



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NUMBER 212 OF 2015

ELEPHANT OILS MILLS LIMITED.....PLAINTIFF

VERSUS

STEPHEN NJENGA NJOROGE.....1ST DEFENDANT

MAVJI KARSAN HIRANI.....2ND DEFENDANT

MWANALIMA MWINYIKAL.....3RD DEFENDANT

SALIM ALI NYAWA.....4TH DEFENDANT

KWALE COUNTY LAND REGISTRAR.....5TH DEFENDANT

ATTORNEY GENERAL.....6TH DEFENDANT

RULING

1. This ruling is in respect to the plaintiff's Notice of Motion dated 2nd October 2020 brought under Section 1A, 1B, 3A and 7 of the Civil Procedure Act and Order 2 Rule 15 (i), Order 26 Rule 5 and Order 51 Rule 1 of the Civil Procedure Rules. The application is supported by affidavit of Ushwin Khanna and seeks the following orders:-

- i. The Defence and Counterclaim of the 3rd and 4th defendants filed on 8th June 2017 herein dated 30th May 2007 be struck out.
- ii. The undated and unsigned Amended Defence and Counterclaim of the 3rd and 4th defendants filed on the 4th February 2020 be struck out.

IN THE ALTERNATIVE

- iii. That the 3rd and 4th defendants be ordered to furnish security for costs of the suit including the counterclaim in the Sum of Kshs 2,244,759.25 or such sum as this Honorable Court may deem just, and until the furnishing of such security all further proceedings herein be stayed.
- iv. That in the event of the 3rd and 4th defendants, failing to provide the security ordered within twenty one days of the order, or such other time as this Honorable Court may deem just, the defence and counterclaim of the 3rd and 4th defendants do stand struck out with costs.
- v. That the costs of the suit and application be awarded to the plaintiff.

2. The application is based on the grounds thereon and it is averred that the amended defence and counterclaim filed on 4th February 2020 is not only undated and unsigned but also filed out of time without leave of court. The applicant states that the 3rd and 4th defendants' suit is frivolous, vexatious and with the intention of delaying trial. More to that, that same lacked merit and was an abuse of court process and was barred by statute and that they are res judicata.

3. In the affidavit supporting the application, it is stated that at all material times the plaintiff has been the registered proprietor of the

property Galu/Kinondo/ 351 (“the suit property”) and a title deed dated 7th November 1980 has been exhibited.

4. A chronological account of the cases that have been instituted in connection to the suit property were given as follows; Mwinyikai Kiriwacho and Ali Ramadhan who are respective fathers to the 3rd and 4th defendants herein instituted **HCCC 109 of 2005 (OS) Ali Ramadhan V Raj Mohamed Hussein Virji and Elephant Oil Mills Limited**. The Originating Summons dated 17th March 2005 and filed on 7th June 2005 sought the following orders:-

i. That the defendants’ registration as the proprietors of all that plot of land known as KWALE/GALU KINONDO/351 be revoked and the said title be issued in the name of the applicants/plaintiffs herein.

ii. That the costs of this application be provided for.

5. On 11th June 2006 the plaintiffs in the said O.S filed a request for judgement against the defendants for failing to enter appearance within the prescribed period of time. On 20th June 2006 the court entered interlocutory judgement against the defendants as prayed. Consequently there was a vesting order that was issued on 17th July 2006 that ordered as follows:-

i. That a vesting order be and is hereby issued in favour of the plaintiffs MWINYIKAI KIRIWACHO and ALI RAMADHAN and that the land known as KWALE/GALU/KINONDO/351 be and is hereby vested in favour of the said plaintiffs and the Title Deed be issued in their names.

ii. That there is no orders as to costs.

6. To effect the said vesting order, the Land Registrar Kwale District issued a Gazette Notice No 8059 dated 24th August 2007 that sought to transfer the suit property to the plaintiffs in the said suit. Being dissatisfied by the vesting order, the 2nd defendant in the said HCCC 109 of 2005 (O.S) was heard in court and by consent an order was made on 14th December 2007 that stated:-

i. That all consequential orders including the vesting order issued on 17th July 2006 be and are hereby set aside with immediate effect.

ii. That the order granted herein be registered against the original title Kwale/Galu Kinondo/351 with the land registry.

iii. That the land registrar Kwale District be directed to cancel the Gazette Notice No 8059 dated 24th August 2007 and to treat the transfer of the land title deed issued to the plaintiffs as cancelled and of no effect.

iv. That the costs shall be in the cause.

7. After the vesting order was set aside by court, the 2nd defendant therein made an application to court to have the plaintiffs’ suit struck out and on 8th October 2009 it was ordered:-

i. That the plaintiffs’ suit against the 2nd defendant instituted by way of originating summons dated 17th March 2005 be hereby struck out.

ii. That the cost of this application be and are hereby granted to the 2nd defendant.

