



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

ENVIRONMENT & LAND DIVISION

CIVIL SUIT NO. 158B OF 2015

TROPICAL TREASURE LIMITED..... PLAINTIFF/RESPONDENT

- VERSUS -

KRYSTALLINE SALT WORKS LIMITED1ST DEFENDANT/APPLICANT

MOMBASA BOND WAREHOUSE LIMITED.....2ND DEFENDANT/APPLICANT

LAND REGISTRAR, MOMBASA3RD DEFENDANT/APPLICANT

NATIONAL LAND COMMISSION4TH DEFENDANT/APPLICANT

RULING

I. PRELIMINARY

1. The 1st Defendant/Applicant moved this court urging it to make a determination on matters contained in the Notice of Motion application dated 4th November, 2019 and filed in this Honorable Court on 12th November, 2019. It was brought to court under the provisions of Sections 1, 1A & 1B, 3 and 3A of the Civil Procedure Act, Order 2 Rule 15 and Order 51 of the Civil Procedures Rules 2010.

II. THE 1ST DEFENDANT/APPLICANT CASE

2. From the aforesaid application, the 1st Defendant/Applicant seeks for the following orders:-

(a) Spend

(b) That this Honorable Court do strike out the Plaintiff and suit in its entirety on the ground that it discloses no reasonable cause of action and/or scandalous and vexatious.

The said application is found on grounds, testimony and the averments on the 19 Paragraphed Supporting Affidavit of HASMITA PATEL and one annexure marked as "HP – 1" dated and sworn on 4th November 2019.

3. She deposed being a female adult of sound mind the Director of the 1st Defendant/Applicant and hence well conversant to the facts of this case. She further deposed that the Plaintiff/Respondent instituted this suit against the 1st, 2nd, 3rd and 4th Defendants seeking for a declaration that it was the duly registered proprietors of all that parcels of land known as Land Reference Numbers 28534, 29026 and 29027 respectively all situated in Mariakani, within the County of Mombasa. She held that the Plaintiffs/Respondents posited that the boundaries of two parcels Land Reference Numbers 29026 and 29027 overlapped with that of Land Reference Number 28534.

4. She further deposed that the 1st Defendant/Applicant responded to the suit asserting that it was the one that was the duly registered owners to the two (2) parcels of land known as Land Reference Numbers 29026 and 29027 situated within Mariakani, the County of Mombasa. She held that the 1st Defendant/Applicant had no claim over the said parcel of land known as Land Reference Number 28534 but asserted the integrity of the boundaries of property of the parcel known as Land Reference Numbers 29026 and 29027.

5. She deposed that sometimes in the early October, 2019, the 1st Defendant/Applicant learnt that the said parcel Land Reference Number 28534 was also a subject to another suit ELC (Malindi) – Civil Case No. 26 of 2015 – “**Charo Manigula Mangi & Another –VS- Tropical Treasure Limited & 2 others**” where it was claimed that the Plaintiff herein acquired the said title deed fraudulently. In view of that fact the outcome of the said suit would have some serious ramification to the instant suit before this Court. She held that as a result, the 1st Defendant/Applicant on 9th October, 2019 applied for stay of the proceedings in this suit pending the delivery of the judgment in the afore mentioned case ELC (Malindi) No. 26 of 2015. The said application was due for hearing and determination on 28th November, 2019. Nonetheless, she held that on 24th October, 2019 the Honorable Court in the case of ELC (Malindi) No. 26 of 2015, delivered its judgment and found out that the transfer of all that parcel known as Land Reference Number 28534/Kilifi ostensibly to Tropical Treasure Limited – the Plaintiff/Respondent herein was illegal, null and void and did not confer any proprietary interest upon the Tropical Treasury Limited as the same was acquired fraudulently. As a result, it directed that the Land Registrar to nullify and rectify the register. Hence, it was her preposition that this decision would have direct ramification to this suit and therefore the Plaintiffs/Respondents suit should abate. She further held that by virtue of that judgment the Plaintiff/Respondent was bereft of the *locus standi* to sue the Defendants in relation to the parcel of land known as LR. No 28534/Kilifi LR No. 53828.

