



REPUBLIC OF KENYA



Mbukoni Holdings Limited & 16 others v Luvita & 3 others (Environment & Land Case E028 of 2021) [2021] KEELC 4779 (KLR) (22 October 2021) (Ruling)

Mbukoni Holdings Ltd & 16 others v Rachael Nthenya Luvita & 3 others [2021] eKLR

Neutral citation: [2021] KEELC 4779 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E028 OF 2021**

OA ANGOTE, J

OCTOBER 22, 2021

BETWEEN

MBUKONI HOLDINGS LIMITED 1ST PLAINTIFF
ALICE ANYANGO OKUMU 2ND PLAINTIFF
ALBAN HUS OJIAMBO 3RD PLAINTIFF
JOHN MUSEMBI MUTALA 4TH PLAINTIFF
MARK ARASA 5TH PLAINTIFF
MICHAEL NJAMA KAMAU 6TH PLAINTIFF
SELINA NDUNGWA ISEVA 7TH PLAINTIFF
ERICK MURIITHI GATHUMBI 8TH PLAINTIFF
JENIFFER WAMBUI 9TH PLAINTIFF
SAMUEL MUNYIRI MUKWA 10TH PLAINTIFF
DAVIS NYAGAKA NYAMWANGE 11TH PLAINTIFF
EVANS MOSE 12TH PLAINTIFF
ALFAYO ATIKA 13TH PLAINTIFF
BENJAMIN MAINGI 14TH PLAINTIFF
WINFRED AWORO OCHOLA 15TH PLAINTIFF
PRISCILLA WAMAITHA MITHAMBO 16TH PLAINTIFF
FRANKLIN M NJINI 17TH PLAINTIFF

AND



RACHAEL N'THENYA LUVITA 1ST DEFENDANT
JOHN MUNYAO MUINDI 2ND DEFENDANT
MULIKA MUINDI 3RD DEFENDANT
FLORENCE MUOTI KIOKO 4TH DEFENDANT

RULING

Introductions

1. This Ruling is in relation to a Notice of Motion Application dated 26th February, 2021, brought under Order 40 and 51 Rule 1 of the Civil Procedure Rules, Article 159 (2) (d) of *the Constitution*, Sections 1A, 1B, 3A and 63(c) (e) of the *Civil Procedure Act*. In the Application, the Plaintiffs are seeking for the following Orders:
 - a) The Defendants be restrained by themselves, servants, agents and/or employees from alienating, subdividing, transferring, leasing, charging, dealing in, transacting or in any manner disposing off the Suit property more particularly referred to as L.R No. Mavoko Town Block 3/2057 or the sub-divisions of the suit property by any form or in any way referred to pending the hearing and determination of this suit.
 - b) The Defendants by themselves, servants, agents and/or employees be restrained from placing beacons, pulling down fences, demolishing houses and other existing structures on the Suit Property more particularly known as L.R No. Mavoko Town Block 3/2057 or the sub-divisions of the Suit Property by any form or in any way referred to or trespassing on any part thereof pending the hearing and determination of this suit.
 - c) The cost of this Application be borne by the Defendants.
2. The application is supported by the Affidavit of the 1st Plaintiff's Director who deponed that the 1st Plaintiff purchased property known as L.R No. Mavoko Town Block 3/2057 (hereinafter referred to as the "Suit Property") from the 2nd, 3rd and 4th Defendants as beneficial owners vide a Sale Agreement dated 13th September, 2016.
3. It is the deposition of the 1st Plaintiff's Director that at the time of entering into the Agreement of Sale between the 1st Plaintiff and the 2nd, 3rd and 4th Defendants, the registered proprietor of the suit property was Agnes Mbithe Muindi, the deceased mother of the 2nd, 3rd and 4th Defendants; that the 2nd, 3rd and 4th Defendants handed over the original Title Deed for the suit property to the 1st Defendant for eventual transfer upon completion and that the said Title Deed is still in the hands of the 1st Defendant.
4. It is the 1st Plaintiff's case that it paid to the 2nd – 4th Defendants the full purchase price for the suit property in the year 2010; that the Defendants handed to the Plaintiff the original Title Deed upon payment of the purchase price and that the Plaintiff instructed its advocates to prepare the transfer documents for registration.
5. The 1st Plaintiff's Director deponed that the 1st Defendant instructed him to assist the 2nd to 4th Defendants' family to pursue a succession cause being Nairobi High Court Succession No. 282 of 2007 in which the court granted Letters of Administration of the deceased's estate to the 2nd and 3rd Defendants respectively;



6. According to the Plaintiff, it subdivided the suit property and later sold the same to more than 200 people, including the Plaintiffs herein and that while knowing and participating in Nairobi High Court Succession Cause No. 282 of 2007, the 2nd, 3rd and 4th Defendants, in conspiracy with the 1st Defendant, fraudulently filed and obtained fresh Letters of Administration for the deceased's estate which grant was confirmed on 7th September, 2012.
7. It was deponed that the 2nd, 3rd and 4th Defendants fraudulently reported to Machakos Police station that the Original title of the suit property was lost and that the Defendants applied for a replacement of the title which was re-issued in the name of the 4th Defendant who subsequently purported to sell and transfer the property to the 1st Defendant.
8. The 1st Plaintiff's Director deponed that the 1st Defendant has since threatened to dispose of the suit property; that the Plaintiffs have learnt that the 1st Defendant has fraudulently subdivided the suit property into several plots which he intends to sell to unsuspecting members of the public and that the 1st Defendant has threatened to start demolishing residential houses belonging to the Plaintiffs and other property owners residing on the suit property.
9. The 1st Plaintiff's Director deponed that the Plaintiffs have been in possession of the suit property for more than 10 years and have no other homes; that the Defendants have issued upon the Plaintiffs eviction notices and that it was just and equitable that the Plaintiffs be heard on a priority basis so that their grievances are heard without delay.
10. According to the 1st Plaintiff, it filed a suit being Machakos ELC No. 22 of 2017, formerly Nairobi ELC No. 225 of 2014 against the Defendants in which the Defendants were restrained from evicting the Plaintiffs; that in the course of the proceedings, the 1st Defendant died; that the Application to substitute the 1st Defendant was allowed on 30th January, 2019 and that when the matter came up for hearing on 9th April, 2019, their advocate informed the court that pretrial directions had not been taken in the matter.
11. The 1st Plaintiff's Director deponed that the court declined to adjourn the matter and dismissed the suit for want of prosecution and attendance on the part of the Plaintiffs with costs; that there was no justification in dismissing the matter and that the decision of the court was whimsical, high handed and totally unreasonable.
12. The 1st Plaintiff has pleaded that the court declined to review its Ruling; that the Plaintiffs filed a Notice of Appeal against the Ruling of the court and that despite the court having dismissed the suit, the Plaintiffs are not barred from re-instituting the suit again.
13. In response, the 1st Defendant filed a Notice of Preliminary Objection together with a Replying Affidavit. In the Notice of Preliminary Objection dated 15th March, 2021, the 1st Defendant averred that this suit was fatally defective as the 1st Plaintiff did not pass a resolution approving/ authorizing the institution of the suit and that there was no authority authorizing either their advocate on record to act on their behalf or the Deponent, Thomas Maingi Wambua, to swear Affidavits.
14. In the Replying Affidavit, the 1st Defendant deponed that she was the widow of the late Edwin Luvita Kawai; that she co-administers the deceased's estate with her brother in law and that she was shocked that the Plaintiffs had sued her husband despite him being deceased.
15. It is the 1st Defendant's case that the Plaintiff's Application is misadvised, evasive, grossly incompetent and an abuse of the court process; that the Plaintiffs were guilty of gross abuse of the court process having filed numerous suits being Machakos CMCC No. 1035 of 2013 Mbukoni Holdings Limited



& 16 Others v Edwin Luvita Kawai & 3 Others as well as Machakos ELC No. 22 of 2017, Mbukoni Holdings Limited & 16 Others v Racheal Nthenya Luvita & 3 others, which suits were dismissed.

16. The 1st Defendant deponed that following the dismissal of the Plaintiffs' Application for review, they lodged a Notice of Appeal on 16/10/2019 which they purportedly withdrew on 26/02/2021; that the present suit was filed in response to the notices served upon some of the Plaintiffs and that the Application should be dismissed.
17. The 2nd, 3rd and 4th Defendants also filed their Replying Affidavit sworn by the 4th Defendant who deponed that they never at any point entered into an agreement for sale with the 1st Plaintiff regarding the sale of the suit property and that the agreement of sale being referred to by the Plaintiffs was a forgery as confirmed by the DCI's report dated 13/06/2006.
18. The 4th Defendant deponed that they never received any monies from the 1st Plaintiff as they had never transacted with them regarding the suit property or for any other purpose; that no grant was issued by the court in Nairobi Succession Cause No. 282 of 2007 as alleged by the 1st Plaintiff; that their mother died way back in 1997 and that at the time of the alleged transaction with the 1st Plaintiff, they had not obtained letters of administration.
19. The 4th Defendant deponed that the occupation of the suit land by the Plaintiffs is without any legal right; that the Plaintiffs are trespassers who should be evicted from the land by this Honourable court; that this suit is similar to Machakos ELC No. 22 of 2017 and that the issues raised herein have been determined by this court with finality.
20. The Plaintiffs, through the 1st Plaintiff's Director, filed a Further Affidavit dated 26.05.2021 in which he deponed that a resolution was passed by the 1st Plaintiff appointing the firm of M/s Nyamweya & Mamboleo Advocates to act on behalf of the 1st Plaintiff and that he had authority to swear the Affidavits on behalf of the 1st Plaintiff. The parties' advocates made oral submissions which I have considered. I have also considered the authorities which were tendered in court by counsel.

Analysis and Findings

21. I have considered the Application and authorities cited. In my considered opinion, before considering if the Plaintiffs' Application for injunction should be granted or not, I should determine if this court has jurisdiction to hear, not only the Application, but also the entire suit.
22. It is not in dispute that the Plaintiffs sued the Defendants herein in Nairobi ELC No. 225 of 2014 which upon transfer to Machakos became Machakos ELC Case number 22 of 2017 over the suit property. Indeed, in his Affidavit, the 1st Plaintiff's Director stated as much. In the said suit, the Plaintiffs were granted an injunction on 25th February, 2016 pending the hearing of the suit.
23. When Machakos ELC Case number 22 of 2017 came up for hearing on 9th April, 2019, the Plaintiffs' counsel informed the court that the Plaintiffs need more time to file documents. The Defendants' counsel opposed the Application for adjournment. The court declined to adjourn the matter and directed the Plaintiffs and their advocate to prosecute the Plaintiffs' case.
24. However, neither the Plaintiffs nor their advocate were ready to conduct their case. Indeed, there was no indication from the Plaintiffs' advocate that all the Plaintiffs were in court on that day. It is on that basis that the court dismissed the Plaintiffs case for want of prosecution and attendance.
25. The Plaintiffs have deponed that they did file an Application for the review of the Ruling of the court, which Application was dismissed by this court. Although the Plaintiffs lodged a Notice of Appeal



challenging the Ruling of the court, the said Notice of Appeal was withdrawn, whereafter the Plaintiffs filed the present suit.

26. Order 12 Rule 3 of the Civil Procedure Rules provides as follows:

- (1) If on the day fixed for hearing, after the suit has been called out for hearing outside the court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.
- (2) If the defendant admits any part of the claim, the court shall give judgment against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court.
- (3) If the defendant has counterclaimed, he may prove his counterclaim so far as the burden of proof lies on him.

27. Order 12 Rule 6 of the Civil Procedure stipulates as follows:

- (1) Subject to sub rule (2) and to any law of limitation of actions, where a suit is dismissed under this Order the plaintiff may bring a fresh suit.
- (2) When a suit has been dismissed under rule 3 no fresh suit may be brought in respect of the same cause of action.

28. As stated in the preceding paragraphs, when this matter came up for hearing, the Defendants' advocate informed the court that he was ready to defend the suit. However, the Plaintiffs were neither ready to prosecute the matter, nor was there any indication that the Plaintiffs were in court. This matter was dismissed not only for want of prosecution of the suit on the part of the Plaintiffs but also for want of attendance.

29. The Court of Appeal has had occasion to consider the effect of an order dismissing a suit for want of prosecution and non-attendance. In the case of *Njue Ngai vs Ephantus Njiru Ngai & another* (2016) eKLR, the Court of Appeal held as follows:

“Now we have seen that a dismissal for want of prosecution was as good as a final judgment in the appeal unless a successful application for setting aside was filed...It is clear to us, as it was to the trial court, that the declaratory suit raised the same or substantially the same issues decided before the Appeals Committee and confirmed by the High Court in dismissing the appeal. The filing of it was in breach of section 7 of the *Civil Procedure Act* and a matter that satisfies the tests for the defence of res judicata as stated above.”

30. In the case of *Cooperative Bank of Kenya vs Cosmas Mrombo Moka and another* (2019) eKLR, the Court of Appeal held as follows:

“As stated hereinbefore, this court has already addressed its mind as to whether a matter dismissed for want of prosecution could be resuscitated through a fresh suit and the categorical answer was that it could not as doing so would offend the doctrine of res judicata. Consequently, this matter being completely on all fours with the *Njue Ngai* matter, we find no justifiable reason to allow a party who had litigated on the same issue to re institute a similar suit. In our considered view, the former suit having been dismissed for want of prosecution, the latter was res judicata and cannot stand. The 1st Respondent filed a suit which he failed and neglected to prosecute, it cannot be proper for him to wake up again and decide to start the same process again. We agree with the Appellant that this would be



contrary to public policy that litigation must come to an end and the best the 1st Respondent could do was to invoke the appellate process and not filing a fresh suit.”

31. The law is clear that where a suit is dismissed for want of prosecution, the affected party can only apply for review of such a decision, or appeal. As was stated in the Cooperative Bank case (supra), the Plaintiffs cannot prosecute a fresh suit in respect of the same issues and against the same Defendants after the dismissal of Machakos ELC Case number 22 of 2017. That being the case, it is my finding that the Application and the suit before me are incompetent and bad in law.
32. For those reasons, the Plaintiffs’ suit and Application dated February 26, 2021 are dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 22ND DAY OF OCTOBER, 2021.

O. A. ANGOTE

JUDGE

In the presence of;

N/A for the Plaintiffs

Mr. Ngolya for the 1st Defendant

Court Assistant – John Okumu

