



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC CASE NO. 109 OF 2016**

**AHMED MOHAMED OMAR.....PLAINTIFF**

**VERSUS**

**MWANAMKUU BAHANI MBWAHAJI AND 17 OTHERS.....DEFENDANTS**

**RULING**

1. By this Notice of Motion application dated 5<sup>th</sup> May 2017 the 18 Defendants herein pray for an order that this suit be struck out with costs. Their application is based on the grounds inter alia:-

*i) That the Plaintiff instituted this suit on 10<sup>th</sup> May 2016 after he illegally sold LR No. 29207 situate North of Lamu, Hindi measuring approximately 27.26 acres to Stima Investment Co-operative Society Ltd by a transfer registered in its favour dated 18<sup>th</sup> December 2015;*

*ii) That the subject matter of this suit was thereafter unavailable to the Plaintiff as the said sale was without the approval of the Defendant who have occupied the land for years and have acquired proprietary ancestral rights over the land;*

*iii) That the Plaintiff has no locus standi to institute the said suit as he lost his proprietary rights once he sold the property;*

*iv) That the suit is rather an abuse of the process of the Court and should be struck out and Judgment be entered to the Defendant as stated in the counter claim.*

2. In a Replying Affidavit filed on 25<sup>th</sup> July 2017 in response to the Defendant's application, Ahmed Mohamed Omar (the Plaintiff) avers that he is the registered owner of all that parcel of land known as LR No 29207 Lamu. The Plaintiff avers that he has been in possession of the land since 1<sup>st</sup> July 1998 and a grant was later on duly registered in his name on 24<sup>th</sup> June 2013.

3. The Plaintiff avers that the Defendants have without any colour of right occupied his land and have started building structures thereon. He avers that the title documents for the suit property were lawfully obtained and due process followed and that this application is misconceived, misguided and a tactic to delay justice.

4. I have considered the application and the response thereto. Order 2 Rule 15 of the Civil Procedure Rules provided as follows:-

*“15. (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” (emphasis added).*

5. As was stated by the Court of Appeal in *Kiranga Estates Ltd –vs- National Bank of Kenya Ltd(2017) eKLR:-*

***“It is not for nothing that the jurisdiction of the Court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the Court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations.”***

6. In the matter before me, the main argument by the Applicant is their contention that the Plaintiff herein has no locus standi to institute and maintain the suit herein. According to the Defendant/Applicants, the Plaintiff lost this right to sue over the same property once he illegally sold the property to a third party, a company known as Stima Investment Co-operative Society.

7. In his Replying Affidavit filed on 25<sup>th</sup> July 2018, the Plaintiff does not make any reference to the sale and/or transfer of the land to the said third party. It is however notable that throughout the 18 paragraphs of the Replying Affidavit, he refers to his ownership in the past tense and states that he was the owner of the suit property.

8. From the annexures attached to the Supporting Affidavit of Asili Juano Dido on behalf of the Applicants, it is evident that the Plaintiff Ahmed Mohamed Omar indeed sold and transferred his interests in the land to the said Stima Investment Co-operative Society Ltd vide an agreement and Transfer dated 29<sup>th</sup> November 2015. That transfer was indeed registered on the Grant in respect of the suit property on 18<sup>th</sup> December 2015.

9. As it were the word “transfer” is defined under the Land Act as a means of passing of land from one party to another by an act of the parties and not by operation of law. Section 37 of the Land Registration Act further provides that:-

***1) A proprietor may transfer land, a lease or a charge to any person with or without consideration, by an instrument in the prescribed form or in such other form as the Registrar may in any particular case approve.***

***2) A transfer shall be completed by:-***

***a) Filing the instrument; and***

***b) Registration of the transferee as proprietor of the land, lease or charge.***

10. Arising from the foregoing, the transfer of the suit property was completed on 18<sup>th</sup> December 2015 when the said Stima Investment Co-operative Society Ltd was registered as the proprietor thereof.

11. In this regard, I am inclined to accept the Defendant/Applicant’s position that as at 18<sup>th</sup> May 2016 when he filed this suit, the Plaintiff did not have the standing to bring the same. Locus Standi as it were would only arise in these circumstances where the Plaintiff was able to demonstrate to the Court sufficient connection to support his participation in the case. It would arise where he stands to directly and/or personally suffer some harm or injury arising from the situation or condition for which he is asking the Court for relief. That cannot be the case in a situation such as the one herein where the Plaintiff himself consciously refers to his ownership of the disputed property in the past tense.

12. Accordingly and in the circumstances herein, I am convinced that this suit was filed by the Plaintiff for an ulterior purpose. His interest in the disputed property was extinguished long before he filed the suit herein and this suit must therefore fall in the category of matters described under Order 2 Rule 15 (d) as being “otherwise an abuse of the Process of the Court.” It would be grossly unfair in the circumstances to drag the Defendants to court to defend themselves against what is clearly a non-starter.

13. In the result, I allow the Application dated 5<sup>th</sup> May 2017. This suit is accordingly struck out with costs to the Applicants/Defendants.

**Dated, signed and delivered at Malindi this 18<sup>th</sup> day of January, 2019.**

**J.O. OLOLA**

**JUDGE**