



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
ENVIRONMENTAL AND LAND DIVISION
ELC CIVIL SUIT NO. 40 OF 2012

NJOROGE MUGO T/A CHEGE HARAKA TIMBER.....PLAINTIFF

VERSUS

STEPHEN MUNGANIA MUGWIKI.....DEFENDANT

RULING

The Defendant is seeking to have the Plaintiff filed herein struck out with costs, or in the alternative that the suit herein be stayed pending the hearing and determination of High Court Civil Suits Nos. 721 of 2006, 3618 of 2008, and 2336 of 2007 (Nairobi). These prayers are in a Notice of Motion he filed dated 22nd June 2012. The Defendant claims that the suit herein is *res judicata* and that the Plaintiff has caused him to incur huge expenses in defending numerous duplicated suits.

The Defendant in his supporting affidavit sworn on 22nd June 2012 states that he is the chairman of Komorock/Mutarakwa road Jua Kali Association, which originally owned the property known as Plot 85/New Komorock/Mutarakwa Road Shopping Centre (hereinafter referred to as the suit property). Further, that the Plaintiff does not own the suit property because the same property was allotted and paid for earlier by other members of the Defendant's association.

The Plaintiff in opposition states in a replying affidavit sworn on 18th February 2013 that there is no matter in issue between the parties herein that has been heard and finally determined by the Court. Further, that upon his Advocate carrying out investigations for HCCC 3618/2008 at the High Court Civil Registry and the Land and Environmental Division they were informed that there was no such file in their records. He admitted that he was aware of HCCC 721 of 2006 which he filed against Stephen Mungania Mugwika, Stanley Mwatha Kamu and Richard Okello Onyango, sued in their capacities as office bearers of Off Komarock/Mutarakwa Road/Jua Kali Association and not in their personal capacity.

The parties were directed to file written submissions. The Defendant's counsel failed to file any written submissions after numerous adjournments and requests for more time to do so. The Plaintiff's counsel filed written submissions dated 3rd June 2013 wherein he addressed the issues of whether this suit is *res judicata*, and whether the Defendant has satisfied the conditions for striking out of pleadings.

The counsel submitted that the conditions of section 7 of the Civil Procedure Act for *res judicata* to apply had not been met by the Defendant, as there was no other suit between the same parties that had been heard and fully determined. The counsel reiterated that HCCC 3618 of 2008 does not exist and that they could not trace the files for HCCC 2336 of 2007 and HCCC 721 of 2006. Further, that the Plaintiff was only aware of HCCC 721 of 2006 in which the Defendant and others were sued in their capacity as office

bearers and that the matter therefore has different parties. Further, that it has not been heard and fully determined. The counsel relied on the decision in Anaj Warehousing Limited vs National Bank of Kenya & Another (2006) eKLR in this regard.

On the issue of striking out of the Plaintiff the Counsel submitted that the conditions of Order 2 Rule 15 (1) on striking out of pleadings had not been met by the Plaintiff, his only ground being that the suit has caused the Defendant substantial losses. Further, the Defendant does not own the land in dispute and the Plaintiff has been the sole occupant of the said land since 1980 and is carrying out business thereon. It was also submitted that the issues raised in the Plaintiff can only be determined on merit after full hearing.

I have read and carefully considered the pleadings, evidence and submissions made herein. The main issue to be determined is whether the Plaintiff herein should be struck out in the circumstances presented in the Defendant's Notice of Motion. The law on striking out of pleadings is stated in Order 2 Rule 15 of the Civil Procedure Rules and in various judicial decisions. Order 2 Rule 15(1) provides that:

(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 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."

The salient principles that apply to striking out of pleadings are that this is a draconian measure to be employed sparingly, and the grounds for striking out must be plain on the face of the pleadings and from the facts alleged by the parties. This was stated by the Court of Appeal in D.T. Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 as follows at page 9:-

"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.”

The main ground for striking out the suit that is presented by the Defendant is that the suit herein is *res judicata* and therefore an abuse of the process of the court. Section 7 of the Civil Procedure Act provides as follows with regard to the doctrine of *res judicata*:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

The Plaintiff did not produce any evidence of proceedings or pleadings filed in High Court Civil Suits 721 of 2006, 3618 of 2008, and 2336 of 2007. The Defendant however admits being aware of, and produced orders given in HCCC 721 of 2006. I have perused the file for HCCC 721 of 2006, and found that the case was transferred to the Environment and Land Division on 23rd October 2007, and given a new case number being ELC 1930 of 2007.

The claim in the Amended Plaintiff filed in ELC 1930 of 2007 dated 14th March 2008 is in relation to the Plaintiff’s occupation and ownership of an unsurveyed parcel of land comprising one hectare, and known as Chege Haraka Timber in the Komorock Mutarakwa Jua Kali Scheme. The parties in that suit are the Plaintiff herein who has sued the Defendant herein and two other persons being office bearers of Komorock/Mutarakwa Road Jua Kali Association as the 1st to 3rd Defendants, and Nairobi City Council as the 4th Defendant. The said suit has not gone for full trial and there are also two pending Notice Motion therein dated 6th July 2006 and 22nd June 2011 brought by the Plaintiff and 1st -3rd Defendants respectively.

It is apparent that ELC 1930 of 2007 has not been finally heard and determined to give rise to the application of the doctrine of *res judicata*. It is also not clear whether it relates to the same subject matter as the suit herein, as the Plaintiff file herein dated 25th January 2012 is seeking orders in relation to a parcel of land known as Plot 85/New Komorock/Mutarakwa Road Shopping Centre. The Defendant’s Notice of Motion dated 22nd June 2012 therefore fails for these reasons.

Notwithstanding this finding and pursuant to the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and Order 11 of the Civil Procedure Rules, it is the view of this court that as the parties herein are also parties in ELC 1930 of 2007, and since the subject properties in the two cases appear to be in the same location, it may be expedient to have the two cases be heard and determined together. This case and ELC 1930 of 2007 shall therefore both be mentioned on 7th October 2013 for purposes of considering their consolidation. The Plaintiff to serve the Defendants in ELC 1930 of 2007 with the mention notice.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____9th____ day of ____July____, 2013.

P. NYAMWEYA

JUDGE