



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC. NO. 315 OF 2015

MICHAEL ANDREW SUTER.....PETITIONER

VERSUS

1. LEILA JAMES VAN ROSI (ALIAS LEILA IBRAHIM KHAN)

2. LEKEV HOLDINGS LIMITED

3. MILFAN DEVELOPERS LIMITED

4. ABDULHAKIM ABDALLA

5. THE LAND REGISTRAR MOMBASA

6. THE HON. ATTORNEY GENERAL.....RESPONDENTS

RULING

1. By a notice of motion dated 14th September, 2017 made pursuant to Order 2 Rule 15 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act, the 4th Respondent/Applicant seeks for orders that the suit against him be struck out with costs.

2. The Application is based on the grounds that the suit is scandalous, frivolous and/or vexatious and is otherwise an abuse of the process of the Court. The Application is supported by the affidavit of Abdulhakim Abdalla, the Applicant sworn on the 14th September, 2017. The Applicant avers that he is a bona fide purchaser for valuable consideration of **PLOT NO.1610/MN** situate in Nyali from Milfan Developers Limited, the 3rd Respondent herein, and that pursuant to transfer the Applicant is now the registered owner of the said property.

3. The Applicant states that he was not aware of any alleged claim by the Petitioner against the 3rd Respondent over the suit property throughout the transaction between him and the 3rd Respondent until the transfer process was complete. The Applicant further states that he only learnt of the alleged claim after completion of registration of title in his name and upon receipt of a demand letter from the Petitioner's advocates. That upon being served with summons and plaint, he contacted the 3rd Respondent who advised the Applicant that the Petitioner's claim over the suit premises had already been determined in **HCCC No.151 of 2006** in which the court made a declaration that the Petitioner has no lawful claim over **PLOT NO.1610/MN**. The Applicant avers that he has been in occupation and possession of the suit premises since June 2008. He added that the High Court in **HCCC No.286 of 2007** struck out the suit against Milfan Developers Limited for lack of cause of action and made an order for eviction of the Petitioner in **HCCC No.151 of 2006**. The Applicant had annexed copies of the transfer and title deed in his name, the demand letter dated 17th June 2008 and the ruling in Mombasa **HCCC No. 151 of 2006**.

4. The Application is opposed by the Petitioner through a replying affidavit sworn by Michael Andrew Suter, the Petitioner on 16th October 2017 in which he depones that the Applicant is not a purchaser for value without notice as presented by him since when he bought the property, he was always aware that there were encumbrances bedeviling **PLOT NO.1610/MN**. That the Applicant had knowledge of the Petitioner's claim of the title and must have even read a caveat emptor placed in one of the local dailies but still ignored and proceeded to purchase and develop the plot. It is his contention that the Applicant had a duty to do due diligence, look at the previous transactions, and specifically should have looked at entry Nos. 5, 6 and 7 and also look at the transfers and satisfy himself before entering into the sale agreement.

5. The Petitioner believes that he has a suit which is deserving to go for full hearing, adding that no suit has proceeded for full hearing and determined on merits between the Petitioner and the 4th Respondent, and noting that the case relied upon is not between the Petitioner and the 4th Respondent and that there is no evidence of such suit having been concluded. The Petitioner states that looking at the transfer prior to the one to the 4th Respondent, there are issues which require this court to interrogate and these are issues that the 4th Respondent was aware of or should have been aware of at the time of buying the property.

6. It is the Petitioner's contention that there has been collusion between the 1st, 2nd and 3rd Respondents and that this is very clear when one looks at the transfers which gave them ownership and the value indicated. He added that there is already judgment entered against the 1st, 2nd and 3rd Respondents and the 4th Respondent cannot claim to have a good title acquired from the Respondent who have not defended the suit, and further a party who had a bad title. The Petitioner states that even after the fraudulent transfer to the 1st Respondent, the Petitioner still retained a special Power of Attorney and as such no one could transfer the title without his participation. The Petitioner argued that he should not be knocked out of the seat of justice and should be given an opportunity to be heard especially considering that this is a land matter which, according to him, is very close to the hearts of Kenyans. The Petitioner has attached copies of the caveat Emptor, previous transfers and the special Power of Attorney.

7. The Application was canvassed by way of written submissions with the Applicant filing his submissions on 26th September 2018 and the Petitioner on 18th October 2018.

