



REPUBLIC OF KENYA

IN THE ENVIROMENT & LAND COURT AT MOMBASA

ELC CASE NO. 258 OF 2016

- 1. MARTIN MUTHAMA.....1ST PLAINTIFF**
- 2. JOSEPH MUTUA KAINDI.....2ND PLAINTIFF**
- 3. GEORGE KOGORA.....3RD PLAINTIFF**

VERSUS

- 1. KENYA WOOL INVESTMENT CO. LTD.....1ST DEFENDANT**
- 2. DOPP INVESTMENT.....2ND DEFENDANT**
- 3. NATIONAL LAND COMMISSION.....3RD DEFENDANT**
- 4. HON. ATTORNEY GENERAL.....4TH DEFENDANT**

RULING

1. By a Notice of Motion dated 25th July 2017 made pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act, order 2 Rule 15(1) (a) (b) and (d) and Order 51 Rule 1 of the Civil Procedure Rules, the 2nd Defendant seeks orders:

- 1) *That the plaint filed herein be struck out.*
- 2) *That the suit herein be dismissed with costs as against the 2nd Defendant.*
- 3) *That the costs of this Application be granted to the 2nd Defendant.*

2. The application is premised on the grounds on the face of the motion namely:

- i. *The Plaintiff's suit herein is a claim for the beneficial and legal ownership of the property known as plot No. 1040/2 CR. No. 21749 (the suit property).*
- ii. *The plaintiffs pleaded claim is that they bought the suit property from a company known as Kenya Wool Limited through an Agreement for sale dated the 15th day of February 2002 ('the Agreement'). It is instructive to note that Kenya Wool Limited is not a party to this suit.*
- iii. *The plaintiffs have not disclosed or pleaded any particulars of ownership over the suit property. The only evidence pleaded to support their allegation of ownership over the same is the Agreement.*
- iv. *The plaintiffs in any event are time barred in law from making any claim over the suit property based on the Agreement pursuant to Section 7 of the Limitation of Actions Act Cap22.*
- v. *The plaintiffs suit as pleaded, discloses no reasonable cause of action against the 2nd Defendant by reason of the foregoing.*
- vi. *The 2nd Defendant is the registered proprietor of the suit property holding a title thereto, being a Grant issued on 4th July 1991 which is lawful and indefeasible title.*

vii. The plaintiffs although having entered into the Agreement with the company known as Kenya Wool Investment Company Limited, have not sued the said Kenya Wool Investment Company Limited but instead has sued the 1st Defendant herein who is Kenya Wool Limited (sic).

viii. The plaintiffs suit as against the 2nd Defendant is scandalous, frivolous and vexatious and is a gross abuse of the process of court.

3. The application is supported by the affidavit of HARISH PATEL sworn on 25th July 2017. The 2nd defendant avers that it is the registered proprietor of the suit property and has exhibited documents showing the background of how it acquired the same. That although the plaintiffs contend that they are the legal and beneficial owners of the suit property pursuant to a sale to them, yet the only evidence shown by the plaintiffs is a Sale Agreement dated 15th February 2002 entered into with them by a Company called Kenya Wool Limited which is not a party to this suit. It is the 2nd defendant's contention that the plaintiffs are barred in law from making a claim based on the Agreement made over 12 years. Further, the 2nd Defendant contends that Kenya Wool Limited is not the same company as the 1st Defendant to this suit, whose name is stated as Kenya Wool Investments Limited and that it is quite apparent that the Agreement even if it did exist, is insufficient of itself to justify the plaintiffs' assertion that they are the legal and beneficial owners of the suit property in the absence of any evidence of title deed showing either Kenya Wool Limited or the plaintiffs as the registered properties of the suit property; any evidence to show that Kenya Wool Limited acquired the suit property from their alleged predecessors in title, Mukinye Enterprises Limited; a duly stamped and registered transfer showing Kenya Wool Limited having transferred its alleged interest in the land to the plaintiffs pursuant to the agreement or any payment being made under the terms of the Agreement.

4. The Advocate for the 2nd Defendant made brief submissions in support of the application and mainly relied on the grounds in face of the motion and the supporting affidavit.

5. The application was supported by the 3rd and 4th Defendants through their counsels on record who also made brief submissions.

6. During the hearing of the application on 5th March 2018, counsel for the plaintiff informed the court that they no longer have instructions to act for the plaintiffs, and applied for time to file an application to cease from acting. The court declined to grant the request as no sufficient reason had been given why such application was not filed earlier. The application was therefore unopposed.

7. I have carefully considered the application, the affidavit in support, the pleadings on record and the submissions made. In the case of Yaya Limited –vs- Trade Bank Limited (In Liquidation) [2000] eKLR, the court of Appeal expressed itself as follows:

“A plaintiff is entitled to pursue a claim in our courts however improbable his chances of success. Unless the Defendant 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...”

8. In the case of DT Dobie & Company (Kenya) Ltd –vs- Muchina (1982) KLR I, the court of Appeal stated:

“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.

9. In the case of G.B.M Kariuki –vs-Nation Media Group Ltd & 4 Others [2012] eKLR Odunga, J had this to say:

“In the exercise of its powers under Order 2 Rule 15 of the Civil Procedure Rules, there are certain well established principles that a court of law must adhere to. Whereas the essence of the said provision is the striking out of a pleading, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to Civil Litigation is not to be deprived of his right to have his suit or defence tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a mini-trial thereof before finding that a case does not disclose a reasonable cause of action or is otherwise an abuse of the process of the court. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However where the suit is without substance or groundless or fanciful and is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as legitimate use of the process, be used as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the courts resources while taking into account the need to allot resources to other cases.”

10. The overriding principle therefore to be considered in an application for striking out of a pleading is whether it raises any triable issues.

11. I have looked at the plaint dated 13th September 2016. In it, the plaintiffs pleaded claim is that they are the legal and beneficial owners of the suit property having purchased it from the 1st Defendant, Kenya Wool Investment Company Limited on 15th February 2002. I have however looked at the Agreement for sale dated 15th February 2002 and the same shows the vendor as a company known as Kenya Wool Limited and not Kenya Wool Investment Company Limited. The plaintiffs have not filed any claim against the said Kenya Wool Limited. Although the defendants have taken issue with this, the plaintiffs have not made any application to bring in the said company or to amend the

plaint.

12. Besides the said Agreement for sale the plaintiffs have not disclosed or pleaded any particulars of ownership of the suit property. The 2nd defendant has shown that it is the registered proprietor of the suit property and has given documents showing the history of the title to the suit property. It is clear from this history that by virtue of a Grant issued on 4th July 1991, the 2nd Defendant acquired title to the suit property and the same has not been impugned or properly challenged by the plaintiffs in their pleadings.

13. As already noted the plaintiffs are relying on an agreement for sale dated 15th February 2002. Section 7 of the Limitation of Actions Act provides as follows:

“An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if first accrued to some person through whom he claims, to that person.”

If the plaintiffs are relying on a contract entered into on 15th February 2002, they are clearly time barred by virtue of the above provision of the law. In my view, the plaintiffs action has no foundation, is hopeless and has no chance of succeeding. The same is without doubt frivolous, vexatious and an abuse of the court process. I think this is a plain and obvious case and ought to be struck out.

14. In the result, the Notice of Motion dated 25th July 2017 is merited and is hereby allowed. The plaintiffs case is struck out with costs to the defendants.

Dated signed and delivered out Mombasa this 3rd day of May 2018.

C. YANO

JUDGE