8. The 3rd and 4th defendants were appointed as the legal administrators of the estate of Mwinyikai Kiriwacho and Ali Ramadhan in **Succession No 41 of 2015** from the Kadhi Court at Kwale. Having acquired these rights the 3rd and 4th defendants filed a suit against the plaintiff herein in **ELC No 43 of 2014 Mwanalima Mwinyikai and Salim Ali Nyawa V Elephant Oil Mills Limited** vide a plaint dated 27th February 2014 and prayed for an order of eviction against the defendant from Plot No KWALE/GALU KINONDO/351. The defendant in the said suit made an application on 4th April 2014 to court to have the plaintiffs’ suit struck out with costs. Consequently the court on 8th October 2014 ordered the plaintiffs’ suit to be struck out with costs.

9. The 3rd and 4th defendants offered to sell the suit property to the 2nd defendant and received Kshs 12,090,700/= as part payment towards the purchase price. That during the transaction, the 3rd and 4th defendants produced a copy of the title deed of the suit property and a certificate of official search showing the plaintiff herein as the registered owner of the suit property. This prompted the 2nd defendant herein to demand a refund of the part payment with interest. This led to the 2nd defendant filing a suit against the 3rd and 4th defendant in **HCCC 136 of 2014 Mavji Karsan Hirani V Mwanalima Mwinyikai Chiriwacho and Salim Ali Nyawa** vide a plaint dated 24th October 2014 and prayed for:-

i. Return of the said sum of Kshs 12,090,700/=

ii. Interest on the said sum of Kshs 12,090,700/= at court rate.

iii. Costs.

iv. Further or any other relief as this honorable court may deem fit to grant.

10. That the plaintiff in the said suit made an application dated 19th March 2015 seeking to have the defendants defence and counterclaim struck out and judgement to be entered as prayed in the plaint. On 25th June 2015 the court granted the application and made the following orders:-

- a. The defendants' defence and counterclaim is hereby struck out with costs to the plaintiff.
- b. Judgement is hereby entered for the plaintiff as prayed in the plaint.
- c. A prohibition/inhibition is issued in respect to the property KWALE/DIANI S.S/414 pending execution of the plaintiff's judgement herein.
- d. Plaintiff is awarded costs of the notice of motion dated 19th March 2015 and costs of this suit.

11. The property KWALE/DIANI S.S/414 was being reserved by court to ensure that the plaintiff in the said suit would have an asset to execute the judgement. The defendants made an application on 28th April 2017 for stay of proceedings in HCCC 136 of 2014 pending hearing and determination of this present suit. The application was dismissed with costs for the reason that the court could not find justification to delay conclusion of execution process set in motion pending a second determination of a dispute already determined. The court also held that the title that the plaintiff therein held was no more than a piece of paper and directed that the title be surrendered to the County Land Registrar Kwale for cancellation. On 12th March 2019 the Registrar of Lands wrote to court to confirm that the title to the suit property in the names of the 2nd defendant herein had been surrendered and the said title cancelled.

12. The application further alluded that the 3rd and 4th defendants' raised the issue of ownership of the suit property yet that issue had already been determined in the said; HCCC 109 of 2005 (OS), ELC 43 of 2014 and HCCC 136 of 2014. That the 3rd and 4th defendants have no known assets that can be attached to meet the costs estimated at Kshs 2,244,759.25 that the plaintiff has incurred, and that the only asset they have has been attached by 2nd defendant herein to recover his costs in the said HCCC 136 of 2014.

13. In response to the application, the 3rd defendant filed a replying affidavit dated 19th November 2020 and stated that the plaintiff and the 2nd defendant are in a fraudulent deal to defraud the 3rd defendant of their ancestral land. That the suit HCCC 136 of 2014 was not on ownership of the suit property but on a claim of liquidated sum. That after the title to the suit property was cancelled by the 5th defendant, title did not pass to the plaintiff or any person. The 3rd defendant also claimed that the applicant is blocking the defendant who is from a poor background from accessing justice. Further to this, the 3rd defendant stated that the applicant has not presented a valuation report to qualify the value of the suit property to justify the costs claimed. The 3rd defendant concluded by praying for the application to be dismissed with costs.

14. Parties attended court 3rd March 2021 to urge the application and Mr. Khanna for the applicant/plaintiff stated that the 3rd and 4th defendants had no locus and that title of the suit property has never been vested on the 3rd and 4th defendants as the vesting order in HCCC 109 of 2005 (O.S) was given ex parte in default of service. That vide a consent order, the said vesting order as well as the gazette notice that purported to transfer the suit property to the 3rd and 4th defendants were set aside by court. That the 5th defendant at the time did not comply with the court orders to cancel the gazette notice and went ahead and issued the 3rd and 4th defendant with title to the suit property. Mr. Khanna too submitted that the amended defence and counterclaim was filed without leave of court making it an abuse of court process and that the counterclaim was res judicata. On the fact that the 3rd and 4th defendants alleged that the suit property was ancestral land, the plaintiff refuted the claim stating that they had at one point allegedly transferred the suit property to the 2nd defendant and procured a title which was later cancelled. Mr. Khanna maintained that the plaintiff is the owner of the suit property which has since been subdivided into 48 plots and has never been sold or transferred to any party. Mr Khanna concluded by asking the court to grant prayers 1 and 2 of the application.

