



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 21 OF 2017

SERVE IN LOVE TRUST AFRICA.....PLAINTIFF

VERSUS

ABRAHAM KIPTARUS KIPTOO & 2 OTHERS.....DEFENDANT

AND

AMBROSE KIPROP & 2 OTHERS.....3RD PARTIES/RESPONDENTS

RULING

This ruling is in respect of an application by the defendant/Applicants dated 13th December 2019 seeking that the plaintiff's suit be struck out with costs to the defendant. The application was based on the grounds that the suit discloses no reasonable course of action, is scandalous, frivolous and an abuse of the court process.

DEFENDANT /APPLICANT'S CASE

Counsel for the applicants submitted that the plaintiff filed this suit together with an application for injunction orders restraining the defendants from dealing with the property known as Kipsinende/Kipsinende Block 3 (Mosop "A"/61 pending hearing and determination of the suit. A finding was made by the High Court as to who the bonafide trustees of SILA trust and the same has a direct bearing to these proceedings as the parties who preferred the proceedings on behalf of the plaintiff have lost the capacity to do so and the pendency of these proceedings is an abuse to the court process.

Counsel cited the provisions of Order 2 Rule 51 of the Civil Procedure Rules and submitted that the court has jurisdiction to strike out pleadings. This matter was filed on 24th January 2017 during the pendency of Eldoret Court Petition No. 18 of 2016 whereby the matter revolved around who the bonafide trustees of SILA trust were, which owned the subject matter of the suit land.

Mr. Korir submitted that the intended appeal by the respondents in petition no. 18 of 2016 will have no bearing on these proceedings as the rights of the defendants as trustees of the organisation crystallized the moment the High Court made its finding.

PLAINTIFF/RESPONDENT'S CASE

Counsel for the respondent submitted that the interested parties have not been made parties to the suit therefore orders cannot be issued against them hence their names ought to be struck out of the suit.

Mr Momanyi submitted that the High Court made a determination on the trusteeship of the plaintiff, however, when the plaintiff's land was sold, the defendants were not trustees. The High Court has not made a decision that the trustee should operate as if the defendants never ceased being trustees of the plaintiff. The matter in issue is whether or not the defendants were trustees on 1/1/2017.

Counsel further submitted that the decision of the High Court in Petition No. 18 of 2016 is the subject to appeal in the Court of Appeal Case No. 47 of 2020. The matter in the Court of Appeal was heard on 29th June 2020 and a decision is yet to be made. Counsel urged the court to stay the proceedings in this case to await the ruling in the Court of Appeal as striking out this suit will not serve the interest of justice.

ANALYSIS AND DETERMINATION

The issue for determination is whether this case should be struck out and whether the case is an abuse of the court process.

The applicants argue that the plaint was filed by Ambrose Kiprop, David Chemworem, Moses Kipng'etuny Kipkulei and Eric Teimuge who

purported to be trustees of SILA trust. Their trusteeship was declared illegal and the defendants were restored as trustees vide a judgment dated 22nd October 2019. The question that arises therefrom is whether the current cause of action can be sustained as the parties that had the authority and capacity to file the suit have since lost that capacity.

As per the replying affidavit and the submissions of the respondents, it is clear that the appeal is yet to be determined. In the event that the appeal succeeds then the cause of action in this matter shall be revived as it is based on the capacity of the defendants who acted on behalf of the plaintiff. Further, the success of the appeal would result in the reinstatement of the capacity of the ousted trustees to institute this suit and therefore giving life to the suit once more.

Striking out of suits is a draconian measure which should be used sparingly in the interest of justice. If a matter is hopeless and an abuse of the court process, then the court will not hesitate but apply the draconian measure to ensure that the dignity of the court is not taken away by such cases which are purely and abuse of the court process.

It is on record that there is an appeal in respect of Petition No. 18 of 2016, and it is further on record that the appeal No. 47 of 2020 is pending ruling before the Court of Appeal. There would be no prejudice for the applicant to wait for a few more days for the ruling to be delivered which may or may not compromise this case. The parties will cross the bridge when the said ruling is delivered and may give a way forward with this case.

In the case of **John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation) [2015] eKLR** as follows:

“The fundamental principles of justice are enshrined in the entire Constitution and specifically in Article 159 of the Constitution. Article 50 coupled with article 159 of the Constitution on right to be heard and the constitutional desire to serve substantive justice to all the parties, respectively, constitutes the defined principles which should guide the court in making a decision on such matter of reinstatement of a suit which has been dismissed by the court. These principles were enunciated in a masterly fashion by courts in a legion of decisions which I need not multiply except to state that ; courts should sparingly dismiss suits for want of prosecution for dismissal is a draconian act which drives away the plaintiff in an arbitrary manner from the seat of judgment. Such acts are comparable only to the proverbial “Sword of the Damocles” which should only draw blood where it is absolutely necessary. The same test will apply in an application to reinstate a suit and a court of law should consider whether there are reasonable grounds to reinstate such suit-of course after considering the prejudice that the defendant would suffer if the suit was reinstated against the prejudice the Plaintiff will suffer if the suit is not reinstated.”

Having said that I find that the application lacks merit and is therefore dismissed with costs. I order a stay of these proceedings for 30 days.

DATED and DELIVERED at ELDORET this 22nd DAY OF September, 2020

DR. M. A. ODENY

JUDGE