



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MILIMANI**

**ELC CASE NO. 9 OF 2019**

**KENYA REDEEMED CHURCH.....PLAINTIFF**

**(Suing through its Chairman, Secretary and Treasurer)**

**VERSUS**

**NEW LIFE REDEMPTION MINISTRY.....DEFENDANT**

**(Being sued through its Chairman, Secretary and Treasurer)**

**RULING**

This ruling is in respect of the Defendant's application dated 9/12/2019 vide which it seeks to have the *plaint dated 24/1/2019 struck out for misjoinder of issues and incompetence. In the alternative, the Defendant seeks to have the court order the Plaintiff to withdraw this suit so that it can file two separate suits in respect of the parcels of land known as D4-199 and land reference number (L.R No.) 4148/58 because there was misjoinder of issues since the two properties were obtained through different transactions.*

The application is based on the ground that the plaintiff discloses two properties being plot number D4-199 situated in Kayole, Nairobi County and L.R No. 4148/58 situated in Muigai Inn, Kiambu County. The Defendant contended that the two parcels of land were acquired on 10/9/1992 and 22/5/2007 respectively and that the Plaintiff should have filed two separate suits to avoid misjoinder of issues which may confuse the court and embarrass the Defendant. Further, that the plaintiff is incurably defective for misjoinder of issues and cannot be salvaged through the amendment of the plaintiff.

The Plaintiff filed grounds of opposition on 19/4/2021. The grounds were that the Defendant's defence, list and bundle of documents, witness statements all of which are dated 9/12/2019 were filed without leave of the court and that they should therefore be expunged from the court record and that the alleged joinder and misjoinder of causes of action was a misconception since the dispute over the two properties involved the Defendant and the Plaintiff. The Plaintiff urged that the Defendant's application lacked merit and ought to be dismissed.

The Plaintiff commenced these proceedings through the plaintiff dated 24/4/2019. The basis of the Plaintiff's claim is that it was allocated Kayole plot D4-199 on 10/9/1992 by Nairobi City Council and that it bought L.R No. 4148/58 from Bigma Housing Company Limited. The Plaintiff claims that these two parcels of land were fraudulently transferred to the Defendant and seeks cancellation of the titles and transfer of the two parcels of land to its name.

In its defence dated 9/12/2019, the Defendant pleaded that the Kayole plot number D4-199 was allocated in the name of Kenya Redeemed Church but that it was allocated to Bishop Absalom Ndungo who was part of the Plaintiff but later founded and moved on to form the Defendant. The Defendant averred that the transfer of the Kayole plot from the Plaintiff to the Defendant was properly and regularly undertaken. In the defence, the Defendant also averred that there was a Memorandum of Understanding and a Report of the Mediation Team both dated 12/2/2016 which were adopted by the High Court in Civil Appeal No.510 of 2011(Consolidated with High Court Civil Appeals No. 441 and 219 of 2011.) where the two zones, that is the Eastern and Western were separated and allowed to go their separate ways. The Defendant contended that plot number D4-199 was ceded to the Western Zone under Bishop Absalom Ndungo. The Defendant denied all allegations of fraud and sought dismissal of the suit.

The court has considered the application, the grounds of opposition together with the written submissions filed by both parties. The Defendant made reference to Order 2 Rule 15(1) (c) of the Civil Procedure Rules and sought to have the plaintiff struck out on the premise that there was misjoinder of causes of action and that the impugned plaintiff may prejudice, embarrass and delay the trial of the suit. The Defendant also made reference to Section 12 of the Civil Procedure Act on geographical jurisdiction which stipulates that a suit should be filed within the local limits of whose jurisdiction the land is situated. The Defendant requested the court to find that L.R No. 4148/58 which is situated in Muigai Inn area of Kiambu County was wrongly filed before this court.

The Plaintiff's submissions reiterated its grounds of opposition. The Plaintiff submitted that the Defendant's defence and documents were filed on 20/12/2020 without leave of the court and that they should be expunged from the court record. On the claim of misjoinder of causes

of action, the Plaintiff made reference to Order 1 Rule 9 of the Civil Procedure Rules which stipulates that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and that the court may deal with the matter in controversy so far as regards the rights and interests of the parties actually before it. The Plaintiff submitted that even if the plaint had made reference to more than two properties it would still be prudent for the suit to be heard and determined by the same court since it involved the same parties over the same issues.

The issue for determination is whether this suit should be struck out for misjoinder of issues. Whereas courts have power to strike out pleadings in appropriate cases, it is generally the practice that that power should be exercised cautiously and sparingly. Madan J A (as he then was) captured it as follows in the case of **D. T. Dobie & Company (Kenya) Limited v Muchina [1982] KLR 1**: -

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way.”

Courts have continued to follow that path. In **Fremar Construction Company Limited v Minakash N. Shah C.A Civil Appeal No 85 of 2002 (Nairobi)** the Court of Appeal stated thus: -

“This Court has stated many times before, and the learned Judge of the superior Court was conscious of it, that striking out a pleading is a drastic remedy and the powers of the court are to be exercised with great caution and only in clear cases. But the power is clearly donated in the rules and exists inherently for the court in the interest of justice, to reject manifestly frivolous and vexatious pleadings or suits and to protect itself from abuse of its process.”

The court record confirms that the Defendant was granted leave to file its documents on 14/11/2019 and as such the Plaintiff’s contention that the Defendant’s documents were filed without leave of the court is erroneous. A careful consideration of the facts reveals that the suit refers to two properties acquired through different transactions and on different dates. However, the two properties in dispute relate to the same parties currently before this court.

As to whether or not the suit was wrongly filed before this court with respect to L.R No. 4148/58 situated in Muigai Inn area, Kiambu county, the court finds that nothing bars this court from determining the dispute relating to that property alongside the dispute relating to the Kayole plot. Having the claim for the two parcels of land heard by this court will serve the interest of justice and the overriding objective of the Civil Procedure Rules which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes.

This court is also mindful of Article 159 (2) (d) of the Constitution of Kenya, 2010 which exhorts courts to administer justice without undue regard to procedural technicalities. Where a cause of action is disclosed the court has a duty to determine the dispute. The joinder of the two causes of action in this suit is not fatal to the Plaintiff’s case. This is not a proper case for striking out the plaint. The application dated 9/12/2019 is devoid of merit and is dismissed with costs to the Plaintiff.

**DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF AUGUST 2021.**

**K. BOR**

**JUDGE**

In the presence of: -

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiff and the Defendant