



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 544 OF 2017

(FORMERLY HCCC NO.1059 OF 2000)

THE MARKET PLAZA LIMITED.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....1ST DEFENDANT

CHINA ROAD & BRIDGE CORPORATION LIMITED.....2ND DEFENDANT

ETHICS AND ANTI-CORRUPTION COMMISSION.....3RD DEFENDANT

CITY MARKET STALL HOLDERS ASSOCIATION.....4TH DEFENDANT

RULING

The plaintiff brought this suit against the 1st and 2nd defendants on 7th July, 2000 seeking the following reliefs;

- a. A permanent injunction restraining the defendants from entering, trespassing on, building and/or constructing and/or erecting on, remaining on, wasting and/or conducting any business or any other form of interference with the plaintiff’s quiet possession of all that parcel of land known as L.R No. 209/1855/2 (hereinafter referred to as “the suit property”).
- b. General damages for trespass.
- c. Costs of the suit.

In its plaint, the plaintiff averred that it was the registered proprietor of the suit property which is situated at the junction of Koinange Street and Market Street in the Nairobi City center. The plaintiff averred that on or about 14th June, 2000, the 1st defendant at the request of the 2nd defendant allowed the 2nd defendant to dump its waste material on an excavated area on the suit property. The plaintiff averred that the purported authorization that was given by the 1st defendant to the 2nd defendant to dump waste of the suit property was given in bad faith and was actuated by malice since the suit property was transferred by the 1st defendant to the 2nd defendant on or about 22nd December, 1992. The plaintiff averred that on or about 3rd July, 2000, the 2nd defendant started dumping waste on the suit property which activity continued on 4th July, 2000. The plaintiff averred that the 1st and 2nd defendants had no legal right to enter the suit property and/or interfere with the plaintiff’s quiet possession of the property. The plaintiff averred that the 1st and 2nd defendants’ actions aforesaid were aimed at defeating the plaintiff’s proprietary rights over the suit property. The plaintiff averred that its title to the suit property was indefeasible and that unless the 1st and 2nd defendants were restrained by the court, they were likely to continue with the activities complained of thereby subjecting the plaintiff to loss and damage.

The plaintiff amended the plaint on 23rd October, 2007. In the amended plaint, the plaintiff averred that the 1st defendant had converted the suit property into parking bays after filling the pits that the plaintiff had excavated for the purposes of construction it had intended to undertake thereon and that the 1st defendant was collecting parking fees from the motorists who were parking on the suit property. The plaintiff sought an order for accounts against the 1st defendant in respect of the parking fees that it had collected from the suit property and payment of the amount found due to the plaintiff and a mandatory injunction compelling the defendants to vacate the suit property. The plaintiff also sought special damages.

The 1st defendant filed a statement of defence on 29th November, 2000. The 1st defendant averred that it had allowed the 2nd defendant to

dispose of the excavated material on the suit property because the plaintiff had let water to accumulate on the suit property thereby creating a nuisance. The 1st defendant filed amended defence and counter-claim against the plaintiff dated 4th February, 2008. I have not seen a copy of the said amended defence and counter-claim in the court file but from the material on record, it appears that the 1st defendant had contended in its amended defence and counter-claim that the plaintiff had acquired the suit property fraudulently and illegally, and that the suit property still belonged to the 1st defendant. I have not seen on record a copy of the 2nd defendant's defence to the original plaint and the amended plaint.

On 16th July, 2020 the court granted leave to the 3rd and 4th defendant to join the suit. Following that joinder, the plaintiff filed a Further Amended Plaint on 1st September, 2020. A part from adding the 3rd and 4th defendants as parties to the suit and changing the name of the 1st defendant from City Council of Nairobi to Nairobi City County, the plaintiff did not raise any new issue in its Further Amended Plaint. The 2nd defendant filed a defence to the Further Amended Plaint on 2nd October, 2020. The 2nd defendant averred that the plaintiff's suit was incompetent and defective in that the 2nd defendant was at all material times acting as an agent of the 1st defendant and as such could not be sued for what it did as such agent. The 2nd defendant averred further that the plaintiff had no *locus standi* to file this suit since its title to the suit property was revoked by the Registrar of Titles on 26th November, 2010.

The 3rd defendant filed a defence to the Further Amended Plaint on 18th June, 2021. The 3rd defendant contended that the suit property was reserved for a municipal market and other related purposes. The 3rd defendant averred that the transfer of the suit property by the 1st defendant to the plaintiff was fraudulent, illegal, null and void.

The 4th defendant filed a defence to the Further Amended Plaint on 31st August, 2020. The 4th defendant averred that the suit property was reserved for public use as a municipal market and other related uses. The 4th defendant averred that the transfer of the suit property by the 1st defendant to the plaintiff was illegal, null and void. The 4th defendant averred that the plaintiff had no valid title to the suit property.

What is before me is a Notice of Motion application dated 29th September, 2019 by the 2nd defendant. In the application, the 2nd defendant sought the following orders;

1. That the suit against the 2nd defendant be struck out because the Amended Plaint dated 27th August, 2007 discloses no reasonable cause of action against the 2nd defendant.
2. Alternatively;
 - a. The Amended Plaint dated 27th August, 2007 be struck out and the entire suit dismissed for being an abuse of the process of the court, or
 - b. The name of the 2nd defendant be struck out for being improperly joined in these proceedings.
3. Costs.

The application was brought on the grounds that the Amended Plaint did not disclose a cause of action against the 2nd defendant because the 2nd defendant's actions on the suit property were undertaken by the 2nd defendant in its capacity as an agent of the 1st defendant a fact that the plaintiff admitted in paragraphs 5,6 and 7 of the Amended Plaint. The 2nd defendant contended that an agent of a disclosed principal cannot be sued. The 2nd defendant contended further that the plaintiff's title to the suit property was revoked by the Registrar of Titles on 26th November, 2010 which revocation was upheld by both the High Court and the Court of Appeal.

The 2nd defendant contended that the plaintiff's claim that it was the registered owner of the suit property was misleading and false. The 2nd defendant contended that the plaintiff could not enforce rights over a property that it did not own. The 2nd defendant contended that the revocation of the plaintiff's title had not been challenged in this suit and that the plaintiff was trying to reverse the said revocation through the back door. The 2nd defendant contended further that it had been wrongly joined in this suit. The 2nd defendant averred that the dispute before the court was between the plaintiff and the 1st defendant and that it concerned the ownership of the suit property. The 2nd defendant contended that it had no interest in the outcome of the suit as it had no interest in the suit property.

The 2nd defendant contended that the orders sought could not issue as against the 2nd defendant since the 2nd defendant was not in possession of the suit property neither was it seeking possession. The 2nd defendant contended that its joinder to the suit was not necessary to enable the court to effectually and completely determine the issue of ownership of the suit property as between the plaintiff and the 1st defendant. The 2nd defendant contended that joining it to the suit did not serve the overriding objective of the Environment and Land Court Act which is to facilitate the expeditious resolution of disputes. The application was also supported by the affidavit of Zhang Ding sworn on 3rd October, 2019.

The 2nd defendant's application was opposed by the plaintiff through grounds of opposition dated 16th December, 2019. The plaintiff averred that the 2nd defendant had filed an earlier application for the dismissal of the suit that was still pending hearing as at the time the present application was brought. The plaintiff averred that the Amended Plaint disclosed a cause of action of trespass against the 2nd defendant and that the 2nd defendant was liable to the plaintiff in damages for trespassing on the suit property. The plaintiff contended further that the 2nd defendant was properly joined in this suit since it trespassed on the suit property. On the allegation that the plaintiff was not the registered owner of the suit property because its title had been revoked, the plaintiff averred that its title had not been revoked by a court of law as required by the law and as such it was still the registered owner of the suit property. The plaintiff contended that in the decisions made by the

High Court and the Court of Appeal on its application challenging the said revocation that were relied on by the 2nd defendant as a basis for its application, the two courts were emphatic that the Registrar of Titles had no power to revoke title to land. The plaintiff urged the court to dismiss the application with costs.

When the application came up for hearing on 25th January, 2021, Mr. Ondego who appeared for the 2nd defendant reiterated the grounds on the face of the application and the affidavit filed in support thereof and urged the court to allow the same. Ms. Mutuku for the 4th defendant and Mr. Oange for the 1st defendant supported the application. In his submission in reply, Mr. Njenga who appeared for the plaintiff relied on the plaintiff's grounds of opposition dated 16th December, 2019 and argued that the application had no merit. He submitted that the Amended Plaintiff disclosed a cause of action of trespass. On the issue of ownership of the suit property, he submitted that there had never been a determination by a court of law on the issue. He submitted that the plaintiff's title was intact as it had not been revoked by a court of law. Mr. Njenga submitted that in the cases in which the plaintiff challenged the revocation of its title, the courts directed that the parties should have the issue of ownership of the suit property determined in this suit. He submitted that neither the High Court nor the Court of Appeal sanctioned the revocation of the plaintiff's title by the Registrar of Titles. He urged the court to dismiss the application.

The 2nd defendant's application was brought under Order 1 Rule 10(2) and Order 2 Rules 15 (1) (a) and (d) of the Civil Procedure Rules. Under Order 2 Rules 15 (1) (a) and (d) of the Civil Procedure Rules, the court has a discretionary power to strike out a pleading on the grounds that; it discloses no reasonable cause of action or defence or that it is otherwise an abuse of the process of the court. In view of the draconian nature of this remedy, it is now settled that the court's power to strike out pleadings should be exercised with great circumspection and only in clearest of cases. In D.T. Dobie & Company (K) Ltd. v Joseph Mbaria Muchina & Another [1982] KLR 1, Madan J.A stated as follows regarding the exercise of the power to strike out pleadings:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.”

In J.P. Machira v Wangethi Mwangi, Court of Appeal, Civil Appeal No. 179 of 1997, Omolo J.A, stated as follows:

“I do not think the unfettered power in the courts to allow amendments at any stage is to be used to enable the parties to create all sorts of fanciful defences in the course of litigation. Nor do I understand the decision of this court, particularly that of Madan J.A in the case of D.T. Dobie & Company (Kenya) Ltd. vs. Joseph Mbaria Muchina & another, Civil Appeal, No. 37 of 1978 (unreported) to mean that no pleading could ever be struck out even where it is patently clear that no useful purpose could ever be served by a trial on merits.....I agree that these powers are drastic and as the court said.....the powers are to be exercised with great caution and only in clearest of cases. But once such caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on the merits, the court is perfectly entitled to strike out a pleading for as I have said, there is no magic in holding a trial on the merits particularly where it is obvious to everyone that no useful purpose would be served by it.”

Order 1 Rule 3 of the Civil Procedure Rules provides as follows;

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

Order 1 Rule 10 (1) and (2) of the Civil Procedure Rules on the other hand provides as follows:

(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

In Deported Asians property Custodian Board v Jaffer Brothers Limited (1999)1E. A 55 (SCU) which was cited with approval in Pravin Bowry v John Ward and another [2015] eKLR, the court stated among others that:

“For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the Plaintiff seek in the suit, would legally affect the interest of that person, and that it is desirable, for avoidance of multiplicity of suits to have such person joined so that he is bound by the decision of the court in that suit.”

In Werrot and Company Ltd. and others v Andrew Douglas Gregory and others, Nairobi (Milimani) HCCC No. 2363 of 1998 (1998) LLR2848 (CCK), Ringera J. (as he then was) stated that:

“For determining the question who is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and, (ii) It should not be possible to pass an

effective decree in the absence of the party”.

In the book, Pleadings, Principles and Practice by Sir Jack Jacob and Ian Goldrein, the authors have stated that:

“An action is an abuse of the process of the court where it is “pretenceless” or “absolutely groundless” and the court has the power to stop it summarily and prevent the time of the public and the court from being wasted.”

It is on the foregoing principles that the 2nd defendant’s application falls for consideration. On the material before me, I am not persuaded that this is a proper case in which the court should exercise its discretion to strike out a plaint. As correctly submitted by the plaintiff’s advocate, the plaintiff’s claim against the 1st and 2nd defendants is based on trespass. The plaintiff has pleaded that the 2nd defendant with the permission of the 1st defendant entered the suit property that was registered in the name of the plaintiff and dumped waste material thereon. Whether or not the 2nd defendant dumped waste on the suit property as an agent of the 1st defendant can only be determined at the trial. From the material before the court as of now, there is no prima facie evidence of such agency. I am satisfied that both the Amended Plaint and the Further Amended Plaint disclose a reasonable cause of action against the 2nd defendant.

As was stated in the text that I have cited above, an action is an abuse of the process of the court when it is absolutely groundless. I am not persuaded that this suit is groundless. When the plaintiff came to court in 2000, it was the registered owner of the suit property. It is not disputed that the 2nd defendant entered and dumped waste material on the suit property. In 2010, 10 years after the filing of this suit and while the suit was pending, the Registrar of Titles purported to revoke the plaintiff’s title in respect of the suit property. The plaintiff challenged the revocation before the High Court and the Court of Appeal. The High Court made a finding that the Registrar of Titles had no power to revoke the plaintiff’s title without following due process but exercised its discretion against setting aside the revocation because the underlying dispute was the ownership of the suit property that could not be determined in a judicial review application. The High Court directed that the issue of ownership of the suit property and the revocation of the plaintiff’s title in respect thereof be determined in this suit which was pending when the decision of the High Court was made. The Court of Appeal upheld the High Court decision.

It is therefore in this suit that the court will determine whether or not the plaintiff held a valid title to the suit property and whether the said title was validly revoked. The High Court in its judgment had hinted to the plaintiff that it could be necessary to amend the plaint so that all the issues regarding the ownership of the suit property and the legality of the Registrar of Title’s decision to revoke the plaintiff’s title could be determined in this suit. The plaintiff appears not to have taken that hint seriously. The subsequent amendments to the plaint should have added the Registrar of Titles and the National Land Commission to the suit. This was not done for reasons known only to the plaintiff which still insists that its claim is limited to trespass even through its title was revoked and this is the court that ought to deal with that question.

Since the High Court had directed that the issue of the ownership of the suit property be dealt with in this suit, the revocation of the plaintiff’s title the validity of which the court is yet to pronounce itself on cannot render this suit an abuse of the process of the court so as to call for its dismissal. The plaintiff’s suit cannot be said to be so weak beyond redemption or cure through further amendment.

With regard to the joinder of the 2nd defendant to the suit, I have already made a finding that the Amended Plaint and Further Amended Plaint disclose a cause of action against the 2nd defendant. It follows therefore that the 2nd defendant was properly joined in the suit. The issue of misjoinder does not therefore arise.

In the final analysis, I find no merit in the 2nd defendant’s application dated 29th September, 2019. The application is dismissed with costs to the plaintiff.

DELIVERED AND DATED AT NAIROBI THIS 7TH DAY OF OCTOBER, 2021

S. OKONG’O

JUDGE

Ruling delivered through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Shivugu for the Plaintiff

N/A for the 1st Defendant

Mr. Masila for the 2nd Defendant

N/A for the 3rd Defendant

Ms. Mutuku for the 4th Defendant

Ms. C. Nyokabi-Court Assistant