15. Ms. Chesaro for the 3rd and 4th defendants argued against the application and stated that none of the parties to the suit had title to the land since the current subdivisions are in the name of the 1st defendant making the plaintiff lack locus too. That the plaintiff too has filed pleadings without leave of court, presented them in support of their case and that the 3rd and 4th defendants did not have an opportunity to look at them. Ms. Chesaro further reasoned that the plaintiff had been given a chance to present its case to conclusion thus the 3rd and 4th defendants should also be given a chance to present their case in the defence hearing. That the counterclaim should not be struck out as the entire suit is for the plaintiff in the first place. She concluded by asking court to dismiss the application with costs and let the case proceed to defence hearing.

16. Having considered the application, the replying affidavit as well as all the submissions in support of and in opposition to the application, the issue before court for determination is whether the amended defence and counterclaim of the 3rd and 4th defendants should be struck out.

17. Order 2 Rule 15 (1) of the Civil Procedure Rules provides that:-

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.

18. The principles upon which the court acts in considering applications to strike out pleadings under Order 2 rule 15 of the Civil Procedure Rules have been settled in several cases. **The Court of Appeal in Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu [2009] eKLR stated thus:**

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs Muchina (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13(1)(a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:

“The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading.”

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.”

19. The plaintiff/applicant has prayed for the amended defence and counterclaim of the 3rd and 4th defendants to be struck out for being lacking merit and being an abuse of the court process. The plaintiff avers that the 3rd and 4th defendants’ suit is frivolous, vexatious and intended to prejudice and delay the fair trial of the suit. The plaintiffs also states that the amended defence and counterclaim of the 3rd and 4th defendants is barred by statute and for being res judicata and being filed out of time without leave of court.

20. It is clear from previous proceedings that the 3rd and 4th defendants’ suit raises no triable issues. This is because their alleged title to the suit property has been denied in previous suits. The first instance is in **HCCC 109 of 2005 (O.S)** where the 3rd and 4th defendants’ suit against the plaintiff was struck out by court and the vesting order and gazette notice that were issued therein set aside. The second instance is in **ELC 43 of 2014** where the 3rd and 4th defendants’ suit against the plaintiff was struck out and lastly in **HCCC 136 of 2014** where the 2nd defendant successfully had the 3rd and 4th defendants’ defence and counterclaim struck out and judgment entered in favour of the plaintiff in that case. After the 3rd and 4th defendants’ suits being struck out by court in three different cases, the 3rd and 4th defendants in my view cannot come back to court with the same defence in this suit. This clearly amounts to an abuse of the court process.

21. Whereas striking out of a defence is a very serious matter as it deprives a defendant of such defence that would be open to him, the 3rd and 4th defendants have not provided any satisfactory explanation that would convince this court to sustain their defence and counterclaim. I associate myself with the findings of Gikonyo J in **Kenya Commercial Bank v Suntra Investment Bank Ltd [2015] eKLR** where he stated **“I have stated in past decisions, and I will state again, that the policy considerations of the above approach are that; 1) on one hand, a Plaintiff should not be kept away from his judgment by unscrupulous Defendant who has filed a defence which is a sham for the purpose only of temporizing on the case as long as possible; and 2) on the other hand, a defendant who has bona fide issue worth of trial should not be denied the opportunity to be heard on his defence on merit to enable the Court determine the real issues in controversy completely; that is serving substantive justice on consideration of all facts of the case.”**

22. Litigation has to come to an end and the reason why courts exist is to finally and completely determine disputes between parties. Multiple proceedings must be avoided and the principle of res judicata observed. Where there is a suit that has been struck out, the subsequent actions over the same subjects and same parties should be struck out too. Parties should not re-litigate disputes which have already been decided by a court of competent jurisdiction. The deliberate continuation of proceedings connotes parties are avoiding justice rather than achieve it. The 3rd and 4th defendants’ amended defence and counterclaim is a continuation of proceedings with no intention of ever concluding the matter and this amounts to abuse of court process.

23. This court has to exercise its inherent powers to prevent abuse of court process by the 3rd and 4th defendants who have clearly failed to raise any triable issue in their amended defence and counterclaim. Accordingly, the Notice of Motion dated 2nd October 2020 is allowed and the court makes the following orders:-

a. The amended defence and counterclaim of the 3rd and 4th defendants dated 24th January 2020 and filed on 4th February 2020 is hereby struck out with costs to the plaintiff.

b. Costs of the application are awarded to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH MAY OF 2021

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE