



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC. NO. 382 OF 2010

PROSPER PROJECTS LTD.....PLAINTIFF

VERSUS

- 1. THE COUNTY GOVERNMENT OF MOMBASA**
- 2. THE MINISTRY OF EDUCATION, SCIENCE AND TECHNOLOGY**
- 3. THE BOARD OF MANAGEMENT, MAJI SAFI PRIMARY SCHOOL**
- 4. THE LAND REGISTRAR MOMBASA**
- 5. THE HON. ATTORNEY GENERAL.....DEFENDANTS**

RULING

1. The Application for determination is the Notice of Motion dated 1st March, 2018 by the 1st defendant/applicant seeking orders that the suit against it be struck out. The motion is predicated on the grounds that the plaintiff was reliably informed by the applicant after filing the suit that the applicant neither allocated the suit property nor permitted encroachment of it by any individual, entity or institution as alleged in the plaint and that the suit property is what was under the old legal regime known as Government Land which could only be allocated and leased to individuals by the National Government and not the predecessor of the applicant. They aver that both the Plaintiff and Maji Safi Primary School, the alleged trespasser were allocated land by the National Government, a fact allegedly within the plaintiff's knowledge. They further contend that the applicant does not run Maji Safi Primary School as only the provision of pre-primary education is devolved. It is their contention that it is not a proper party to the suit in view of the fact that it never sanctioned trespass upon the suit property as alleged by the plaintiff and that the plaintiff has not disclosed any reasonable cause of action against the applicant, adding that the suit against it is an abuse of the court process.

2. The application is supported by the affidavit of Paul Manyala sworn on 1st March, 2018, in which he depones inter alia that on 24th April 2014 and 15th April 2015, the plaintiff wrote to the County Director of Education inquiring the ownership of Maji Safi Primary School and vide a reply dated 2nd May 2014 was informed that the said school is a public institution. He depones further that only provision of pre-primary education was devolved to counties while primary education remains a function of the National Government. That documentation filed shows that both the plaintiff and the applicant were allocated land which happens to be the suit property by the National Government, the only difference being that Maji Safi Primary was allocated part of the suit property sometime in 2002 while the plaintiff was allocated the whole of the suit property in 1997. It is the applicant's contention that the suit should be dismissed for being abuse of court process.

3. In opposing the application, the plaintiff filed a replying affidavit sworn by Ashok Labshanker Doshi on 14th May 2018 in which he deposed inter alia that although the plaintiff was not certain of the ownership status of Maji Safi Primary School, it filed suit against the applicant reasonably believing it to be the proper party based on the information then in the plaintiff's possession. That in the statement of defence dated 3rd December 2010 the applicant pleaded that it took possession of the subject property within the confines of the law and pursuant to lawful council resolution and that the position now taken by the applicant is different from its earlier pleaded position. He further depones that there is a pre-primary block or classes erected on the suit property which are under the legal authority or management of the applicant therefore making the applicant not only a proper party but also a necessary party to this suit. He added that the applicant has been collecting rates for the suit property. It is the plaintiff's contention that the application is an attempt to frustrate or delay the case.

4. The application is also opposed by the 2nd, 3rd, 4th and 5th defendants through grounds of opposition dated 12th March, 2018 which inter alia stated that the applicant was a vital player during the land allocation before the proclamation of the new constitution and therefore should not be relieved of its duties as a party to the suit.

5. I have considered all the issues raised in the application, the affidavits in support and against, the grounds of opposition, the rival submissions made and the authorities cited. The application is brought under Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure

Rules, and Sections 1A, 1B and 3A of the Civil Procedure Act. In the exercise of its power under Order 2 Rule 15, there are certain well established principles that a court of law must adhere to. Whereas the essence of the said provision is the striking out of a pleading, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit or defence tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon mini-trial thereof before finding that a case or defence is otherwise an abuse of the court process.

6. 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 a claim in our courts however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the Plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of court, it must be allowed to proceed to trial....”

7. The overriding objective therefore to be considered in an application for striking out a pleading is whether it raises any triable issues. The power to strike out pleadings must be sparingly exercised and can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day it may not succeed, then the suit ought to go to trial. However, where the suit is without substance or groundless or fanciful or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as a legitimate use of the process, the court will not allow its process to be used as a forum for such venture. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court’s resources while taking into account the need to allot resources to other cases.

8. Whereas the court retains the jurisdiction to strike out pleadings in deserving cases, each case must be viewed on its own peculiar facts and circumstances. The law is that statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable and where the hearing involves the parties in a trial of the affidavits, it is not plain and obvious case on its face.

9. In this case, the court is urged to find that the applicant neither allocated the suit property nor permitted encroachment of it, and that that suit property was Government Land which could only be allocated by the National Government and not the applicant or its predecessor. In addition, the applicant alleges that both the plaintiff and Maji Safi Primary School were allocated land by the National Government and that the applicant does not run the said school. To determine all these issues, I am afraid, would amount to making determination of this case based on affidavit evidence. It must be noted that subsequent to the filing of the suit, the plaint was amended to include additional parties as defendants. The 2nd, 3rd, 4th and 5th defendants have filed their defence and counter-claim. They have also filed notice of claim dated 12th October, 2018 against the applicant as co-defendant in which they are claiming indemnity and damages, among others.

10. Taking all the circumstances of this case into consideration, I am not satisfied that the justice of the case will be attained by terminating the plaintiff’s suit against the applicant at this stage. Under Article 50 (1) of the Constitution, every person has the right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body. Under Article 25 that right cannot be limited. Whereas I agree that the form of a hearing does not necessarily connote adducing oral evidence, and that in appropriate cases hearing may take the form of affidavit evidence, to determine a suit by way of affidavit evidence ought to be resorted to only in clear and plain cases. I am not satisfied that the present case can be termed as clear and plain case.

11. The upshot is that the Notice of Motion dated 1st March 2018 is without merit and is dismissed with costs to the plaintiff.

DATED, SIGNED and DELIVERED at MOMBASA this 22nd day of January, 2019.

C. YANO

JUDGE

IN THE PRESENCE OF:

Ms. Mwanazuma holding brief for Oluga for Plaintiff

Ms. Kiethi holding brief for Kibara for 1st Defendant

No appearance for AG for 2nd, -5th defendants.

Yumna Court Assistant

C.K. YANO

JUDGE