6. She held that in the given circumstances the court would be properly utilizing its valuable resources such as time by making a decision on the viability of this claim by the Plaintiff/Respondent at the earliest opportunity and by dispensing with the suit in its entirety with costs. She attached a copy of the judgment here for ease of reference.

III. THE PLAINTIFF/RESPONDENTS CASE

7. On 29th January, 2020, the Plaintiff/Respondent filed their 20 Paragraphed Replying Affidavit sworn by one ABDULSWAMAD ABEID SAID. He held that he was a Director and shareholder of the Plaintiff/Respondent and hence competent and duly authorized to swear this affidavit. He stated that it was the Plaintiff/Respondent who indeed was the bona fide purchaser, legally registered and owner of the suit property known as LR. No. 28534 – Mariakani Land Registry as CR. No. 53828 measuring approximately 33.61 Hectares as delineated on the Land Survey Plan No. 321708. It was for these reasons, that they filed this suit seeking for a declaration it was the duly registered owner of all that parcels of land known as LR. No. 28534, 29026 and 29027 respectively.

8. He disposed that the subject matter of the suit was the illegal occupation and the alleged ownership by the 1st Defendant/Applicant of parcels of land known as Land Reference Numbers 29026 and 29027 located within the property known as Land Reference Number 28534. He stated that the 1st Defendant/Applicant purported to have legal land ownership documents on a part of the property known as Land Reference. No. 28534 that was owned by the Plaintiff/Respondent for twin parcels allegedly known as Land Reference Numbers 29026 and 29027 respectively.

9. He admitted not being a stranger to the Civil Suit known as ELC (Malindi) No. 26 of 2015 – where he held that the parcel No. 28534 was lawfully registered in favour of the family of Manyule Mangi Yaa, now deceased. He stated that there was a sale agreement duly extended between themselves and the Plaintiff/Respondents at a consideration of Kenya shillings Four Million Five Hundred Thousand (Kshs. 4,500,000/=) over the suit property and where they paid a deposit a sum of Kenya Shillings Two Million Twenty Thousand (Kshs. 2,020,000/=). He deposed that it was during the intervening period that they came to learn that the 1st Defendant/Applicant was actually a trespasser and transgressor on to the suit property - Land Reference No. 28534 and the illegal ownership of the conformed properties - Land Reference Numbers 29026 and 29027 came to the fore and the 1st Defendant/Applicant was also illegally on the land and hived it off and put a wall and indeed that is the purpose of this suit hereof – allegations of encroachment of land by the 1st Defendant/Applicant and it was still to be established from whom they had bought it from.

10. He held that it was a result this circumstances that the 1st Defendant/Applicant illegal occupation and criminal attempt to illegally acquire the said conjoined properties that it halted the purchase process of land by the Plaintiff/Respondent from the family of Mangule Mangi Yaa and hence they stood to lose a lot unless the matter was heard and determined by this court.

11. He deposed that this court should not be influenced by the proceedings of another court and which may occasion an embarrassment or undermine the authority of this court and particularly taking that the 1st Defendant/Applicant was not even a party to the said suit ELC (Malindi) No. 26/2015 Besides, he held that there was a stay of execution of the said judgment, decree given on 24th October, 2019 and all consequential orders in the said suit dated 16th December, 2019. In the long run they urged court to dismiss the 1st Defendant/Applicant application with costs.

III SUBMISSIONS

On 19th July, 2021 when all the parties appeared before court, it was directed that the that the said application dated 4th November, 2019 be disposed off by way of written submissions. Indeed, all the parties fully complied by filing their written submissions accordingly and a ruling date was reserved for 1st December, 2021.

IV THE 1ST DEFENDANT/APPLICANT’S SUBMISSION

12. On 12th August, 2020 the Law firm of Messrs Arwa & Change Advocates filed their written submissions dated 5th June, 2020. They submitted that the instant application by the 1st Defendant/Applicant was brought following a prior one which had sought to have this proceedings stayed pending the determination of another suit ELC (Malindi) No. 26 of 2015 – **Charo Mangule Mangi – Versus - Tropical Treasure limited & 2 others**.

13. On 9th October. 2019, they learnt that judgment in the above mentioned suit had been delivered whereby the transfer of the Land Reference No. 28534 to ostensibly Tropical Treasure Limited – the Plaintiffs/Respondents herein had been declared illegal and the Land

Registrar directed to nullify and rectify the Land Register. It was on the basis of that court decision that they filed the Notice of Motion application dated 4.11.2019 to have the entire suit dismissed and/or struck out with costs under the Provisions of Order 2 Rule 15 of the Civil Procedure Rules 2010. Additionally they have invoked the doctrine of *Locus Standi* as being of applicable for private and public litigation law. On this, they relied on the decisions of “**Juletabi African Adventures Limited –Versus- Christopher Michael Luckey [2017 eKLR and Isaya Masira Momanyi –VS- Daniel Omwoyo & Another 2017 [eKLR] Midlands Gem Limited & Another –versus- Airspace Forwarders Limited & Another [2016] eKLR. Where it left the Plaintiff/Respondent without any legal standing in the case and hence sustain it would be a waste of time taking that he was not the legal registered owner to the suit property**”

They urged the court to find that the notice of motion application dated 4th November, 2019 was meritorious and the prayers sought should be allowed with costs.

VI. THE PLAINTIFF/RESPONDENTS SUBMISSIONS

14. On 15th June, 2021 the Advocates for the Plaintiff/Respondents the law firm of Messrs. E.K. Owinyi & Co. Advocates filed their written submissions dated 10th June, 2021. They submitted that they opposed the application seeking to have the entire suit being struck out pursuant to the prayers sought by the 1st Defendant/Applicant vide their Notice of Motion application dated 4th November 2019. They emphasized that the Plaintiff/Respondent was the bona fide legal and proprietor to the suit land having bought through a sale agreement dated 10th June 2010 and a transfer registered in their favour on 11th November, 2011. The Learned Advocates refuted the allegations that from the Court Civil Case ELC (Malindi) No. 26 of 2015 – it had found that the Plaintiff/Respondent had acquired the suit land illegally and through fraudulent means. They held that, initially they had even agreed with the Defendants to settle this matter amicably and withdraw it. The title they held was indefensible and there had never been any prove of fraud or illegality by anyone as required by law.

They had instituted this suit to obtain a declaration that the suit land was theirs and it was actually the 1st Defendant/Applicant who was a trespasser and a transgressor onto their land. The Learned Advocates for the Plaintiff/Respondent found the application to be mischievous, scandalous and flexuous all intended to deprive the plaintiff of its property. They urged court to have the said application dismissed with costs.

IV. ANALYSIS AND DETERMINATION

15. I have read through all the pleadings in this matter and in particular the notice of motion application dated 4th November, 2019 by the 1st Defendant/Applicant, the Replying Affidavit by the Plaintiffs/Respondents, the cited authorities and the well stated out written submissions by both the Advocates and the relevant provisions of Law onto the subject matter. In order to arrive at an informed and just decision. I have framed out the following three (3) salient issues for consideration in this ruling;

- a. Whether the notice of motion application dated 4th November, 2019 meets the threshold for striking out the entire suit and application under the Provisions of Order 2 Rule 15 of Civil Procedure Rules 2010.**
- b. Whether the 1st Defendant/Applicant is entitled to the relief sought?**
- c. Who will bear the costs?**

Issue No. (a) Whether the notice of motion application dated 4th November, 2019 meets the threshold for striking out the entire suit and application under the Provisions of Order 2 Rule 15 of Civil Procedure Rules 2010.

16. Before embarking on the analysis of the case for the sake of drawing up a ruling, I feel it is important that I first and foremost recapture the brief facts of the case herein. Through the Amended Plaint dated 15th April, 2019, the Plaintiff/Respondent avers that it is the legal registered owner of that entire parcel of land known as Land Reference Number No. 28534 measuring approximately 33.61 HA. He held that he purchased it from the beneficiaries of the estate of one Mwanyule Mangi Yaa in or around the year 2010. Thereafter the suit property was transferred to the Plaintiff/Respondent on 14th December, 2011. The parcel came to be after the grant was issued in the names of Mwangale Mangi Yaa over the suit property situated at Mariakani, within the County of Mombasa. On 20th April, 2013, the Plaintiff/Respondent came to learn that the 1st Defendant/Applicant had trespassed and entered into the suit land fell trees and excavated soil in readiness for the construction works and development on the suit land. The 1st Defendant/Applicant had even put up a perimeter wall and claimed part of it to be theirs – that is parcels LR. Nos. 29026 and 29027 claiming to have bought them from the 2nd Defendant. The Plaintiff/Respondent instituted the instant suit seeking for a declaration that the land was theirs. While this was going on the 1st Defendant came to learn of the existence another court case -the ELC No. 26 (Malindi) 2015 where the Plaintiff/Respondent was the 1st Defendant/Respondent in that suit.

17. Being apprehensive, they filed an application to have the proceedings in this suit be stayed awaiting the outcome of the Malindi case. Nonetheless on 9th October, 2019 the ELC in Malindi delivered its judgment where it found out that the transfer of Land Reference No. 28534 to the Plaintiff/ Respondent had been illegal and through fraudulent means. It directed the Land Registrar to cause a nullification of the said title deed and verification of the Land Register removing the names of the Plaintiff/Respondent from the records. It's for this reason that the 1st Defendant/Applicant moved this court with the instant application. Be that it may, according to the Plaintiff/Respondent, on 16th December, 2019 they obtained stay of execution of the decree and the consequential orders emanating from the said judgment and hence to them that also applied to this application.

18. The court exercises discretionary powers in striking out pleadings because of its consequential order. An application to strike out pleadings is founded under Order 2 Rule 15 of the Civil Procedure Rules, 2010 has established clear principles which guide the courts in the

exercise of that power on the following terms:-

15(1) At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that:-

- a. It disclose no reasonable cause of actions or defence *in law or***
- b. Its scandalous, frivolous and vexatious or**
- c. It may prejudice, embarrass or delay the fair trial of *the actions***
- d. It is otherwise an abuse of the process of the court and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.**

19. To begin with, under this sub – heading, I feel there is need to briefly address the concept of “**the Cause of action**”. According to the Black Law dictionary 9th Edition “**Cause of action**” means **a group of operative facts giving rise to one or more bases for suing a factual situation that entitles one person to obtain a remedy in court from another person**”

From an excerpt of the book “**The Law of Pleading Under the Codes of Civil Procedure**” pg 170 (2nd edition 1899 by Edwin Bryant it states:-

“.....Cause of action may be defined generally to be a situation or state of facts that entitles a party to maintain an action in a judicial tribunal. This state of facts may be (i) a primary right of the Plaintiff actually violated by the Defendant or (ii) the treated violation of such right, which violation the Plaintiff is entitled to restrain or prevent as the case of actions or suits for injunction or (iii) there may be some doubts as to some duty or right or the right be clouded by some apparent adverse right or claim, which the Plaintiff is entitled to have cleared up, that may safely perform his duty or enjoy his property” (Emphasis is mine).

