



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 175 OF 2015

JOSEPH LOKODI TELEU (SECRETARY)

Suing on behalf of Trans Mara Community Development Project....PLAINTIFF

VERSUS

JONATHA PAAPAI.....1ST DEFENDANT

GRACE NAIGURAL.....2ND DEFENDANT

WILSON SUYA.....3RD DEFENDANT

JOSHUA KIPNGETICH KURUI (Surveyor Transmara).....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. Before me for ruling is the 1st and 2nd defendants Notice of Motion application dated 11th November 2017.

2. The application is brought under Order 2 Rule 15(1)(b), (c) and (d) of the Civil Procedure Rules, Order 51 Rule (1) and Sections 1A, 1B and 3A of the Civil Procedure Act and Section 4 of the Limitation of Actions Act, Cap 22 Laws of Kenya. By the application, the applicant seek the following orders:-

1. The Honourable Court be pleased to strike out and/or order to be struck out the plaintiff's respondent's plaint dated 8th May 2015, albeit filed in court on the 11th May 2015.

2. Consequent to prayer (1) being granted, the honourable court be pleased to dismiss the suit by and/or on behalf of the plaintiff/respondent herein.

3. Costs of this application and the main suit be borne by the plaintiff/respondent.

4. Such further and/or other orders be made as the court may deem fit and expedient.

3. The application is supported on the grounds set out on the face of the application and on the annexed affidavits sworn in support of the application by Jonathan Paapai, the 1st defendant herein. The applicants contend that the plaintiff, Joseph Lekodi Telen resigned and ceased from being the Secretary of Transmara Community Development Project on 4th February 2015 and consequently lacked the mandate and/or *locus standi* to bring this suit on behalf of the community project. The applicants further aver that the suit involves a dispute respecting the ownership of **LR No. Transmara/Poroko/39** and the plaintiff has no interest in the said property which is registered in the names of third parties. The applicants further aver that the suit by the plaintiff raises no reasonable cause of action against them, is misconceived and bad in law and is legally untenable. The applicants contend the suit is mischievous, scandalous and vexatious and the same constitutes an abuse of the process of the court.

4. The plaintiff filed a replying affidavit sworn on 23rd January 2018 in opposition to the 1st and 2nd defendants' application. The plaintiff reiterated that he filed the instant suit on 11th May 2015 on behalf of "his" project Transmara Community Development Project. The plaintiff avers that he purchased the land (6 acres) from Felix Oramat Katende and Meshack Leteipa Chelunku and not the defendants. The plaintiff further stated that the project was solely his own and that the defendants were but mere imposters intent on taking over the project from him (the plaintiff). The plaintiff stated that he was not validly removed from being an official of the community development project.

5. The application was argued by the parties by way of written submissions. The 1st and 2nd defendant submissions were filed on 3rd April 2018 and the plaintiff's submissions were filed on 9th July 2018.

6. The application by the 1st and 2nd defendants seeks to have the plaintiffs' suit struck out on the basis that the plaintiff lacks a *locus standi* to bring the suit; the suit is misconceived, frivolous and vexatious and is an abuse of the process of the court. The applicants assert that the plaintiff resigned from being an official of Transmara Community Development Project on 4th February 2015 as per minutes dated the February 2015 annexed to the affidavit of the 2nd defendant marked "P3". As per the minutes an interim board of management for the community project was constituted and the 2nd defendant was nominated as the Chairman. The plaintiff thus ceased to hold office in the community project as from 4th February 2015. The office of secretary which the plaintiff held was taken over by one, Michael Tupunya. The new office bearers were handed over the assets of the community project which included the Children Home as per the minutes of the meeting held at Transmara Children Home on 12th February 2015 annexed as "JP6" to the 2nd defendant's affidavit. The outgoing chairman, Rev, Benson Shamji who served with the plaintiff in the outgoing board of management presided at the handing over of the assets.

7. The plaintiff as his replying affidavit attests treated Transmara Community Development Project as his own property. Paragraph 8 and 10 of the plaintiff's affidavit makes this clear and I set them out hereunder:-

8. That it is not true that I was removed from my own project as the imposters wants to take over my project unfairly just because they were retired as police officers and as they only work up one fine morning on 4th February 2015 and pronounced themselves as office bears of my project.

10. That some of the imposters were my witnesses during the time of purchasing the land and have now started misusing my property by taking away my properties from the project.

