abuse of judicial process is imprecise, it implies circumstances and situations of infinite variety and conditions. Its one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice ...”
16. The question I have to answer is whether the suit herein falls within the above definition. The Plaintiff maintains that he has a valid title for land parcel number Nzoia /Moi's Bridge Block 1 (Nzoia Sisal)/3582 which is separate and distinct from land parcel number Nzoia Moi's Bridge Block 1/3406. The latter parcel was the subject of protracted litigation between the defendant and the person from whom the plaintiff purchased parcel number 3582. The plaintiff was not a party to the said litigation. The Defendant maintains that the plaintiff's title only exists on paper but on the ground, parcel number 3582 is part of parcel number 3406. He contends that the plaintiff's title was obtained fraudulently. Allegations of fraud cannot be determined summarily as the standard of proof is higher than on a balance of probabilities. For this reason, I am of the view that the instant case is not an abuse of the process of the court and it ought to go for full hearing so that the Plaintiff can prove if he has a valid title. In arriving at this finding I am guided by the case of *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal no 35 of 2000) where the court expressed itself thus:
- “A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) 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 or could be proved”
17. In light of the foregoing I find no merit in the application and I dismiss it. The costs of the application shall be in the cause.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF MAY, 2023.

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J.M ONYANGO

JUDGE

In the Presence of;

1. Mr. Momanyi for the Defendant/Applicant

2. Mr. Mathai for the Plaintiff/Respondent

Court Assistant: A. Oniala

