



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT ELDORET

CIVIL CASE NO 75 OF 2018

KIPKEBUT CHEBET (Legal Representative of

Kabon Chepsergon).....1ST PLAINTIFF/RESPONDENT

DANIEL CHEPKONGA KIYAI....2ND PLAINTIFF/RESPONDENT

VERSUS

SALINA KIPSOTO (Administrator and representative

of Charles Kiptorus Ngabo).....1ST DEFENDANT/APPLICANT

KIPNGOK KIMASAS.....2ND DEFENDANT/APPLICANT

LABAN BELLE.....3RD DEFENDANT/APPLICANT

RULING

This ruling is in respect of an application dated 19th November 2018 brought by way of Notice of Motion by the 2nd and 3rd defendants seeking for the striking out of the Originating Summons against them together with costs. The application was supported by the annexed affidavits of the 2nd and 3rd defendants respectively. Counsel agreed to canvass the application by way of written submissions which were filed accordingly.

2ND AND 3RD DEFENDANTS SUBMISSIONS

It was Counsel's submission that it is the 2nd and 3rd Defendants' position that they have been wrongfully sued as they are not the registered proprietors of the suit property, and as such the suit amounts to an abuse of court process.

Counsel submitted that it is not in dispute that the 2nd and 3rd Defendants were not and are not proprietors of the suit property. Further that the Plaintiffs' claim is based on adverse possession and no averment has been pleaded to the effect that the 2nd and 3rd Defendants have laid claim to the suit property.

Counsel for the 2nd and 3rd defendants also submitted that the defendant have been sued in their capacity as members of Kapchumuso Land Committee and no relief in so far as their duties are concerned has been sought against them. Counsel further submitted that even if the court were to grant the reliefs pleaded in the Originating Summons the same cannot be enforced as against the 2nd and 3rd Defendants and therefore there is no legal basis at all to enjoin them as parties in the suit and or for the suit to be continued against them. Counsel therefore urged the court to strike out the names of the 2nd and 3rd defendants from the suit as it is frivolous, vexatious and amounts to an abuse of court process with costs.

1ST AND 2ND PLAINTIFF/RESPONDENTS' SUBMISSIONS

Counsel for the respondents filed submissions and stated that the defendant/applicants' application is fatally defective, incompetent and premature as it is only at the hearing of the originating summons that the true identity and relationship of the defendants/applicants will come out clearly.

Counsel for the plaintiff also submitted that it is through the full trial that the respondents will establish whether the applicant herein infringed in any manner the right of the plaintiff and whether it had interest or not over the property in dispute. Further that the applicant

ought not be left out to explain how the deceased acquired the land having been a member of the Land Committee at the time of land adjudication.

Counsel therefore urged the court to dismiss the application with costs to the respondents.

Analysis and determination

This is an application to strike out the names of the 2nd and 3rd defendants from the Originating Summons as it is an abuse of the court process, frivolous and vexatious. Striking out of pleadings is provided for under Order 2 rule 15 of the Civil Procedure Rules which provides:

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.

(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.

The order specifically states that the application shall concisely state the grounds on which it is made which has been complied with in this application.

The issue that the court has to determine is as to whether the suit against the 2nd and 3rd defendants is an abuse of the court process and whether it may prejudice, embarrass or delay the fair trial of this case.

From the onset it is clear that the Originating Summons is a claim of adverse possession whereby the plaintiffs want the court to declare that they have been in quiet, open, exclusive and uninterrupted occupation of the suit land for a period of over 12 years.

The pleadings are very clear that the orders sought are against the registered owner of the suit land who is the 1st defendant. In a claim of adverse possession, how will the plaintiff enforce the order against a person who has no proprietary interest in the parcel of land? The body of the pleadings does not have any claim against the 2nd and 3rd defendants on the issue of adverse possession apart from the allegations of fraud.

Suits should not be filed in vain where orders of the court cannot be enforced against parties. The allegations of fraud against the 2nd and 3rd defendants and the submission by Counsel that they should come and tell the court how they discharged their duties at the Land Committee during the land adjudication cannot be canvassed in a claim of adverse possession by suing them. The best that the plaintiff can do is to summon them as witnesses to shed light in the case.

Courts should be slow at striking out pleadings but when the abuse of the court process is glaring then they should not shy away from doing so.

I find that the 2nd and 3rd defendants have been sued wrongly in this Originating Summons for adverse possession as the final orders if any cannot be enforced against them. If the plaintiffs wanted to sue them for fraud then they should have elected to do so and not through a claim for adverse possession.

I therefore find that the 2nd and 3rd defendants' application dated 19th November 2018 has merit and is hereby allowed with costs. The upshot is that the 2nd and 3rd defendants' names are struck out of the Originating Summons with costs.

DATED and delivered at Eldoret this 26th day of March, 2019

M.A. ODENY

JUDGE

Read in open court in the presence of Mr. Kandie holding brief for Miss Chesaro for Respondent and in the absence of Bundotich for the Applicant.

Mr. Koech – Court Assistant.