8. There is no dispute that "Transmara Community Development Project" was registered with the relevant Ministry in 2006 and having been so registered could only execute its functions and mandate through officials. The plaintiff was the secretary of the project from its inception up to 4th February 2015 when it is apparent there was a change of officials and the plaintiff ceased to be the secretary of the community project and did not henceforth have any mandate to act for and/or represent the community project. If the plaintiff did not approve of the change of officials he ought to have challenged the Constitution of the new board of management. He did not. As the name suggests "Transmara Community Development Project" was a communal project and could not have been a personal project as the plaintiff intimates. The project belonged to the community and even the land the plaintiff states he purchased, the same was for the community project and not for the plaintiff. The agreement dated 25th January 2011 which the plaintiff refers to clearly shows the purchaser as "Transmara Community Development Project Reg. No. 1473" and that the plaintiff executed the same together with the chairman on behalf of Transmara Development Project. The property was therefore not intended to benefit the plaintiff but the project.

9. On the evidence and material before the court there is irrefutable evidence that as at 11th May 2015 when the plaintiff filed the present suit he was not an official of Transmara Community Development Project as the evidence shows he ceased to be the secretary of the project on 4th February 2015. In case the plaintiff was filing the suit as a representative of Transmara Community Development Project members in his private capacity and not as official of the project he would have been required to comply with the provisions of Order 1 Rule 8(1) and (2) which provides thus:-

8(1) Where numerous persons have the same interest in any proceeding, the proceedings may be commenced, and unless the court otherwise orders, continued by or against any one or more of them as representing all or as representing all except one or more of them.

(2) The parties shall in such case give notice of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

10. It is not apparent from the plaint whether the plaintiff is pursuing the interests of the wider members of the public or a private agenda as some of the pleadings referred to earlier reveal. Be it as it may be, Transmara Community Development Project as a Self Help Group draws its membership from the local community and it cannot be assumed that the interested members are at all aware of the instant suit. My view is that if the suit was intended for the benefit of the members of Transmara Community Development Project as framed, permission to bring a representative suit ought to have been sought and directions given in terms of Order 1 Rule 8 of the Civil Procedure Rules.

11. Having found and held that the plaintiff had ceased to be an official of Transmara Community Development Project by the time he filed the present suit on 11th May 2015 and further having held that the suit was not brought in compliance with Order 8 of the Civil Procedure Rules, it follows that I find and hold that the plaintiff lacks the *locus standi* to sustain the present suit.

12. On the issue whether the suit is misconceived, frivolous and an abuse of the court process, I have considered the pleadings on record and note that under the plaint, the plaintiff seeks an order of injunction against the defendants restraining them from claiming a portion of 6 acres from unnamed land purchased by the plaintiff. The agreement on which the plaintiff founds his claim dated 25th January 2011 named Transmara Community Development Project as the purchaser and not the plaintiff in his individual capacity. The community development project would be entitled to pursue the completion of the transaction through its registered officials. It cannot be that it is only through the plaintiff that the community development project can act. It has its officials through whom it can act and such action could include following up completion of the sale transaction for the community development project that the plaintiff initiated. If the defendants are serving office bearers of Transmara Community Development Project, they cannot be restrained from exercising their mandate as such officials.

13. I am satisfied the plaintiff's suit having regard to the pleadings and the material on record is misconceived and frivolous so as to amount to abuse of the court process. I am conscious that to strike out a suit is a draconian action that must only be taken as the very last option and only when a suit cannot be salvaged even by an amendment. In the case of **DT Dobie & Co. (Kenya) Ltd -vs- Muchina [1982] KLR 1** the Court of Appeal stated thus:-

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

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 full facts of a case before it.”

14. In the present case, I have held that the plaintiff lacked the *locus standi* to institute the suit and not even an amendment can cure that given that without locus the suit is a nullity. Even if locus was there, my view is that the suit is totally misconceived and is frivolous and discloses no reasonable cause of action. I do not think any **“panel beating”** by way of amendment could salvage the suit. The suit was misguided as the plaintiff was clearly attempting to solve their community project management squabbles through the suit and in doing so he clearly chose the wrong forum.

15. The net result is that I find merit in the Notice of Motion by the 1st and 2nd defendants and I accordingly order the plaint dated 8th May 2015 and filed in court on 11th May 2015 struck out and the suit by the plaintiff dismissed.

16. I award the costs of the application and suit to the defendants.

17. Orders accordingly.

RULING DATED, SIGNED and DELIVERED at KISII this 5TH DAY of OCTOBER 2018.

J. M. MUTUNGI

JUDGE

In the presence of:

Mr. Chenge for Sagwe for the plaintiff

Mr. Olalndo for 1st & 2nd for the defendant

N/A for 3rd, 4th & 5th defendants

Ruth Court assistant

J. M. MUTUNGI

JUDGE