



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO. 257 OF 2015

BARLET LIMITED.....PLAINTIFF

VERSUS

1. TOM ODERA

2. RUFUS NGILA.....DEFENDANTS

AND

PACIFICA THEISIN.....APPLICANT

RULING

1. The application for determination is the Notice of Motion dated 7th January 2018. It is brought under Sections 1A, 1B, 3A and 63(c) of Civil Procedure Act and all enabling provisions of the law. It seeks orders:

a) Spent

b) That the suit herein said to be withdrawn on 6th March 2017, be reinstated and the Applicant be made a defendant in the proceedings.

c) That applicant be made a party to the proceedings as a defendant.

d) That in the meantime, the plaintiff/respondent be restrained by an order of interim injunction from constructing, alienating, digging, excavating, wasting or in any other way whatsoever dealing with the property known as plot No. Mombasa/Mwembelegeza/643 pending hearing and determination of the application inter parties.

e) That this Honourable court be at liberty to make any orders it deems fit to grant in the larger interest of justice, equity and good conscience.

f) That the costs of the application be provided for.

2. The application is based on the grounds on the face of the motion and supported by the affidavit of Isaiah Ombasa Nyaribo, sworn on 7th January 2018. The deponent deposes that she is a donee of Power of Attorney in respect of one Pacifica Theisin, the applicant, together with one Josephine Kembo Orina the proprietor of the property known as **MOMBASA/MWEMBELEGEZA/643**. That the applicant was married to a German National and on his death had filial relationship with one Omar Omwoyo Mose and upon her departure to Germany, used the opportunity to make all manner of forgeries to obtain the property and purported to sell to many other people. That in 2009, there were proceedings in respect of the same property being Mombasa RMCC No.2464 of 2009 between one Geoffrey Wanyeki Kimeria and the deponent together with the applicant which proceedings ended with the demise of the plaintiff, Geoffrey Wanyeki Kimeria. That it was upon the demise of the plaintiff in RMCC No.2464 of 2009 that one Omae Omwoyo Mose purported to sell the property to the plaintiff herein. It is contended that the purported vendor neither had the title nor the right to effect the transfer of the property in favour of the plaintiff and that consequently the sale to the Plaintiff is a nullity and void *ab initio*.

3. The application is opposed by the Plaintiff who filed grounds of opposition dated 7th June 2018 and a replying affidavit sworn by Ankit Doshi on 20th September 2018. It is the Plaintiff's contention that the suit was properly and procedurally marked as withdrawn and that the applicant has no *locus standi* to file any application in this suit for reasons that the applicant was not a party to the suit at any stage. That allowing the application is tantamount to forcing the plaintiff to institute a claim against the applicant.

4. The court directed that the application be heard through written submissions which were duly filed by the advocates for the parties who also made brief oral submissions to highlight the same.

5. I have considered the application the affidavit filed and the rival submissions. On 3rd February 2017 the plaintiff through their advocates on record filed a notice of withdrawal of the suit against the defendants pursuant to Order 25 Rule 1 of the Civil Procedure Rules. The withdrawal was not objected by the defendants. The applicant who was not a party to the suit which was withdrawn now seeks to have the suit reinstated and she be enjoined as a defendant.

6. Order 25 Rule 1 of the Civil Procedure Rules provides as follows:

“(1) At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action.”

7. I am of the view that the suit was properly withdrawn. Now what remains for my decision is on whether the application has merit. The applicant seeks to have the order withdrawing the suit set aside and for an order reinstating the former suit. I have already pointed out that the suit was withdrawn pursuant to the provisions of Order 25 Rule 1 of the Civil Procedure Rules. It is my humble view that a suit which has been withdrawn pursuant to Order 25 of the Civil Procedure Rules cannot be reinstated. A party has the option of instituting a fresh action. This finding is on the basis of the provisions of Order 25 rule 4 of the Civil Procedure Rules which provides

“If any subsequent suit shall be brought before payment of the costs of a discontinued suit upon the same, or substantially the same cause of action, the court may order stay of such subsequent suit until such costs shall have been paid.”

8. The law under this order does not envisage a litigant to seek for an order of reinstatement. Moreover, the applicant herein was not even a party to the former suit. I do agree with the plaintiff's submissions that the court cannot compel a party to sue another party, unless of course there is an existing suit where the court may order for a joinder of a party who will assist in determining the real question in controversy. In this particular case, there is no suit pending.

9. In the final analysis, I find the Notice of Motion dated 7th January 2018 lacking in merit. The same is dismissed with costs to the plaintiff/respondent. In view of my decision, there is no need to consider the merits of the other prayers which essentially depend on the outcome of the prayer for reinstatement of the suit.

DATED, SIGNED and DELIVERED at MOMBASA this 30th day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Mbwana holding brief for Mrs. Oluoch Wambi for plaintiff/respondent.

No appearance for applicant.

Yumna Court Assistant

C.K. YANO

JUDGE

28/1/19