



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO.53 OF 2014

WANJE NYAU MWALUNGO.....PLAINTIFF

VERSUS

1. MERRY BEACH LIMITED

2. DIRECTOR OF LAND ADJUDICATION & SETTLEMENT

3. COUNTY LAND REGISTRAR

4. ATTORNEY GENERAL.....DEFENDANTS

RULING

1. Before me for determination are two applications. The first application dated 23rd July 2018 was filed by Wanje Nyau Mwalungo (the Plaintiff) seeking an order that this Court adopts the National Land Commission (NLC) Report and recommendation dated 28th July 2018 as the Judgment of this Court.

2. The Plaintiff's application is premised inter alia on the grounds that:-

i) The dispute herein was referred to and was heard in the presence of both parties by the National Land Commission in application of alternative (resolution)disputes mechanism as provided for under the Constitution of Kenya;

ii) That the Commission as an arbitrator had a chance to listen to all parties including the Chief and area village elders who have first hand information on all land history in the area and therefore their verdict is more reliable than evidence given in a Court of law; and

iii) That the Commission's verdict and recommendations reflect the true position in reference to the land in dispute and ought to be adopted in this case as the final Judgment.

3. In a Replying Affidavit filed on 12th September 2018 in response to the first application, Merry Beach Limited (the 1st Defendant) avers through its company secretary Walter Kilonzi that the Motion is a gross abuse of the Court process and that it is an absolute falsehood to state that the decision of the National Land Commission was not challenged, objected to or appealed.

4. The 1st Defendant further avers that it was not heard by the National Land Commission. On the contrary, the 1st Defendant had advised the National Land Commission not to hold any public hearing concerning the suit premises on the grounds of sub judice as the suit was still pending in Court.

5. In addition to the Replying Affidavit, the 1st Defendant also filed the second application herein dated 11th September 2018 seeking an order that the Plaintiff's suit be dismissed for Want of Prosecution.

6. The 1st Defendant's application is premised on the grounds that the Plaintiff has failed to set down the suit for hearing or to take any step in the suit ever since it was filed in the year 2014. It is further the 1st Defendant's case that the Plaintiff has abandoned the suit and made the decision not to prosecute the suit based on the alleged determination of ownership of the suit premises by the National Land Commission.

7. But in a Replying Affidavit filed herein on 17th September 2018, the Plaintiff characterizes the 1st Defendant's application as a mere

smokescreen. It is the Plaintiff's case that his application dated 23rd July 2018 remains pending for determination and it cannot therefore be concluded that the Plaintiff has lost interest in the suit.

8. It is further the Plaintiff's case that dismissal of suits is a draconian measure and hence parties should be allowed to canvass their claims and the real matters in controversy so that justice may not only be done but also be seen to be done.

9. I have considered the two applications and the respective responses thereto. I have equally perused and considered the written submissions filed by the Learned Advocates for the parties as well as the authorities to which they referred me.

10. In his application dated 23rd July 2018, the Plaintiff urges this Court to adopt the National Land Commission Report and recommendations dated 28th July 2018 as the Judgment of this Court. According to the Plaintiff, this dispute was referred to the National Land Commission as a mechanism for alternative dispute resolution. It is further the Plaintiff's case that the National Land Commission has had the matter first hand and that the resultant verdict is more reliable than any evidence that can be given in Court and hence the application by the Plaintiff.

11. As it were, the Plaintiff herein is also the 1st Respondent in Malindi ***Petition No. 18 of 2017; Merry Beach Ltd –vs- Wanje Nyau Mwalungo & 5 Others***. As can be seen from the citation, the 1st Defendant herein is the Petitioner in the said Petition while the National Land Commission is the 5th Respondent. That Petition was filed by the 1st Defendant to restrain the Plaintiff herein and the other Respondents therein from acting on the decision of the National Land Commission that the Plaintiff seeks to rely on herein.

12. In a Ruling delivered by this Court on 28th June 2018 following an application by the Petitioner, this Court stated as follows at paragraphs 17 and 18 thereof:-

17. Quite evidently, a challenge to a title as well as a grant or disposition of land on the basis that it was obtained unprocedurally or illegally through a corrupt scheme falls within the jurisdiction of this Court. The dispute in Malindi ELC Case No. 53 of 2014 turns on the legality of the title held by the Petitioner herein and this Court was already fully seized of the matter when on 18th January 2015, the 1st to 5th Respondents decided to refer the same to the 5th Respondent. By a lengthy letter dated 7th September 2015, the Petitioner's Advocates brought to the 5th Respondent's attention the fact that the subject matter was already the subject of proceedings in the said Malindi ELC Case No. 53 of 2014.

18. In my view, where a party has commenced proceedings before this Court challenging title, it would amount to abuse of the Court Process for the same party to refer the same to the 5th Respondent. As it were, any matter pending in Court is sub judice and the 5th Respondent could not properly proceed to hear and purport to determine the same.

13. Having made those findings, and this being the ELC Case No. 53 of 2014 referred to in the above Ruling, I must say that it is indeed very surprising that without moving to set aside the said decision and/or to appeal the same, the Plaintiff now makes an application to this Court to adopt the very decision that resulted from the abuse of the Court process and was declared sub-judice.

14. In this regard, I agree with the submissions of the 1st Defendant that the application by the Plaintiff is scandalous and nothing but a veiled attack on the earlier decision made by this Court on 28th June 2018 aforesaid. It is a waste of Judicial time, is filed in abuse of the Court process and must be dismissed without more.

15. The second application filed by the 1st Defendant seeks to have the Plaintiffs suit dismissed for want of prosecution. It is premised on the grounds that the Plaintiff has failed to set down the suit for hearing or to take any step in the suit ever since it was filed in 2014.

16. While I understood the 1st Defendant's frustrations with the failure so far to prosecute the substantive suit herein, it could not really be said in the circumstances herein that no steps have been taken in the matter. The 1st Defendant's application dated 11th September 2018 is brought inter alia under the provisions of Order 17 Rule 2 of the Civil Procedure Rules.

17. A clear reading of those Rules would indicate that such an application ought to be made when one calendar year has lapsed without any proceedings being undertaken in the matter. As it were, when the 1st Defendant's application was filed, the Plaintiff's application dated 23rd July 2018 had been filed two months earlier and was pending hearing and disposal.

18. Accordingly, I did not find any merit in the 1st Defendant's application either. In the result I make the following Orders:-

i) The Plaintiff's application dated 23rd July 2018 is dismissed with costs to the 1st Defendant.

ii) The 1st Defendants application dated 11th September 2018 is dismissed with no order as to costs.

iii) The parties to appear before the Deputy Registrar of this Court within a period not exceeding 60 days from the date hereof for pre-trial directions

19. Orders accordingly.

Dated, signed and delivered at Malindi this 30th day of July, 2019.

J.O. OLOLA

JUDGE