



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO. 632 OF 2011(OS)

HAMISI TSUMA MWERO & 15 OTHERS.....PLAINTIFFS

VERSUS

1. COLFAX HOLDING LIMITED

2. COUNTY COUNCIL OF KWALE.....DEFENDANTS

RULING

1. By a Notice of Motion dated 14th June, 2018 the 16th applicants/plaintiff is seeking the following orders

1. Spent
2. That this Honourable court be pleased to issue an order expunging the name of the 16th Applicant and all others who had withdrawn herein from pleadings.
3. That this Honourable court be pleased to strike out this Originating Summons for being an abuse of the court process as the same has abated.
4. That the 1st applicant be ordered to refund all the monies he fraudulently collected from the applicants allegedly being legal fees.
5. That the costs of this application be borne by the 1st Applicant.

2. The application is premised on the grounds on the face of the motion and supported by the affidavit of Ali Ndosho Katana. The applicant has deposed that he has never resided in the suit property and that the 1st applicant fraudulently beseeched him to join the suit herein to serve his personal interests, adding that the 1st applicant does not also occupy in the suit property. He states the 1st applicant has been fraudulently extorting funds from the other applicants. He deposed that the 11th, 14th and 15th Applicants are all deceased as shown by the copies of burial permits attached, while the 5th, 8th, 9th and 17th Applicants filed notices to withdraw from the suit and to have their names expunged from the pleadings. He further deposed that the 4th and 12th Applicants do not reside in the suit property. The applicant has attached an application dated 16th October, 2013 and ruling on status quo dated 3rd April, 2014 as well as a letter from the area chief.

3. The 2nd applicant filed a replying affidavit sworn on 22nd March, 2019 in which he deposed that the suit was filed for the benefit of all the original 17 Applicants who executed an authority to file the proceedings. He admitted that the 11th, 14th and 15th applicants are deceased. It is his contention that the death and/or withdrawal of some of the applicants cannot warrant the striking out of the suit, adding that the 1st applicant cannot be ordered to refund money allegedly received by him as legal fees.

4. The application was canvassed by way of written submission. In his submissions, Mr. Egunza learned counsel for the applicant cited Order 1 Rule 10 of the Civil Procedure Rules and submitted that in this case, the 1st applicant was not mistaken on the parties who should have been in the suit, but intentionally added parties that should not be in the suit and as such should not benefit from the discretionary orders of the court. He submitted that the suit has abated as no application was made under Order 24 of the Civil Procedures Rules and should be struck out. He pointed out that on 22nd October, 2013, the 9th Applicant in his application dated 16th October 2013 sought to have his name together with that of the 5th, 8th and 17th applicants struck off from the pleadings and the 1st applicant has not made any effort to rectify the pleadings. That in the circumstances, the court is likely to be embarrassed by proceedings with the suit as it is. Counsel pointed out that the 1st applicant has not sought leave for extension of time to seek to replace the deceased applicants. He urged the court to strike out the pleadings herein. Counsel relied on the case of **Daniel Otieno Migori –v- South Nyanza Sugar Co. Ltd (Civil Appeal No. 52 of 2017)**;

Hunter –v- Chief Constable of West Midland Police & Others; and Zeuss Stiflung –v- Rayner & Keeler Ltd (1966).

5. Mr. Asige, learned counsel for the 1st, 2nd, 3rd, 4th, 6th, 7th and 12th applicants submitted that if the applicant desires to withdraw from the suit, he is at liberty to do so on a proper application to court in his individual capacity. That the applicant cannot apply to have the suit withdrawn on behalf of other applicants he alleges are dead. That the applicant has not provided any evidence of the death of those other applicants and neither has he exhibited legal authority or status to bring proceedings on behalf of the deceased parties. Counsel further submitted that the suit cannot be struck out as the applicant has not shown what abuse of the court process the respondents have committed, adding that the suit has not abated as claimed. Mr. Asige further submitted that the 1st applicant cannot be ordered to refund money allegedly collected from the applicants as there is no evidence provided by the applicant. He urged the court to dismiss the application with costs.

6. I have considered the application and the submissions made. Prayer 2 of the application beseeches the court to expunge the name of the 16th Applicant from these proceedings together with all other applicants who have withdrawn from the suit. Order 25 Rules 1 and 2 of the Civil Procedure Rules permits the withdrawal and discontinuance of a suit or claim by a plaintiff. In the instant case, the applicant desires to withdraw from this suit. From the respondents submission, there appears to be no objection to the intended withdrawal. The respondents however submit that the suit cannot be withdrawn on behalf of other applicants in the absence of any evidence to show that they are deceased. Moreover, the applicant has not shown that he has legal authority to make the application on behalf of the deceased parties. Order 24 Rule 3 of the Civil Procedure Rules is clear that “where one of two or more plaintiffs dies and the cause of action does not survive or continue to the surviving plaintiff or plaintiffs alone, or a sole plaintiff dies and the cause of action survives or continues, the court, on application made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the suit.” The applicant herein has not shown that he is a legal representative of the deceased plaintiffs. Further, no application has been made by the defendant as required under sub-rule (2) of rule 3 of Order 24.

7. The application also seeks to strike out the originating summons herein. The principles which guide the courts in an application for striking out pleadings are well settled. In the case of **DT Dobie & Company (Kenya) Ltd –v- Muchina (1982) KLR**, it was stated:

“ i) The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing of the case.

ii) The court should aim at sustaining rather than terminating suit. A suit should only be struck out if it is beyond redemption and incredible by amendment. As long as a suit can be injected with life by amendment, it should not be struck out. ”

8. It has come out from the affidavits, pleadings and proceedings that some of the plaintiffs/applicants, including the applicant herein, wish to withdraw their claim or discontinue their suit against the respondent. The applicant and anyone else who wishes to withdraw from the suit and or to discontinue their claim against the respondent is at liberty to do so. Moreover, the 1st applicant and any other applicant who wish to continue with their claims should amend their pleadings so that the names of the applicants who have withdrawn from the suit are expunged. I therefore decline to strike out the originating summons herein but direct that the same be amended accordingly.

9. The applicant also seeks an order directing the 1st applicant in the suit to refund money allegedly collected by the 1st Applicant as legal fees. However, the court has not been shown any evidence to support that allegation. I therefore decline to grant prayer 4 of the application.

10. In the result, I find that the orders which commends to be made which I hereby make is as follows:

1. An order be and is hereby made expunging the name of the 16th Applicant from the suit.

2. An order be and is hereby made expunging the name of any other Applicant who has applied to the court for withdrawal of his/her suit or discontinuance of their claim.

3. The parties to amend their pleadings within 30 days from the delivery of this ruling.

4. Each party to bear their costs.

11. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA electronically by email due to COVID-19 Pandemic this 29th day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE