



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERICHO

E.L.C CASE NO. 94 OF 2017

HELLEN CHELANGAT RUTO.....PLAINTIFF

VERSUS

PHILIP NGENO.....1ST DEFENDANT

AMOS LANGAT.....2ND DEFENDANT

RULING

Introduction

1. What is before me is the Defendant's Notice of Motion dated 29.1. 2019 brought pursuant to Order 2 Rule 15 (1) (a),(b) and (d) of the Civil procedure rules seeking the following orders:

- i. That the Plaintiff's suit be dismissed as the same is frivolous, scandalous and an abuse of the process of the court
- ii. That necessary directions be given
- iii. That the costs of this application be provided for.

2. The application is predicated on the grounds stated on the face of the Notice of Motion and the Applicant's affidavit sworn on the 29.1.2019. In the said affidavit the Applicant depones that the Plaintiff is not the registered owner of the suit property as the same is registered in the name of one Rorogu Cheruiyot Ngeno who has not been enjoined in the suit. He further depones that the Plaintiff is merely a licensee on the suit property and she cannot arrogate herself the rights of a registered owner in terms of section 25 of the Land Registration Act. He depones that having failed to demonstrate ownership of the suit property, the Plaintiff's suit is just a bubble and a mere waste of the court's time.

3. The application is opposed through the Plaintiff's Replying Affidavit sworn on 13.3.2019 in which the plaintiff depones that she has been in occupation of the suit property since 1986 when the Rorogu Cheruiyot Ngeno who is the registered owner thereof donated it to her. She claims that the Defendant's application is a shortcut to illegally take possession of the land and an attempt to lock her out and prevent her from ventilating her case so that it can determined on the merits.

4. The application was canvassed by way of written submissions and both parties filed their submissions.

Issues for Determination

5. The only for determination is whether the Plaintiff's suit ought to be dismissed for being scandalous, frivolous and an abuse of the process of the court.

6. Under the provisions of Order 2 Rule 15 (1) of the Civil Procedure Rules, the court may order to be struck out or amended any pleading on the grounds that it is scandalous, frivolous, vexatious or otherwise an abuse of the process of the court. Before arriving at the decision as to whether to strike out the Plaintiff's suit, it necessary for me to examine Plaintiff against the meaning of each of the aforementioned terms.

Black's Law Dictionary 7th Edition defines scandal as follows:

“Scandal consists of the allegation of anything which is unbecoming of the dignity of the court to hear, or is contrary to decency or good manners, or which charges some person with a crime not necessary to be shown in the cause to which may be added any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous. The alleged matter however must be not only offensive, but also irrelevant to the cause, for however offensive it may be, if it be pertinent and material to the cause the party has a right to plead it. It may be necessary to charge false representations, fraud and immorality, and the pleading will not be open to the objection of scandal, if the facts justify the charge.”

7. A scandalous matter is one that is both grossly disgraceful and irrelevant to the action or defence.

8. According to **Bullen, Leake and Jacobs Precedents of Pleadings (12th Edition)**- *“a pleading or action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless and offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense”.*

9. The word frivolous is described as something lacking a legal basis or legal merit; not serious, not reasonably purposeful.

10. A pleading which is an abuse of the court process really means in brief, a pleading which is a misuse of the court machinery or process- **Trust Bank Ltd Vs Hemanshusirkat Amin & Co Ltd & Another** (Nrb HCCC No. 984 of 1999).

11. The dispute herein relates to land parcel Kericho/Kipkelion/ Barsiele/220 measuring 7 acres which is registered in the name of Rorogu Cheruiyot Ngeno. According to the Plaintiff who is Rorogu’s sister, sometime in 1986 the said Rorogu allowed her to stay on the suit property and take care of it as he was working out of the country. It is against that background that she has been peacefully occupying and utilizing the suit property with her family since then. However, in March 2017, the 2nd Defendant who is also her brother together with his son (1st Defendant) entered the suit property, cultivated a portion thereof and started threatening to evict her claiming that they had been instructed to do so by Rorogu. The Plaintiff therefore seeks a permanent injunction to restrain the Defendants from evicting her from the suit property. In their Defence, the Defendants scoff at the Plaintiff’s claim against them and state that not being the registered owner of the suit property she is not entitled to sue them for trespass as she too is a trespasser.

12. Viewed against the above definitions, I see nothing scandalous or frivolous about the Plaintiff’s claim. If she is occupying the suit property with Rorogu’s permission then it is only the said Rorogu who is entitled to terminate her stay and he must do so lawfully, not through a letter addressed “whom it may concern” and proxies like he has purported to do. In my view it would help to resolve this dispute if the said Rorogu could be enjoined in the suit so that he can shed light on the correct position.

13. As was stated by Madan J (as he then was) in **D. T Dobie & Company (Kenya Ltd Vs Joseph Mbaria Muchina 1982 KLR 1**

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way,” Sellers LJ. (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind to summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it.”

14. Furthermore, in **Richard Chapi Leiyagu V IEBC & 2 Others** the Court of Appeal held as follows:

“The right to a hearing has always been a well-protected right in our Constitution as is the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day, there should be proportionality”

15. In view of the foregoing, I am disinclined to grant the application and I dismiss it.

16. The costs of this application shall be in the cause.

Dated, signed and delivered at Kericho this 16th day of April 2019

J.M ONYANGO

JUDGE

In the presence of:

Mr. W.K. Ngeno for the Respondent

Mr. Kirui for the Applicants

Court Assistant; Rotich