8. In their submissions, the Applicant's counsel reiterated that the Applicant is a bona fide purchaser for valuable consideration and the registered owner of the suit property having bought it from Milfan Developers Limited who were the previous registered owners. The Applicant submitted that the Petitioner has been filing cases after cases in court over the same subject matter, which cases have either been dismissed or struck out. It is their submissions that litigation must come to an end, adding that the Petitioners' adventure is a fishing expedition which, must also come to an end.

9. In their submission counsel for the Petitioner submitted that on reading the Applicant, one gets the impression that it is made under Order 2 Rule 15 (a) together with other sub rules. That the Application is supported by affidavit whereas under Order 2 rule 15 (1) no affidavit is required to support an Application of this nature. It is their submissions that the affidavit filed clearly brings in fore the fact that the Applicant is struggling to support his Application without evidence of an affidavit. That going through the affidavit, one gets the impression that there are many issues coming up which would require this suit to go for full hearing.

10. It was further submitted that the Petitioner has so far obtained an interlocutory judgment against the 1st, 2nd and 3rd Respondent and that the 4th respondent's title is premised on the title he got from the other Respondents and cannot isolate himself for reasons that his title is as good as for the others. On the issue that the matter has been heard and determined, it was submitted that the annexed decision is a ruling and not a judgment and there is no decree of any court attached. That no evidence of proceedings between the Petitioner and the 4th Respondent to warrant the dismissal of the suit. It was submitted that this court has a duty to give the Petitioner his day in court to adduce evidence and prove his case.

11. I have considered the Application. The principles which guide the courts in determining an Application for striking out pleadings are well settled. In the case of **DT Dobie & Company (Kenya) Ltd –v- Muchina (1982)KLR**, the Court of Appeal stated as follows: -

“... the power to strike out should be exercised only after the court has considered all facts; but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an Application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case. The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendments, it should not be struck out.”

12. In the case of **Yaya Towers Limited –v- Trade Bank Limited (in liquidation)(2000)eKLR**, the Court of Appeal expressed itself as follows:

“A plaintiff is entitled to pursue his claim in our courts however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that he Plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial. It cannot be doubted that the court has inherent jurisdiction to dismiss that which is an abuse of the process of the court.....”

13. The overriding principle therefore to be considered in an Application for striking out a pleading is whether it raises any triable issues.

14. I have looked at the Petition dated 26th February 2015. In it, the Petitioner's pleaded claim is that that the transfers in favour of the 1st, 2nd and 3rd Respondents are incompetent, null and void and unable to transfer title or interest in **PLOT NO.1610/I/MN**. It further pleaded that any subsequent transfer after the 1st and 2nd Respondents are incompetent, null and void and an order is sought to have those subsequent entries removed, among other prayers.

15. I have also perused the ruling in **Mombasa HCCC N.151 of 2006 Milfan Developers Ltd –V- Michael Suter** which is annexed to the affidavit in support to the Application herein. The same was between the 3rd Respondent herein (as plaintiff) and the Petitioner herein (as Defendant). What was pleaded was an order for vacant possession, eviction and an order of declaration that the defendant has no lawful claim over the suit land, **PLOT NO.1610/I/MN**. The court in that case ruled in favour of the plaintiff and granted the orders sought vide the ruling dated 1st March 2007.

16. It is a general principle of law that litigation must come to an end. Ordinarily a suit would come to an end when a court has rendered a decision and that decision has been acted upon or executed. There is no evidence that the ruling in **Mombasa HCCC No.151 of 2006** was reviewed or set aside.

17. In the petition herein, the Petitioner herein is claiming the same property which was subject in **Mombasa HCCC No. 151 of 2006**. The court had rendered itself in **HCCC no. 151 of 2006** over the same suit property. The proper forum at this stage is a superior court. I cannot pretend to sit on appeal over the decision already made by the High Court in **HCCC No. 151 of 2006**. In my view, the petition herein has no

foundation, is hopeless and has no chances of succeeding. The same is without doubt frivolous, vexatious and an abuse of the court process. I think this is a plain and obvious case and ought to be struck out.

18. In the result, the Notice of Motion dated 14th September 2017 is merited and is hereby allowed. The suit against the 4th Respondent is struck out with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 24th day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

MS. Mwainzi holding brief for Oddiaga for Petitioner/Respondent

Ms. Kayatta holding brief for Abed for 4th Respondent/Applicant

No appearance for 1st – 3rd Respondent.

Mrs. Wawa for 5th and 6th Respondents.

Yumna Court Assistant

C.K. YANO

JUDGE

24/1/19