



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL CASE 2 OF 2004

CHARTER HOUSE INVESTMENT LTD.....PLAINTIFF/RESPONDENT

=VERSUS=

SIMON K. SANG1ST DEFENDANT/1ST APPLICANT

MARGARET MUNYAO2ND DEFENDANT/2ND APPLICANT

DISTRICT LAND REGISTRAR, UASIN GISHU THRO

THE ATTORNEY GENERAL 3RD DEFENDANT/3RD RESPONDENT

THE COMMISSIONER OF LANDS THRO

THE ATTORNEY GENERAL 4TH DEFENDANT/4TH RESPONDENT

HILL TEN COMPANY LTD 5TH DEFENDANT/5TH APPLICANT

JOHN KIPCHUMBA TARUS 6TH DEFENDANT/6TH APPLICANT

THE BOARD OF TRUSTEES

NEW LIFE GOSPEL CHURCHES 7TH DEFENDANT/7TH APPLICANT

RULING

This is an application by the 1st, 2nd, 5th, 6th and 7th Defendants (hereinafter “**the appellants**”) in the suit to have the amended ammended plaint struck out and in the alternative, this suit be dismissed for want of prosecution. The application is expressed to be made under the provisions of Order 2 Rule 15 (a) (b) (c) and (d), of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. The application is made on the premise that the suit does not raise any reasonable cause of action; that the 2nd applicant was the 1st registered owner of land parcel number Eldoret Municipality **Block 12/218** which has since been sub-divided into several parcels of land; that the plaintiff fraudulently and without colour of right purported to amalgamate the 2nd applicant\’s land and parcel numbers Eldoret Municipality **Block 12/143, 12/144** and **12/218** to purportedly form parcel number Eldoret Municipality /**Block 12/424**; that there is no law that permits the plaintiff to take away other parcels of land and amalgamate the same into his; that the suit is therefore frivolous and vexatious and an abuse of the process of the court; that the plaintiff has taken inordinately long to prosecute this

suit; that the suit is based on property which does not exist on any Government record and that the suit was filed without any company resolution authorizing the filing of the same and or appointing any of the officers to act as its agent in the suit.

The application is supported by an affidavit of **Margaret Munyao**, the 2nd defendant sworn on 28th March, 2012. The affidavit is an elaboration of the above grounds. There is, in opposition to the application, a replying affidavit by **Sophie Chemengen** a Director of the Plaintiff Company sworn on 8th May, 2012. The gist of the affidavit is that the suit land was allotted to one **Mark Too** by the Government of Kenya and a lease subsequently issued to the plaintiff, a company in which the said **Mark Too** was a director. Despite the said allotment, the same land was allotted by the 4th defendant to **Alice K. Chepkorir, Rael J. Koima, John Kipchumba and Dunoda**

Amani. The latter allotment, according to the plaintiff, was erroneous and that the alleged amalgamation by the plaintiff is misleading as it had no capacity to do so. In the plaintiff's view, the 2nd defendant is a beneficiary of double allotment which allotment the plaintiff challenges – on grounds of fraud. In those premises, the plaintiff contends that its suit is maintainable. With regard to alleged want of authority to institute these proceedings, **M/s Chemengen**, avers, that the only two directors of the plaintiff have authorized the filing of his suit and with regard to delay in prosecution of the suit, she has averred that various proceedings impeded the prosecution of the suit.

When the application came up before me for hearing on 9th May 2012, counsel agreed to file written submissions which were duly filed by 4th July, 2012. Those submissions elaborately reiterated the stand-points of the parties taken in their respective affidavits.

I have considered the application in the light of the pleadings, the affidavits on record and the rival submissions. Having done so, I take the following of the matter.

This is an interlocutory application and it is incumbent upon the court, not to make any definitive findings which are the province of the trial court. I ask myself if the plaintiffs' suit is so obviously unsustainable and or is an abuse of the process of the court. If I understand the applicants' case, it is three pronged. The first challenge is that the deponent of the verifying affidavit and the replying affidavit did not have authority of the plaintiffs to institute this suit. The applicants have made that argument because a resolution of the plaintiff authorizing the filing of this suit has not been exhibited. **Ms Sophie Chemengen**, who swore the verifying affidavit to the amended amended plaint, deponed that she was a director of the plaintiff and was competent to swear the verifying affidavit.

When she swore the replying affidavit in opposition to this application, she deponed that she was a director of the plaintiff and was duly authorized to swear the replying affidavit under the plaintiff's Corporate Seal. In his submissions in response to the submissions in support of this application, counsel for the plaintiff has stated that the plaintiff indeed authorized the filing of this suit. He referred to documents given in discovery in which there is a resolution of the plaintiff in that regard. I have perused those documents and I have seen the said resolution. The plaintiffs clearly authorized the filing of this suit and the swearing of both the verifying and the replying affidavits. In view of that authority, the applicants' arguments with respect to want of authority do not merit further consideration. Is the plaintiff's suit frivolous, vexatious and an abuse of the process of the court?

The applicants' argument is that at the time the plaintiff was registered as proprietor of Eldoret Municipality **Block 12/424**, the 2nd defendant was already registered as the proprietor of parcel number Eldoret Municipality **Block 12/218** and that notwithstanding the latter's registration, the plaintiff proceeded to amalgamate the 2nd defendant's parcel and those of others into one and registered the resultant title in its name. The amalgamation, according to the applicants, was illegal and did not confer any title to the plaintiff. The plaintiff's suit, according to the applicants, is therefore based on actions and purported documents of title which are illegal and cannot found a cause of action.

A perusal of the amended amended plaint shows that the plaintiff alleges fraud against all the applicants with respect to the registration of Eldoret Municipality **Block 12/218** and the subsequent sub-division and

transfers thereof. The plaintiff alleges fraud against the 3rd and 4th defendants in canceling Eldoret Municipality **Block 12/424** and the creation of Eldoret Municipality **Block 12/218**. The pleadings indeed suggest that there may have been double allocation of the subject titles.

Those are bona fide triable issues which can only be resolved by a trial. The applicants appear to have a very strong belief in their case. Their belief seems to partly emanate from the ruling of **Dulu J.** in an application for injunction and the Court of Appeal judgment on appeal from Judge **Dulu's** decision. The applicants do not appear to appreciate that the decision of **Dulu J.** was on an interlocutory application and the decision of the Court of Appeal was also on an interlocutory matter. Those decisions could not determine the issues in dispute with conclusiveness. Only a trial can. In all those premises, I do not think the plaintiff's amended amended plaint can be described as frivolous, vexatious or an abuse of the process of the court. But even if the pleading was inadequate, in my pinion, the remedy would not be to strike it out as the door to further amendment is not closed.

The applicants have lastly sought dismissal of the plaintiff's suit for want of prosecution. This record shows that the plaintiff lodged an appeal against Judge **Dulu's** decision on its application for injunction. The Court of Appeal determined the appeal on 12th November, 2010. The record further reveals that an order on costs was the subject of an application before a single judge of the Court of Appeal on 27th January, 2012. In the premises, the applicants are not entirely correct in saying that the plaintiff has never prosecuted this suit since 22nd November, 2006.

In the result, I must , and do hereby dismiss the applicants

Notice of Motion dated 23rd March, 2012 with costs to the plaintiff.

DATED AND DELIVERED AT ELDORET THIS 5TH DAY OF SEPTEMBER, 2012.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Kamau for the plaintiff and **Mr. Omusundi** for the defendant.

F. AZANGALALA

JUDGE