20. Primarily, based on the these definition and interpretation, my understanding is that the cause of action is a legal theory or grounds of actions, a claim, conduct, occurrence or transaction contained in the pleadings capable of being determined by court. Therefore, on this front I am left to determine whether there exists any cause of action in this case. The answer is affirmative.

From the pleadings filed here the Amended Plaintiff dated 15th April, 2019 and the statement of Defence the following issues need to be determined.

- a. who sold the suit land to the Plaintiff/Respondent and the 1st Defendant,
- b. were the sale for innocent purchase for notice and consider
- c. were the procedure followed – and what are the effect of the provision of law Sections 24, 25 and 26 (1) of the Land Registration Act.
- d. If there is a case of fraudulent means on obtaining the said parcels of land.
- e. What are the empirical documentary evidence on this parcel including the decision by ELC (Malindi) No. 26 of 2015 delivered on 9th October, 2019.
- f. Are cases of trespass and encroachment by the 1st Defendant/Applicant onto the plaintiffs/Respondents parcel of land.

All these are very serious issues which cannot be determined at this interlocutory stage but at a full trial.

21. The Principles of Stare Decisis.

Further, it is important to deliberate briefly on the Principle or practice of “**Stare decisis**”. The principle is anchored in the provision of Article 163 (7) of the Constitution of Kenya which provides:- “**All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court**”.

This court has been extensively referred to the decision of ELC (Malindi) No. 26 of 2015 – **Charo Mangule Mangi – Versus - Tropical Treasure limited & 2 others** as being the fundamental ground to cause the striking out of these instant pleadings hereof. While the Defendant/Applicant is correctly entitled to their argument but we are guided by the above cited principles. In as much as this practice would be applicable to courts of the same hierarchy and matters of the same uniformity, in this instant case this court is of the opinion taking that the Defendant/Applicant was not even a party to that suit and where no certified copy of the Judgement has been produced, the best it can go is for it to remain as a persuasive precedent and/or authority in this matter. Nonetheless, the Defendant/Applicant is not debarred from applying the Judgement of that case in this one particularly during the full trial.

22. Additionally, a cursory perusal of the Plaintiff and Defence filed shows they raise triable issues and should not be struck out at this stage. The Principle that guide the court is determining whether to strike out a pleading here set out in the case of “**D.T. Dobie & Company**”

“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 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”

Seller L.J. (Supra) as far as possible, indeed not at all, there should be no opinion expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right. If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally, a law suit is for pursuing it.

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 the case before it.

By and large its trite law striking of suit is such a draconian and drastic decision on litigation which should be resolved to sparingly as the very last resort. It is only where a pleading cannot be salvaged by an amendment that the court will utilize this procedure, hence the use of the word “May” meaning it is discretionary.

Issue (b) Whether the 1st Defendant/Applicant is entitled to the relief sought?

23. The application has no merit this court has noted it. The Defendant was not even a party to the ELC 26 of 2015. As already stated out above, based on the principles of “*Stare decisis*”, this court can only use the decision in ELC (Malindi) No. 26 being a court of the same status and hierarchy later on in this proceedings as additional documentary evidence document but not as a precedent at this stage. The decision is persuasive.

DETERMINATION

24. I find that the Plaintiff suit raises such triable issues and has a reasonable cause of action. In all fairness, they should have their day in court through a full trial. Thus, I find:-

(a) THAT the notice of motion application dated 4th November, 2019 unmeritorious and unreasonable and it is hereby dismissed.

(b) THAT the suit should be heard and determined within the next ninety (90) days from today. The matter to be mention on 18th January, 2022 for pre-trial conference.

(c) THAT the costs in the cause to be borne by the 1st Defendant/Applicant.

IT IS SO ORDERED.

RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 1ST DAY OF DECEMBER, 2021

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna – the Court Assistant

M/s. Nanjali holding brief for Mr. Mola for the Plaintiff/Applicant Mr. Remington Otieno for the 1st Defendant/Applicants.

No appearance for the 2nd, 3rd and 4th Defendant