



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT & LAND COURT

ELC CASE NO. 342 OF 2013

ABERDARE INVESTMENT LIMITED.....PLAINTIFF

=VERSUS=

PAUL NYANJUI KAMOCHÉ & 34 OTHERS.....DEFENDANT

KENYA COMMERCIAL BANK.....THIRD PARTY

WILSON KIARIE.....INTERESTED PARTY

RULING

BACKGROUND

1. This is a ruling in respect of two separate applications. The first application is dated 18th September, 2018. It is brought by the Interested Party. It seeks this Court's orders directing the director of survey or a county surveyor from Thika to survey L.R Nos 4953/2157 and Thika Municipality Block 6/1086 and file a report in Court within 30 days. The second application is dated 24th September, 2018. It is brought by the Plaintiff. The application seeks dismissal of the counter-claim and entry of judgment in favour of the Plaintiff against the Defendants as per the Plaintiff.

2. The Plaintiff filed a suit against the Defendants seeking a declaration that the continued occupation of the Defendants on L.R No. 4953/2157 (suit property) is unlawful and for an order of eviction. The Defendants filed a defence and raised a counter-claim in which they seek general damages for demolition of their properties and for a permanent injunction against the Plaintiff from interfering with the suit property. In the pleadings, the Defendants contend that they purchased the suit property from Margaret Wangui Kimani (now deceased) who had purchased the suit property during a public auction conducted by the third party.

3. When the third party was brought on board in this suit, it denied that it ever instructed anyone to sell the suit property. The third party contended that the title to the suit property had been charged to it by the Plaintiff who had taken a facility from it and that upon payment of the amount advanced, the suit property was discharged.

4. The Plaintiff brought an application seeking deposit of security for costs by the Defendants. The application was allowed and the Defendants were ordered to deposit a combined security for costs in the sum of Kshs.10,000,000/= within 90 days failing which the Plaintiff or the third party were at liberty to apply for dismissal of the counter-claim as per Order 26, Rule 5(1) of the Civil Procedure Rules.

5. The Defendants did not deposit security as directed. This is what prompted the Plaintiff to make the application of 24th September, 2018. The Interested Party is the administrator of the estate of Margaret Wangui Kimani. The Defendants contention now is that they are not interested in the suit property but rather in L.R No. Thika Municipality Block 6/1086. This is what prompted the Interested Party to file the application dated 18th September, 2018.

APPLICATION DATED 18TH SEPTEMBER, 2018

6. The Applicant in this application is the Interested Party and the Administrator of the estate of Margaret Wangui Kimani (Deceased). The Applicant contends that the deceased was a buyer of huge chunks of land which she could then subdivide and sell to purchasers. After the demise of the deceased, he went through the deceased's documents where he discovered that the deceased was the owner of L.R No. Thika Municipality Block 6/1086. The Applicant engaged the services of a surveyor who went to the ground and established that L.R Thika Municipality Block 6/1086 and the suit property were two distinct properties which were far apart.

7. The surveyor also found that L.R No. Thika Municipality Block 6/1086 was fully developed with partly demolished houses and that that is where the Defendants reside. The Applicant therefore contends that the place where the Plaintiff claims is not the suit property but that it is L.R No. Thika Municipality Block 6/1086. This is why the Applicant wants the surveyor to go to the ground and make a report on the two properties.

8. The Applicant's application is opposed by Plaintiff based on a Replying Affidavit sworn on 24th October, 2018. The Plaintiff contends that in the pleadings, the Defendants who are supported by the Interested party/Applicant were claiming the suit property but in the application before the Court, they say that they are not interested in the suit property but that they are now claiming L.R Thika Municipality Block 6/1086. The Applicant who is the Administrator of the estate of the deceased claims that the deceased obtained title to L.R Thika Municipality Block 6/1086 on 1st August, 2014 while the deceased died in 2008.

9. Though the Defendants did not file any response to this application, they supported the Applicant during their oral submissions in Court. I have carefully considered the Applicant's application as well as the opposition to the same by the Plaintiff. The only issue for determination is whether an order should be given directing a surveyor to go to the ground to carry out a survey of the suit property and L.R No. Thika Municipality Block 6/1086.

