



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELCC NO. 1 OF 2016

DILEEP MANIBHAI PATEL.....PLAINTIFF

VERSUS

SAMUEL MBURUGU MWANGI.....1ST DEFENDANT

LAND REGISTRAR NAIVASHA.....2ND DEFENDANT

THE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

1. The plaintiff commenced proceedings herein through plaint filed on 4th January 2016. Subsequently, the plaintiff withdrew his suit against the second and third defendants on 10th March 2020, with no order on costs. Prior to that date, the plaintiff had filed a Notice of Motion which although on the face of it is dated 9th January 2019, counsel for the plaintiff referred to it as dated 9th January 2020. The mix up is perhaps due to a typographical error: the application was filed on 10th January 2020. This ruling is in respect of the application.

2. The following orders are sought in the application:

- 1. That the amended defence filed herein be struck out.*
- 2. That judgement be entered in favour of the plaintiff.*
- 3. That costs of this application and costs of the entire suit be borne by the defendants/respondents.*

3. The application is supported by an affidavit sworn by the plaintiff. He deposed that on 14th September 2017, the second defendant wrote a letter admitting that Block 8 Kianjoya D parcels of land had been victims of fraud in his office. He annexed a copy of a letter dated 26th April 2016 from the second defendant and added that since his suit is primarily anchored on fraud, the letter supports his case and defeats the first defendant's defence.

4. The first defendant responded to the application through a replying affidavit in which he deposed prior to the letter exhibited by the plaintiff, the second defendant wrote to the Directorate of Criminal Investigations a letter dated 5th May 2015 confirming that title deeds in respect of Miti Mingi/Mbaruk Block 8/1205 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1206 (Kianjoya D) originated from his office and were genuine. He added that he purchased the land from Mehbor Mohamed Abdulgafoor and that if there was any fraud then it is the said vendor to be blamed.

5. The application was canvassed through written submissions. The applicant filed submissions on 3rd February 2020 while the first defendant/respondent filed submissions on 19th February 2020. The second and third defendants did not participate in the hearing of the application.

6. It is argued for the applicant that the first defendant/respondent having admitted at paragraph 3 of his defence that the second defendant is the custodian of documents relating to land transactions and the second defendant having confirmed that the respondent's title was obtained through corrupt and unlawful means then the respondent's defence lacks legal foundation and is therefore frivolous. Reliance is placed on the cases of **Mary Wangari Mwangi v Peter Ngugi Mwangi T/A Mangu Builders Ltd & 3 others [2013] eKLR**, **Vivian Muia v Mzoori Limited [2017] eKLR** and **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR**.

7. On the first defendant/respondent's part, it is argued that letter from the second defendant dated 26th April 2016 which states that Block 8 Kianjoya D parcels of land had been victims of fraud and which has been exhibited by the applicant cannot be relied on to the exclusion of the other letter from the same office dated 5th May 2015 which confirms that title deeds in respect of Miti Mingi/Mbaruk Block 8/1205 (Kianjoya D) and Miti Mingi/Mbaruk Block 8/1206 (Kianjoya D) are genuine. There are other arguments advanced but which go to the merit of the main case as opposed to the application presently before court.

8. I have considered the application, the affidavits and the submissions.

9. The application is brought by the plaintiff under **Order 2 Rule 15 (1) (a), (b) and (d)** of the **Civil Procedure Rules** which provides:

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) ...; or

(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.

10. Striking out is a draconian remedy that should be resorted to very sparingly. The wise counsel of Madan J.A. in **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] eKLR** still remains valid:

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.

11. Although not expressly stated so on the face of the application, it is apparent from the submissions that the applicant seeks striking out of the defence on the basis that it is frivolous. As stated in **Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2019] eKLR**:

... a pleading or an action is frivolous when it is without substance or is groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses.

12. A perusal of the amended plaint filed by the applicant on 9th September 2019 prior to the withdrawal of the suit against the second and third defendants shows that the applicant averred that the second defendant without verifying authenticity of documents presented by the first defendant, fraudulently registered a conveyance of the suit properties in favour of the first defendant. The applicant therefore sought revocation of the titles and rectification of the register to reflect him as the registered proprietor. In his statement of defence, the first defendant admitted that the second defendant has the sole mandate of maintaining the register of proprietors of land within his area of jurisdiction. He denied any fraud and further averred that he is the registered proprietor of the suit properties pursuant to a lawful process.

13. The letter dated 26th April 2016 that the applicant is relying on was not written by the first defendant/respondent but by the second defendant. The contents of the letter to the effect that there was fraud are diametrically opposed to the defendant/respondent's case as pleaded in his defence and cannot amount to any admission by the first defendant/respondent. Its effect on the parties' respective cases can only be determined upon trial and judgment. Fraud is a serious allegation which cannot be established on the basis of affidavit evidence only. Beyond being pleaded and particularised, fraud must be strictly proven. See **Kuria Kiarie & 2 others v Sammy Magera [2018] eKLR**. The burden of proof facing a party alleging fraud is higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal law standard of proof beyond reasonable doubt. See **John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR**. I do not therefore see how the letter can render the first defendant/respondent's defence to be without substance or groundless or hopeless or even fanciful. Taking all the factors into account, the parties herein should have their day in court at trial.

14. In view of the foregoing discourse, I find no merit in Notice of Motion dated 9th January 2019. I dismiss it with costs to the first defendant.

Dated, signed and delivered at Nakuru this 29th day of October 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Githui for the plaintiff/applicant

No appearance for the first defendant/respondent

No appearance for the second and third defendants/respondents

Court Assistants: B. Jelimo & J. Lotkomoi