



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 299 of 2012

JOHN KAMANU KIMARI.....PLAINTIFF

VERSUS

PATRICK KANG'ETHE NJUGUNA.....1ST DEFENDANT

EDWARD NJUGUNA KANG'ETHE.....2ND DEFENDANT

GEORGE JAMES KANG'ETHE.....3RD DEFENDANT

ECOBANK KENYA LIMITED.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

THE CHIEF LAND REGISTRAR.....6TH DEFENDANT

RULING

The 2nd Defendant filed an application dated 13/7/2012 seeking an order that the Plaintiff dated 25/5/2012 and filed on 29/5/2012 as against the 2nd Defendant be struck out. The application is brought under Order 2 Rule 15(1)(b) and (d) and Order 51 Rule 1 of the Civil Procedure Rules, and is premised on grounds that the said Plaintiff was filed in gross contravention of the mandatory provision of the Civil Procedure Rules, and is frivolous, vexatious and otherwise abuse of the court process.

The application is supported by an affidavit sworn by the 2nd Defendant on 13/7/2012. The 2nd Defendant deponed that the Plaintiff indicated that he is a joint administrator of the estate of Kimari Kamuyu, but did not tender a letter of authority from his co-administrators authorizing the Plaintiff to file the suit. Further, that the Plaintiff alleged that a grant was confirmed on 5/5/2009 and listed the beneficiaries to the suit property, but did not tender the requisite authority from the said beneficiaries instructing him to file the suit.

The 2nd Defendant also deponed that the green card tendered in evidence by the Plaintiff in his affidavit sworn on 26/6/2012 indicates that prior to the suit property being transferred to the 1st, 2nd and 3rd Defendants; there was a transfer to one Michael Maina Njoroge pursuant to a Court Order issued in H.C. ELC No. 41/2009. Further, that the Plaintiff has not sued the said Michael Maina Njoroge despite the green card clearly indicating that he was the registered owner. It is also alleged that the Plaintiff does not contain any prayer or relief challenging the transfer of the property to the said Michael Maina Njoroge, and does not seek any relief with regard to any of the entries set out in the green card of the title to the suit property. The 2nd Defendant averred that the Plaintiff is as a result frivolous, vexatious and amounts to

an abuse of the court process and must be struck out with costs.

This application was opposed. The Plaintiff filed a Replying Affidavit he swore on 19/7/2012. The Plaintiff deponed that he inadvertently failed to obtain the written authority of his co-administrator since he rushed to Court when he came to know that Plot No. Dagoretti/Riruta/53 had been transferred to other parties. The Plaintiff annexed a copy of an authority to file suit and execute documents executed by Grace Njambi Kamuyu, the co-administrator. The Plaintiff further deponed that at the time he filed the suit on 29/5/2012, he had not obtained a copy of the green card which was eventually obtained on 18/6/2012, and therefore he had no knowledge that there was a Court Case ELC No. 41/2009 wherein Plot No. Dagoretti/Riruta/53 was transferred. The Plaintiff also deponed that his advocates had searched for the Court file in ELC No. 41/2009 which appears not to be at the Court's Registry.

The Plaintiff contended that striking out a pleading is a very drastic action and should be sparingly used by Court, and only used in a case that is incurably defective. Further, that striking out the Plaintiff would be too harsh an action to be taken and that he should be allowed to amend the Plaintiff as appropriate.

The 2nd Defendant filed submissions dated 24/9/2012 reiterating the contents of his application.

I have read and carefully considered the pleadings, evidence and submissions by the respective parties to this application. The issue to be determined is whether the Plaintiff should be struck out in the circumstances presented in the 2nd Defendant's application. 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.”

An examination of the Plaintiff dated 29th May 2012 shows that there is a claim that the suit property which is L.R No. Dagoretti/Riruta/53 was registered in the name of Eli Kimaru Kamuyu, since deceased. The Plaintiff is an administrator of the deceased's estate together with one Grace Njambi Kamuyu. The Plaintiff is seeking a declaration that the transfer of the suit property to the 1st, 2nd & 3rd Defendants is irregular, fraudulent and illegal and that the same be cancelled and a permanent injunction restraining the 1st, 2nd, 3rd and 4th Defendants from entering, trespassing or in any manner interfering with the Plaintiff's quiet enjoyment of the suit property.

It is therefore clear from the face of the pleadings that there is at least one triable issue in this suit, namely whether the transfer of the suit property to the Defendants or any other person was fraudulent, and this issue ought to be heard and decided on. The defects alleged by the 2nd Defendant to exist in the filing of the suit and in the plaint are defects that can be cured by application and amendment of pleadings, and are not fatal to the suit. These defects as garnered from the pleadings of the 2nd Defendant are the absence of the authority to sue from the Plaintiff's co-administrator, and the joinder of necessary parties to the suit. In any event the Plaintiff did attach the authority from the co-administrator to his replying affidavit.

In addition, the Court must be fully informed of the facts alleged particularly of the entries in green card before it can make any substantive and conclusive decision in this matter. This can only be through production of the relevant evidence during trial. It is therefore my finding that this is not a clear case for striking out of the pleadings.

For the foregoing reasons the Defendants application dated 07.12.11 fails, and the Plaintiff is hereby directed to file and serve the authority to sue from the Co-administrator and any application for joinder and amendment of the Plaint within 30 days of the date of this ruling. The Defendants are at liberty to set the suit for full hearing in default.

Dated, signed and delivered in open court at Nairobi this ____6th____ day of ____November____, 2012.

P. NYAMWEYA

JUDGE