10. In the pleadings which are filed herein, the Defendant's claim which has support of the Applicant is that they purchased their respective portions contained in the suit property from the deceased. The deceased had allegedly purchased the suit property during a public auction. The third party has denied that it ever sold the suit property in a public auction. The Defendants have now changed tune and are claiming that they have no interest in the suit property and that their interest is on L.R No Thika Municipality Block 6/1086. The Applicant has already engaged a surveyor who has gone to the ground and found that L.R No Thika Municipality Block 6/1086 is far from the suit property.

11. There is no dispute on encroachment. These two properties do not border each other. L.R No Thika Municipality Block 6/1086 which the Defendant now claim is not in the pleadings and cannot be made a subject of an order of the Court. I therefore do not find that it is necessary for the Court to direct that a surveyor files a report in respect of the two properties. If the Defendants or Applicant's claim is that they are fighting over the same property on the ground with two different titles, then this should have been a different case altogether. The Applicant's claim was on the suit property. They have now changed and are claiming that their interest is in Thika Municipality Block 6/1086. The deceased's claim is that she purchased the suit property in a public auction. When this allegation was denied by the third party, the Applicant and the Defendants seem to be claiming the same land under the guise that it is L.R Thika Municipality Block 6/1086 whose title was obtained in 2014 when the deceased had died. The Applicant is not being serious. I find no merit in the application which is hereby dismissed with costs to the Plaintiff/Respondent and Third Party.

It is so ordered.

APPLICATION DATED 24TH SEPTEMBER, 2018

12. The Plaintiff/Applicant contends that this Court delivered a ruling on 13th June, 2018 which ordered the Defendants to deposit security for costs in the sum of Kshs.10,000,000/= within 90 days failing which the Applicant was to be at liberty to apply for its dismissal pursuant to Order 26 Rule 5(1). The Applicant contends that the 90 day period given to the Defendants passed without any compliance. The Applicant now prays that the counter-claim be dismissed with costs and judgment entered in its favour as per the Plaintiff.

13. The Applicant's application is opposed based on grounds of opposition dated 25th September, 2018 and a Replying Affidavit sworn on 7th November, 2018. The Respondents contend that the application is frivolous, vexatious and an abuse of the process of the Court; that the application is meant to defeat the Defendants claim and is based on misapprehension of the law.

14. The Respondents further contend that the Applicant's application is meant to shut out the Respondents from being heard. The Respondents argue that they have filed an appeal against the ruling of the Court which gave rise to this application and that the Applicant has failed to disclose that fact.

15. I have considered the Applicant's application, the opposition thereto by the Respondents and the oral submissions given in Court. The only issue for determination here is whether the counter-claim by the Defendants should be struck out and judgment entered for the Plaintiff as per the Plaintiff. The Applicant's application is predicated on Order 26 Rule 5 (1) of the Civil Procedure Rules which states as follows:-

“5(1) if security for costs is not given within the time ordered and if the Plaintiff is not permitted to withdraw the suit, the Court shall upon application, dismiss the suit.”

16. The Respondents had been given 90 days within which to deposit security. That period lapsed without any deposit being made. As per order 26 Rule 5 (1) of the Civil Procedure Rules, the Applicant was at liberty to move the Court for dismissal. The Applicant's application has a sound basis. Once such an application is made, the Court has no option other than to dismiss the suit. The only window which was open to the Applicants was to have applied for its withdrawal. Since this was not done, the Court has to dismiss it and if the Respondents later move to Court under Order 26 Rule 5 (2), the Court may consider setting aside the order of dismissal. I therefore find that the Applicant's application is well merited in as far as dismissal of the counter-claim is concerned. Judgment cannot be entered for the Plaintiff as prayed as the defence of the Defendants remains on record. I therefore allow the Applicant's application to the extent that the counter-claim filed by the Defendants is hereby dismissed with costs to the Plaintiff/Applicant and the Third Party. The Respondents shall also bear the costs of this application as well as the dismissed counter-claim.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 28th day of March 2019.

E.O.OBAGA

JUDGE

In the presence of M/s Gachomba for Mr. Kanyi for Interested Party, M/s Nyareru for Mr. Nyakundi for Plaintiff/Applicant and M/s Wanjiku for Mr. Mathenge for Defendants.

E.O.OBAGA

JUDGE

28.3.2019