



Sacapheso International Limited v Eversweet Bakery Limited (Environment & Land Case 439 of 2013) [2023] KEELC 17354 (KLR) (10 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17354 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 439 OF 2013**

M SILA, J

MAY 10, 2023

BETWEEN

SACAPHESO INTERNATIONAL LIMITED PLAINTIFF

AND

EVERSWEET BAKERY LIMITED DEFENDANT

(Application by defendant seeking to strike out suit of the plaintiff and enter judgment as prayed in counterclaim; plaintiff having filed suit seeking to be declared as holding the lawful title to the suit land; applicant filing defence and counterclaim and asserting to be the person with the legitimate title; suit still pending hearing; defendant now seeking to have suit of plaintiff struck out and judgment entered as sought in the counterclaim on basis that the person who sold the land to the plaintiff was found guilty of forgery of the land documents; court not persuaded that this alone would be reason enough to strike out the plaintiff's suit and enter judgment as sought in the counterclaim; best that all parties be given an opportunity to be heard before a conclusion can be made as to who holds the legitimate title to the suit land; application dismissed with costs)

RULING

1. The application before me is that dated 13 December 2022 filed by the defendant. It seeks orders to have the plaintiff's suit struck out with costs and the defendant's defence and counterclaim be allowed as prayed. The application is based on grounds inter alia that through a judgment rendered in the Magistrates' Court at Kisii, in Kisii Criminal Case No. 1056 of 2014, one Samuel Kenani Onwando, claimed in the application to be a director of the plaintiff, was convicted of various offences relating to forgery that allegedly led to issuance of title to the disputed land, which is the land parcel Kisii Municipality/Block III/289, to the plaintiff company. The applicant is of the view that the forged title cannot form a basis for the suit and that in the said judgment the court found that the applicant is the legitimate owner of the land parcel Kisii Municipality/Block III/289 (the suit property). The



application is opposed by the plaintiff who filed Grounds of Opposition. Inter alia, it is contended that the applicant is intent on circumventing the hearing of the instant matter.

2. I have considered the submissions of both Mr. Kenyariri, learned counsel for the applicant, and Mr. Ochwangi, learned counsel for the respondent and also gone through the record herein.
3. I observe that the respondent filed this suit on 4 November 2013, through a plaint, wherein she pleaded to be the proprietor of the suit property having obtained title on 17 December 2010. She pleaded that on 29 October 2013, the applicant, through her servants, trespassed into the suit property and started erecting a fence. In the suit, the respondent sought an order for a declaration that she is the lawful proprietor of the suit land; an order to permanently restrain the applicant from the land; general damages for trespass; costs and interest. Together with the plaint, the respondent filed an application for injunction to have the applicant restrained from the suit property which was compromised in a ruling delivered on 31 October 2014, vide which the court barred both parties from developing the land, or dealing with it, pending hearing of the suit.
4. The applicant responded by filing a defence and counterclaim. She pleaded that she purchased the suit property from one Henry Nyangechi Nyanchoka through an agreement dated 24 March 2006 and that the title thereof was transferred to her. She averred to have taken possession thereof and was developing the property as the registered owner. In the counterclaim, she sought an order for a declaration that she is the legal owner of the suit property, a permanent injunction to restrain the respondent from the property, and any other orders deemed fit.
5. The status of the case is that the hearing of the matter is yet to commence.
6. The application herein is based upon the provisions of Order 2 Rule 15 and Section 3A of the [Civil Procedure Act](#). Order 2 Rule 15 provides as follows :-

15. Striking out pleadings [Order 2, rule 15.]

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

- (a) it discloses no reasonable cause of action or defence in law; or
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) 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.

(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

7. From the above, it will be observed that the court has jurisdiction to order a suit dismissed, and judgment to be entered accordingly, as the case may be, if it is convinced that it discloses no reasonable cause of action. The main reason why the applicant seeks to have the plaintiff's suit struck out and for



judgment to be entered in her favour is based on the claim that a director of the plaintiff was found guilty of forging documents to obtain title to the suit land in the case Kisii Chief Magistrates' Court, Criminal Case No. 1056 of 2014, which judgment was delivered on 23 January 2020. A copy of the judgment is annexed to the supporting affidavit and I have gone through it. The accused in that case was Samwel Kenani Omwando. In that case, he was charged with three counts, respectively, forging an allotment letter in the name of one Nikora Isaboke Kingara, purporting it to be a genuine allotment letter issued by the Lands Department at Nairobi for the land parcel Kisii Municipality/Block III/289; forgery of a receipt No. D613235 purporting to be a genuine receipt from the Department of Lands, Nairobi, for payment of premium of Kshs. 11, 240/= for the suit property; and forging a land lease in name of Nikora Isaboke Kingara for the suit property. In a brief judgment delivered on 23 January 2020, the said Samwel Kenani Omwando, was found guilty of the offences.

8. Now, Samwel Kenani Omwando is not a party in this case. In as much as the applicant claims that the said Mr. Omwando is a director of the plaintiff, I have no such evidence. Neither can I, without taking evidence, proceed to speculate and make a concrete determination that the title of the plaintiff emanates from the said Samwel Kenani Omwando and is therefore an illegitimate title. Similarly, without taking evidence, I cannot make a determinate finding that the applicant is the genuine and lawful proprietor of the suit property. It would probably have been a different issue if title was currently in name of Samwel Kenani Omwando which is not the case here. Moreover, such decision of the Magistrate may be subjected to an appeal and susceptible to reversal. In addition, any finding made by the Magistrates' Court on the legality of the title of the applicant does not bind this court which is a superior court entitled to reach its own decision. Given those circumstances, I am unable to reach a conclusive finding that the case of the plaintiff does not disclose a reasonable cause of action, or that it is scandalous, frivolous and vexatious. My view is that it is best that all parties be given an opportunity to be heard before this court can rush into a finding as to who holds the genuine title to the suit property. Of course, nothing bars any party from using the criminal proceedings and/or judgment to support their case.
9. For the above reasons, I proceed to dismiss the application with costs to the respondent.
10. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 10 DAY OF MAY 2023

JUSTICE MUNYAO SILA

JUDGE,

ENVIRONMENT AND LAND COURT AT KISII

