



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
ENVIRONMENTAL & LAND DIVISION
ELC NO. 656 OF 2013

SUSAN MUTHONI KIMANI.....PLAINTIFF

-VERSUS-

LAND REGISTRAR THIKA.....1ST DEFENDANT

VIRGINIA WANJIKU KIMANI.....2ND DEFENDANT

STELLA WANJIKU KAMANDE.....3RD DEFENDANT

RULING

1. The 3rd Defendant/Applicant seeks this court's orders for the striking out of the Plaint on the grounds that it is frivolous, vexatious and does not disclose any reasonable cause of action. The Applicant also asks that costs of the suit be provided for. These prayers are contained in an application dated 12th May, 2014 and which application is supported by the Affidavit of the Applicant sworn on 12th May, 2014 as well as the sole ground stated on the face of the application.
2. The sole ground is that the 3rd Defendant's property is distinct from and separate from the Plaintiff's property namely title No. Ruiru East/Juja East Block 11/3727. The Applicant states that the Applicant's land is comprised in title No. Ruiru East/Juja East Block 11/3723.
3. The application is opposed. A Replying Affidavit was filed on 5th June, 2014. The Plaintiff/Respondent reiterated the averments in the Plaint and termed the application as inept and an abuse of the process. The Respondent contended as follows at paragraph 7 of the Replying Affidavit:

“7. That it is not true that the two parcels of land are separate and distinct as averred by the Applicants in their paragraph 6 of the Supporting Affidavit the truth of the matter is that the parcel of land is one and the same on the ground despite the issuance of the two

separate titles”.

4. The application was urged and opposed on 21st October, 2014 and on 4th November, 2014. Counsel for the Applicants Mr. G. M. Muhoro reiterated the contents of the supporting affidavit. Pointing out at the copy of the annexed Registry Index Map relating to the property, counsel drummed up the fact that the two parcels of land are separate. He said that the distinction is apparent even on the ground and that the Applicants occupy title No. 3723 whilst the Respondent occupies title No. 3727. He reiterated the point that the Applicants have no interest in the latter title and that the Applicants have never ventured into the said parcel of land.
5. Counsel for the Respondent Mr. Morara thought otherwise. He submitted that the application is premature and should be dismissed. The position on the ground, counsel stated, is that, the 2nd and 3rd Defendants are occupying the Respondent's parcel of land. He urged that there is a pertinent issue as to which property exactly is owned by who and whether the 2nd and 3rd Defendants have unlawfully acquired the Respondent's land. Urging the court to look at the exhibited documents counsel asked the court to dismiss the application with costs.
6. I have looked carefully at all the documents filed in this suit. I have also considered the respective parties' submissions. What I have to consider is whether the plaintiff's suit is frivolous, vexatious and does not disclose any reasonable cause of action to warrant a striking out.
7. The rules of the Civil Procedure make provisions for striking out of pleadings. Order 2 Rule 15 states as follows:

15. (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) it may prejudice, embarrass or delay the fair trial of the action or (d) it is 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.
8. In addition to the power of the court to strike out pleadings under Rule 15 the court has an inherent and general jurisdiction to strike out or stay all proceeding before it which are an abuse of its process. That would obtain under Sections 1A, 1B and 3A of the Civil Procedure Act.
9. It will be seen from the wording of Rule 15(2) of the Civil Procedure Rules that by necessary implication evidence is admissible on an application to strike out a pleading on the ground that it is an abuse of the process of the court as well as that it is vexatious or frivolous. Evidence is likewise admissible under the court's inherent jurisdiction. Furthermore following the introduction of the practice and requirements where witnesses' statements are exchanged in accordance with Order 3 Rule 2 and Order 7 Rule 5, there may well be cases where after the witnesses statements have been served it may be possible to demonstrate that the pleaded case is hopeless or lacks a reasonable cause of action or defence in law. It follows therefore that there can be no objection in principle to an application being made to the court under Order 2 Rule 15(1) (a) on the basis that a Plaintiff or a defence should be struck out because as disclosed in the affidavits filed in support of the application, the claim or defence is incapable of proof. In short, I am of the view that the current nature of Civil Procedure that requires disclosure of evidence from the outset or inception of the suit or filing of the defence has effectively rendered Order 2 Rule 15(2) superfluous and unnecessary. It is no longer reasons to assume that a party would at trial be able to prove all the facts alleged in the pleading. Rather an opposing party should be able to state that there is no reasonable defence or cause of action and rely on the evidence on record to support such contention.
10. Bearing the aforesaid in mind, I hasten to make it clear that the court in an application for striking out must foremost in my view concentrate on the pleadings. Secondly, the court must also review the evidence on record. The court will however only exercise its undoubted right to strike

out all or part of the pleadings in a very clear case: See **Butte Gas & Oil Co. –vs- Hammer and another [1975]2 All ER 51, 61**. As it leads to locking out parties from their guaranteed right to access the court it is deemed as draconian remedy and the court must be very reticent in exercising it: See **D.T. Dobie (K) Ltd –vs- Muchina [1982] KLR 1** where the Court of Appeal held at page 6 of the law report, that:

“It has been said more than once that the rule is only to be acted upon in plain and obvious cases and the jurisdiction [to strike out] should be exercised with extreme caution..... it cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which out to be very sparingly exercised and only in exceptional cases”.

11. The court in **DT Dobie –vs- Muchina (supra)** was dealing with the issue of summary procedure and also finalization of a suit without the benefit of a trial. In exercising such jurisdiction, the court made it clear, that the case ought to be an obvious and plain one. A clear one where the issues raised a mere abuse of the courts process rather than constituting a genuine and bona fide litigation will thus qualify to be struck out.
12. Has the Applicant herein met the “plain and obvious” threshold? The Plaintiffs’ claim is that the Defendants have not only trespassed into the Plaintiffs property namely title Number RuiruEast/Juja East Block11/3727 but that the 2nd & 3rd Defendants have through collusion with the 1st Defendant transferred the same to themselves. The Plaintiffs’ plaint is detailed in these respects. The 2nd and 3rd Defendants reaction is that they have nothing to do with the Plaintiff’s property and that their property is title number RuiruEast/Juja East Block11/3723 which is what they occupy.
13. Certainly, both legally and physically the two parcels of land ought to be distinct. To that extent I would agree with the two Defendants. They however do not address the critical issue by the Plaintiff that the land registry records in the custody of the 1st Defendant reveal that the 2nd and 3rd Defendants are registered as the proprietors of the title known as Ruiru East/Juja East Block11/3727. Two search certificates exhibited by the Plaintiff show exactly this yet the Defendants including the 1st Defendant have steadfastly failed or neglected to address these revelations by the search certificates. The search certificates also reveal that a restriction has been registered against the said title RuiruEast/Juja East Block 11/3727 prohibiting any dealing on the parcel of land due to suspected fraud. That restriction in law could only be imposed by the 1st Defendant. Such action also only lends credence to the Plaintiff’s allegations of fraud. It is such alleged fraud which will have to be proven or dealt with at trial.
14. I must however agree that the particulars of fraud as pleaded by the Plaintiff are not rainproof. They do not appear to meet the ceiling of fraud as a cause of action which must always be pleaded with extra particularity. In my view, however the claim as crafted and drafted is not so hopeless as to be an abuse of the process per se. It can always be amended but more importantly the evidence a trial should be able to vindicate the Plaintiff.
15. I come to the conclusion that the Plaintiff does not fall within the ambit of Order 2 Rule 15(1) (a) and (b) of the Civil Procedure Rules. It is not as frivolous and vexatious as the defendant would want the court to believe. Neither is there lacking a reasonable cause of action as it is apparent that the 2nd and 3rd Defendants are currently registered as the proprietors of the Plaintiff’s property. It will be up to the trial court to verify this matrix of fact at trial including whether the 2nd and 3rd Defendants are actually occupying their parcel of land or the Plaintiff’s parcel of land.
16. In short, it is impossible at this stage for the Defendants to satisfy the “plain and obvious test” applicable to the summary procedure of striking out pleadings. The application dated 12th May, 2014 lacks merit and must be dismissed with costs to the Plaintiff, which I hereby do.

17.Orders accordingly.

Dated, signed and delivered at Nairobi this 13th day of November, 2014.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Applicant

..... for the Respondent