



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 31 OF 2019

ESTHER NZINGO KALUME {Suing on her own behalf and on behalf of the

Estate of Kavumbi Kalume Kitsaumbi (deceased)}.....PLAINTIFF****

VERSUS

THE ADMINISTRATOR OF THE

ESTATE OF WOBBE SVEND ERIK (DECEASED).....1ST DEFENDANT****

LUCY NYAMBURA.....2ND DEFENDANT****

RULING

(Application to strike out suit; grounds being that the suit is incompetent because the 1st defendant does not exist; claim being based on a lease agreement between the plaintiff's predecessor and a person who is now deceased; no administrator in respect of the estate of the deceased; 1st defendant therefore not in existence; suit against 1st defendant struck out; suit can however be continued against the 2nd defendant who has been sued in her individual capacity)

1. The application before me is that dated 13 November 2020 filed by the 2nd defendant. The application is brought pursuant inter alia to the provisions of Order 2 Rule 15. It seeks orders that this suit be struck out for being incompetent. The application is based on the following grounds :-

(a) That this suit is filed against a deceased person.

(b) That no grant of letters of administration have ever been issued and confirmed by any court for the estate of the 1st defendant.

(c) That no citation was ever issued against the 2nd defendant to take letters of administration before the suit was filed.

(d) That the entire suit is an abuse of the court process.

2. The plaintiff has opposed the application.

3. To put matters into context, the plaintiff/respondent commenced this suit through a plaint which was filed on 26 February 2019. The plaintiff has filed suit on her own behalf and on behalf of the Estate of Kavumbi Kalumbe Kitsaumbi (deceased). The 1st defendant is described as “*The Administrator of the Estate of Wobbe Svend Erik (deceased)*”, whereas the 2nd defendant/applicant is Lucy Nyambura, an individual. In the plaint, the plaintiff pleaded that on 30 November 2007, the late Kavumbi leased to the late Erik, the land described as subdivision No. 4595 carved out of Subdivision No. 3843 (Original No. 3839/4 Section III Mainland North) (hereinafter referred to as “the suit land”). It is pleaded that the demised subdivision portion now has a title issued to the plaintiff on 30 July 2012. The plaintiff has averred that the lease dated 30 November 2007 had various terms inter alia terms that the lessor and lessee included the beneficiaries, personal representatives, heirs and permitted assigns; that the lease was for a term of 99 years from 1 January 2008; that the lessee would pay a monthly rent of Kshs. 1,800/= payable annually in advance as Kshs. 21,600/= ; that the lessee would pay the rent reserved; that if rent remained unpaid for 6 months the lessor would be entitled to serve a 14 days notice requiring compliance and in default the lessor could file an appropriate action in court; that upon termination of the lease the lessee had the option to purchase; and that if the lessee omitted to exercise the option to purchase, the lessor could sell the property to any suitable buyer at the valuation price.

4. The plaintiff has pleaded that the tenancy was trouble free for the years 2008 to 2013 and early 2014, and that the late Erik paid the annual rent of Kshs. 21,600/= as prescribed. It is pleaded that upon the demise of the late Erik, the 1st defendant took no interest in the tenancy. The plaintiff contends that this omission by the 1st defendant amounts to abandonment of the tenancy and breach of the covenants therein. The plaintiff has pleaded that she has learnt that the 2nd defendant is now in occupation of the premises. It is her contention that this is unlawful and illegal, and amounts to trespass, for reasons inter alia that the 2nd defendant is not the administrator, personal representative, or heir to the estate of the late Erik, and that there has never been an assignment of the tenancy. The plaintiff has pleaded that she has suffered loss and damage owing to the 2nd defendant's unlawful occupation. In the suit, the plaintiff has asked for the following orders (slightly paraphrased for brevity) :-

(i) A declaration that the 1st defendant has abandoned and fundamentally breached the terms of the Lease Agreement of 30 November 2007.

(ii) An order directing the 1st defendant to pay the plaintiff the sum of Kshs. 86,400/= being unpaid rent for the years 2015 to 2018.

(iii) A declaration that the 2nd defendant is in unlawful and illegal occupation of the suit property and her occupation amounts to trespass.

(iv) A permanent injunction to restrain the 2nd defendant from the suit property.

(v) General damages for the 2nd defendant's act of trespass.

(vi) An order directing the 2nd defendant to vacate the suit property or she be forcefully evicted.

(vii) Costs of the suit and interest.

5. A memorandum of appearance was filed on 1 March 2019 by the law firm of M/s Martin Tindi & Company Advocates for both the 1st and 2nd defendant. I have however seen another Memorandum of Appearance filed on 13 March 2019 by the law firm of Munyithya, Mutugi, Umara & Muzna Advocates for the 2nd defendant only. Through the latter law firm, the 2nd defendant filed a statement of defence and counterclaim. In the defence, it is pleaded that the suit is incompetent for failing to give particulars of the legal representative of the late Erik. The 2nd defendant otherwise pleaded that she is daughter of the late Erik and therefore the automatic heir and beneficiary of the estate of the late Erik. She pleaded that she has been in occupation of the premises before and after the death of Erik and that this is her family home. The agreement of 30 November 2007 is admitted and she has averred that it covers heirs and she is an heir. It is further pleaded that it cannot be said that the tenancy has been abandoned or breached whereas the 2nd defendant is in occupation. She has pleaded that all along she has been willing to pay the rent due and is ready to pay the sum of Kshs. 86,400/=. She has raised issue with the registration of the title deed and avers that it is illegal as she was not involved. She has contended that failure by the plaintiff to issue a citation is intended to defraud her. She has pleaded that the plaintiff is the author of his own misfortune for failing to involve the 2nd defendant when applying for the title deed and taking over the running of the estate of Kavumbi Kalume. She has pleaded that the remedy that the plaintiff should be applying for is payment of rent arrears and not breach of contract. In the counterclaim, she has pleaded that an entry should be made in the title to reflect the existing lease of 99 years. The plaintiff filed a reply to defence and defence to counterclaim and pleaded being a stranger to the claim that the 2nd defendant is heir to the estate of the late Erik.

6. In the supporting affidavit to the application, the 2nd defendant has deposed that the late Erik, who was of Danish origin, married her mother in the year 1996 when she (the 2nd defendant) was 7 years old. She has deposed that she is therefore the daughter of the late Erik. She has further added that her mother died in the year 2013 when she was 24 years old. She has stated that she is the only child residing on the suit property as her siblings are resident in Denmark and Danish citizens. She stated that she only came to learn of the plaintiff's claim upon being served with some documents in the year 2019. She has deposed that neither she nor her step-sisters have applied for letters of administration of her late father and neither has she been served with any citation to take letters of administration. She has stated that she has had challenges communicating with her step-siblings in Denmark since Covid-19 set in and they inform her that they cannot forward the hard copy of the Death Certificate until their Government allows it. She thus seeks that this suit be struck off as being an abuse of the process of court.

7. To oppose the motion, the plaintiff filed a replying affidavit. She is of the view that the same lacks merit. She has pleaded that there are specific reliefs sought against the 2nd defendant. Regarding the 1st defendant, she has pleaded that she has competently sued the administrator of the estate of the late Erik. She has deposed that there had been discussions between her advocates and M/s Martin Tindi & Company Advocates prior to her filing suit and that the latter wrote stating that they have instructions to receive process. She has pointed out that M/s Martin Tindi & Company Advocates have entered appearance for the defendants. She has deposed that no prejudice will be occasioned to the 2nd defendant if this suit is not struck out as she acknowledges the lease agreement and the rent due.

8. Counsel were invited to file written submissions and I have seen the submissions of Mr. Mutugi, learned counsel for the 2nd defendant/applicant, and of Mr. Masore Nyang'au, learned counsel for the plaintiff/respondent. I have taken note of these submissions before arriving at my decision.

9. The suit herein is against two persons. The first, as I have mentioned, is "The Administrator of the Estate of Wobbe Svend Erik (deceased)" whereas the 2nd defendant is the applicant. It is common ground that Wobbe Svend Erik is deceased, and from the deposition of the applicant, it appears that he died sometime in the year 2011. There is no evidence that there has ever been an administrator appointed to administer the estate of the late Erik. It follows therefore that at the moment, there is no administrator of the estate of the late Erik. It is trite that if one wishes to sue the Estate of a deceased person, the only person that can be sued is the administrator of the said estate. In our case,

since there is no administrator, then the 1st defendant is non-existent. In other words, nobody can be said to be “The Administrator of the Estate of Wobbe Svend Erik (deceased).” It is again trite, if not common sense, that you cannot sue a person or entity that does not exist. It follows that the suit against the 1st defendant is a nullity ab initio. It is immaterial that there is an appearance entered, for one cannot enter appearance for an entity that is non-existent. The proper thing would have been to enter an appearance under protest and point out that the 1st defendant does not exist. Given the foregoing, I have little option but to order that the 1st defendant be struck out of this suit and the plaint be accordingly amended within the next 14 days demonstrate this position.

10. I cannot however strike out the suit against the 2nd defendant. She has been sued in her own capacity, and it is indeed the position of the plaintiff that she is a trespasser, who has no right to reside in the suit premises. The suit against the 2nd defendant is therefore competent and is one that can proceed to full hearing on merits. The burden will of course be on the plaintiff to prove that the 2nd defendant is a trespasser and in illegal occupation and the 2nd defendant will have a chance to demonstrate that she is legally in occupation of the suit property. Those are issues that will go to trial for determination and I would not wish to say much at this stage.

11. Thus, save that I order the striking out of the name of the 1st defendant and any claim said to be against “The Administrator of the Estate of Wobbe Svend Erik” , and order the amendment of the plaint to reflect that position, I find nothing incompetent against the rest of the suit and I am unable to strike out the whole suit.

12. The applicant has partly succeeded and will have the costs of this application.

13. Orders accordingly.

DATED AND DELIVERED THIS 10TH DAY OF MAY 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA