



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO.115 OF 2014

LUCAS ONGINJO GOGO.....PLAINTIFF/APPLICANT

VERSUS

NAFTALI OMONDI AMBALA.....1ST DEFENDANT/RESPONDENT

EUNICE AKOTH WANGOMA.....2ND DEFENDANT/RESPONDENT

COSMAS ODHIAMBO.....3RD DEFENDANT/RESPONDENT

EDWIN OLUOCH NYAGAYA.....4TH DEFENDANT/RESPONDENT

RULING

BRIEF FACTS

The Defendants herein filed a Notice of Motion Application under Section 1, 1A,1B,3,3A, 63 (E) of the Civil Procedure Act, Order 2 Rule 15 (b), (c), (d), order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law seeking orders that this Honourable Court be pleased to strike out the plaint dated 23rd April 2014 and dismiss this suit with costs to the Defendant. That the costs of this application be provided for.

The Application was supported by the Affidavit of NAFTALI OMONDI AMBALA who stated that the suit parcels arose from a subdivision of land parcel East Alego/Mur-Ng'iya/317 measuring 0.32 Ha which is registered in the joint names of Gogo Mari and Nyagaya Opiyo who had ½ share each and that Gogo Mari is the Plaintiff's father while Nyagaya Opiyo is his uncle and were not related with the Plaintiff.

That his uncle Nyagaya Opiyo died in the year 1997 and they have not done succession over his estate. That the Plaintiff fraudulently transferred the entire parcel East Alego/Mur Ngiya/317 to his name in 2003 and subsequently in 2004 subdivided it into 6 parcels to create East Alego/Mur -Ng'iya/1693,1694,1695,1696,1697 and 1698.

That these fraudulent transactions were not within their knowledge until later in 2013 after the Plaintiff filed a suit in Siaya Court. That it is clear that the suit property East Alego/Mur Ngiya/1693 and 1694 are fraudulently acquired titles and no benefit can arise therefrom for the simple reason that the Plaintiff illegally and fraudulently acquired ½ share of Nyagaya Opiyo and transferred it to his name after he was deceased. No succession has been done over the estate of Naftali Opiyo and thus none of his properties can be intermeddled with. No orders can be given based on fraudulently acquired title, which fraud is glaring and requires no further proof.

That the Plaintiff had initially filed a suit at Siaya Court being Siaya SPMCC ELC NO. 1 of 2013 regarding the same issues and involving the same parties (Plaintiff and 2nd – 4th Defendants) which matter was heard on merit and dismissed on 4/07/2013. That the Plaintiff applied for a review of the said judgment which review application too was dismissed on 22nd August 2013. That there has been a case before the lands tribunal which also ruled against the Plaintiff. That it is clear that the matter is res judicata and the Plaintiff is hopping at various courts to try and get a favorable order. That the Plaintiff suit is frivolous, vexatious and should be struck out as pleaded. That the suit parcel title was fraudulently acquired and should be all cancelled and reverted back to East Alego/Mur-Ng'iya/317. That to maintain this suit, it will prejudice the applicants and delay the fair trial of this matter. That this constitutes an abuse of the process of this court. That it will be just and prudent to allow the orders sought. That the Application is made in good faith. That equity favours granting of the orders sought.

Replying Affidavit

The Plaintiff herein filed a Replying Affidavit on 1st October 2020 and stating that this Application is mischievous, frivolous and abuse of

the court process. That the suit parcels East Alego/Mur-Ng'iya/1693 and 1694 were created from sub-division of parcel East Alego/Mur Ng'iya/317 which was registered in the names of Gogo Mari and Nyagaya Opiyo who owned it jointly half share each. That the said Naftali Omondi Ambala is not at all related to either of the two families, neither is he a beneficiary of the estate of Nyagaya Opiyo who had a share in the suit land. That in the circumstances, he has no beneficial interest in neither the estate of his father nor in the state of Nyagaya Opiyo. That he had sued him as one of the Defendants as he had trespassed in his parcel of land as the same the 3rd Defendant herein but they have since moved out from parcel of the suit parcel of land and are now occupying their own parcels of land elsewhere.

That the person with beneficial interest in land parcel No. East Alego/Mur-Ng'iya/1693 is the 4th Defendant Edwin Oluoch Nyagaya who is the son of Nyagaya Opiyo and on behalf of whom he holds the title to the parcel.

That the issues the Defendant is raising in the Application are issues of contested facts that can only be verified in a full hearing.

That the case referred in Siaya PMCC ELC No.1 of 2013 is completely different from this one in that case the issue of contention was eviction of the 2nd, 3rd and 4th Defendants herein from land parcel East Alego/Mur Ng'iya/1694. In this case, he seeks for their eviction in land parcel East Alego/Mur Ng'iya/1693.

That this matter cannot be determined in such summary manner in the absence of calling evidence. That he has no problem transferring plot no.1693 to Edwin Oluoch Nyagaya as long as the structures he has erected on his land is removed.

That he has brought an application before this Honourable Court for an order for the District Land Surveyor for Siaya to visit the disputed parcels numbers 1693 and 1694 and confirm their occupants. That the surveyor do file the report in this Honourable court. That he swears this Affidavit to oppose the Defendant's Notice of Motion dated 25th August 2020 and pray that the Application be dismissed with costs.

Submissions by the Plaintiff

The Plaintiff filed his written submissions on 13th September 2021 and raised the following issues for determination:

1. Whether this suit is res judicata to Siaya PMCC ELC NO. 1 OF 2013.

The Plaintiff relied on the provisions of Section 7 of the Civil Procedure Act and submitted that although the Defendants allege that the matter is res judicata to Siaya PMCC ELC No. 1 of 2013 but they did not annex the pleadings to enable this court make an informed decision. The Defendants have only attached a copy of the Judgment which the Plaintiff has disputed the fact that this suit offends the provisions of Section 7 of the Civil Procedure Act. In the previous suit, the Plaintiff sought for orders as against the 2nd-4th Defendants with respect land parcel number Siaya/Mur-ng'iya/1694 while in this suit the Plaintiff seeks for reliefs against the 1st-4th Defendants with respect to land parcel number East Alego/Mur-ng'iya/1693.

The different parcels of land in the former and the later suits clearly shows that parties were litigating under the same title and the Plaintiff placed reliance in the case of **Ukay Estate Ltd & Another vs Shah Hirji Manek Ltd & 2 Others (2006) eKLR** and therefore submitted that Section 7 of the Civil Procedure Act does not bar the filing of the present suit since parties were not litigating under the same title.

2. Whether this suit should be struck out based on the fact that the filing of the Plaintiff's title was illegally acquired.

The Plaintiff submitted that the principles guiding striking out of pleadings and a suit are well settled in the case of **DT Dobie & company (K) Limited vs Muchina (1982) KLR 1** where the court held that:

“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 the full facts of a case before it.”

The Plaintiff further submitted that the Defendants have applied to strike out the Plaintiff's case mainly on the grounds that the same is vexatious on account that the original parcel of land being East Alego/Mur Ng'iya/1693-1698 when the previous proprietors were deceased and succession was not done.

That in the present case, the Plaintiff seeks for eviction and restraining orders against the 1st -3rd Defendants on grounds that the 1st – 3rd Defendants have trespassed on the suit parcel of land. The Defendants on their part are disputing ownership alleging that the same was obtained through corrupt means. The allegations raised by the Defendants raises triable issues and in particular seeks this Honourable Court's determination as to whether the Plaintiff obtained title to the suit parcels of land legally and whether the Defendants have encroached on the said parcels of land.

That the proposal by the Plaintiff to transfer parcel no. 1693 back to Edwin Oluoch Nyagaya is not a clear admission by the Plaintiff that the suit parcel of land was illegally and irregularly acquired. That at the time of filing this suit, the Plaintiff expressly stated that he was holding part of the suit parcel of land in trust for the 4th Defendant and was willing to have it transferred to him.

The Plaintiff therefore submitted that striking out this suit will deprive the Plaintiff his right to have the suit tried by a proper trial and therefore the Notice of Motion is not merited and it should be dismissed with costs to the Plaintiff.

Defendants' Submission.

From the court's record, it is clear that the Defendants failed to file and serve their submissions.

ANALYSIS AND DETERMINATION

This Honourable court has looked at the pleadings and considered the evidence on record and the following issues need to be determined:

1. Whether this suit is res judicata
2. Whether this court should strike out the Plaint dated 23rd April 2014 and dismiss this suit.

On the issue of whether this suit is res judicata; The Defendants have only attached a copy of the Judgment of Siaya PMCC ELC No. 1 of 2013 Lucas Onginjo Gogo vs Eunice Akoth Wangoma, Edwin Oluoch Nyagaya and Cosmas Odhiambo where the court dismissed the suit on as the Plaintiff was not entitled to the orders sought in the Plaint and orders for damages for trespass.

The Defendant has failed to attach the pleadings in Siaya PMCC ELC No. 1 of 2013 Lucas Onginjo Gogo vs Eunice Akoth Wangoma, Edwin Oluoch Nyagaya and Cosmas Odhiambo so that this Honourable court could ascertain whether the current suit satisfies the conditions for res judicata as was held in the case of **Bernard Mugo Ndegwa v James Githae & 2 Others (2010) eKLR**. At paragraph 36, where the judge observed that:

- a) That the matter in issue is identical in both suits;
- b) The parties in the suit are substantially the same;
- c) There is concurrence of jurisdiction of the court;
- d) The subject matter is the same; AND
- e) That there is a final determination as far as the previous decision is concerned."

Section 7 of the Civil Procedure Act provides for the principle of res judicata in the following terms;

'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'

The Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others, Nairobi CA Civil Appeal, the court held that:

"... Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:

- (a) The suit or issue was directly and substantially in issue in the former suit.***
- (b) That former suit was between the same parties or parties under whom they or any of them claim.***
- (c) Those parties were litigating under the same title.***
- (d) The issue was heard and finally determined in the former suit.***
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."***

In the present suit, the plaintiff seeks for an order directing the 4th Defendant at his expense to engage a surveyor to carve out 0.16 Ha from the parcel no East Alego/Mur-ng'iya/1693 within a stipulated time, an order of evictions of the 1st, 2nd and 3rd Defendants from plot East Alego/Mur-ng'iya/1693 and East Alego/Mur-ng'iya/1694 to be executed by the O.C.S Kogelo Police Station, a Permanent injunction restraining the 1st, 2nd and 3rd Defendants, their servants and/or agents from trespassing or building any structures, cultivating or in any other way dealing with the Plaintiff's remaining portion of parcel of land East Alego/Mur-ng'iya/1693 and East Alego/Mur-ng'iya/1694 and costs of this suit together with interest.

In Siaya PMCC ELC No. 1 of 2013 Lucas Onginjo Gogo vs Eunice Akoth Wangoma, Edwin Oluoch Nyagaya and Cosmas Odhiambo it is clear from the judgment that the Plaintiff sought for an order of forceful eviction of the Defendants from the Plaintiff's parcel of land No. East Alego/Mur-ng'iya/1694, an order for permanent injunction restraining the defendants, their servants or agents from entering, encroaching on or in any way interfering with the Plaintiff's parcel of land no. East Alego/Mur-ng'iya/1694, damages for trespass, costs of the suit and any other relief the court may deem fit to grant.

From the orders sought by the Plaintiff in the present case and the previous case, the subject matter is the same, save for the fact that in the present case, the Plaintiff did not include land parcel number East Alego/Mur-ng'iya/1693. Parties are the same save for the present case where the Plaintiff has added the 1st Defendant to the suit property. The previous suit was handled in Siaya and the present suit has been filed in Kisumu and this court therefore agrees with the Defendants that the Plaintiff is shopping at various courts so that he can get a favourable order.

Indeed, the Plaintiff has approached this Honourable court with unclean hands in an attempt to circumvent the system as he has failed to demonstrate to this court how he acquired the title yet there was no succession that took place. This court finds this suit to be frivolous and an abuse of the court process as it is res judicata.

On the issue of whether this court should strike out the Plaint dated 23rd April 2014 and dismiss this suit:

The Plaintiff in his Replying Affidavit stated that the 1st Defendant herein is not related to the two families neither is he a beneficiary to the estate of Nyagaya Opiyo who had a share in the suit property and he sued him as one of the Defendants as he had trespassed in his parcel of land same as the 3rd Defendant herein but they have since moved out from the suit parcel. The Plaintiff has also stated in his Affidavit that the 4th Defendant being a beneficiary to the estate of the late Nyagaya Opiyo, he has no problem transferring land parcel number East Alego/Mur-ng'iya/1693 to him as long as the structures he has erected on his land are removed.

This court finds that if the Plaintiff is willing to transfer the property to the 4th Defendant, the Plaintiff should approach the right forum in doing so since there is no succession that has been done. Although the Defendants allege that the East Alego/Mur-ng'iya/317 was fraudulently transferred to the Plaintiff, this court cannot clearly establish whether there was fraud as the Defendants have failed to enumerate the particulars of fraud in their pleadings. On the hand, the Plaintiff has not demonstrated to this court how he acquired the East Alego/Mur-ng'iya/317 yet the owners were deceased and no succession was done. This court finds that this suit lacks merit and is therefore dismissed with costs.

DATED AT KISUMU THIS 24TH DAY OF NOVEMBER, 2021

ANTONY OMBWAYO

JUDGE

This ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE