



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 380 OF 2017

SUSAN NYAMBURA NJENGA.....PLAINTIFF

VERSUS

OWN A PLOT LTD.....1ST DEFENDANT

WANACHUO INVESTMENT LTD.....2ND DEFENDANT

LAND REGISTRAR.....3RD DEFENDANT

AND

ELIAS NDWIGA NJOKA.....INTERESTED PARTY/APPLICANT

RULING

What is before Court for determination is a Notice of Motion filed on 2nd April, 2019 brought pursuant to Order 2 Rule 15 (2) (b) (c) (d) and Order 51 (1) of Civil Procedure Rules and Sections 3 & 3A, 63 (e) and Section 80 of the Civil Procedure Act as well as Article 159 (2) (d) of the Constitution. The Applicant seeks the following orders:

1. Spent
2. Spent
3. Spent
4. That this suit be dismissed the same being abuse of court process, frivolous or otherwise terminated.
5. That the orders made in the suit on the 2nd day of December, 2014 be set aside.
6. That the Honourable court be pleased to make any other or further orders as it deems fit in the interest of justice.

The application is premised on the summarized grounds that the intended interested party has been the owner of land parcel number Kajiado/ Kisaju/ 121, which has never been subdivided. That the method of subdivision used to produce Kajiado/Kisaju/1794 was fraudulent as the mutations were repudiated by the Geomatics Services Limited licensed surveyors who were alleged to have done it. The suit has no foundation as there was no valid subdivision of Kajiado/ Kisaju/ 121 and the alleged mutations were a decoy by the Plaintiff as well as the 1st Defendant to deceive the 2nd Defendant. The Applicant was shocked to learn on 18th March, 2019 that there was a suit between other parties concerning his land. Further, that there was a claim that Kajiado/ Kisaju/ 1818 was excised from Kajiado/ Kisaju/ 121.

The application is supported by the affidavit of ELIAS NJOKA NDWIGA the intended Interested Party who deposes that he has been the proprietor of land parcel number Kajiado/ Kisaju/ 121 since 1998 but in 2012 when he attempted to dispose off the said land and even received a deposit from the buyers, they undertook a search at the registry where they were informed that the land belonged to ELIUD NDUNGU MUGAMBI. He explains that he instituted a suit vide Machakos ELC No. 7 of 2014 against ELIUD NDUNGU MUGAMBI and the Land Registrar Kajiado and after determination of the said suit, he submitted documents for issuance of another title but learnt that the Land Registry did not have any registers or documents relating to him. He later learnt that there was a claimant LABAN KAMAU claiming Kajiado/ Kisaju/ 1818. He contends that he reported the matter to the Police and the Survey office and it is then that parallel records surfaced in 2018 showing illegal mutations that had been done of parcel numbers 1783 - 1882 in which the alleged parcel No. 1794 was found. He insists the said Mutations were not registered nor properly authorized being all forgeries. He avers that subdivisions purported by OWN A PLOT LIMITED were fraudulent. Further, that WANACHUO INVESTMENT LIMITED have mounted a claim against his land for parcels

they refer to as Kajiado/ Kisaju/ 4611, 4612, 4613, 4614 and 4615 respectively and then combined fraudulently to 4610. He challenges any of the parties herein to produce a registry index map showing any of the parcels referred to as Kajiado/ Kisaju/ 1794; 4610; and 1818 that fall on the map where Kajiado/ Kisaju/ 121 is located. He reiterates that this suit should be dismissed, as the parties herein do not stand to suffer any losses while he stands to suffer loss by the delay in execution of judgment in his favour in ELC 393 of 2017.

The application is opposed by the 2nd Defendant who filed a replying affidavit sworn by LILLIAN ATUO OPONDO an Advocate acting on its behalf. She avers that the Interested Party's application is frivolous, vexatious, an abuse of court's time and aims at obstructing the cause of justice. She confirms that the 2nd Defendant has been the registered owner of land parcel numbers Kajiado/ Kisaju/ 4611, 4612, 4613 and 4614 measuring approximately 39.67 hectares. She insists the Interested Party had never been the registered owner of land parcel number Kajiado/ Kisaju/ 121 and has not annexed proof to demonstrate how he acquired it from the previous owner. She explains that according to records at the Land Registry, the suit property was previously Kajiado/ Kisaju/ 19 and was subdivided into Kajiado/ Kisaju/ 120 and 121 respectively. Further, Kajiado/ Kisaju/ 121 was owned by one Joseph Silipo Kepiro who sold it to a group of women known as Ngara East Women Group. She explains that the group subdivided the property to all the 135 members and subsequently sold the said land to the 1st Defendant who amalgamated it into Kajiado/ Kisaju/ 4610. Further, that the 1st Defendant subdivided Kajiado/ Kisaju/ 4610 into Kajiado/ Kisaju/ 4611 – 4615 and sold the same to the 2nd Defendant. She contends that the Interested Party filed the Machakos ELC Case No. 7 of 2014 against the 3rd Defendant and one Eliud Ndungu Mugambi in relation to the ownership of the suit land and obtained judgment on 22nd November, 2014. Thereafter, the Interested party filed enforcement proceedings on the said Decree seeking for the 3rd Defendant to be ordered to construct the record relating to Kajiado/ Kisaju/ 121 without having to gazette his intention which order was granted on 9th July, 2018. Further, that another application dated the 10th December, 2018 has been filed seeking for nullification of all records and registers made in respect of the suit property. She denies that none of the aforementioned applications, pleadings or orders were ever served upon the 2nd Defendant. Further, the 2nd Defendant as the 1st Interested Party in ELC No. 393 of 2017 has filed an application seeking review and setting aside of the judgment delivered on 21st November, 2014 and subsequent order dated the 9th July, 2018. She contends that in paragraphs 11, 12 and 13 of the Supporting Affidavit, the Interested Party has relied on an affidavit allegedly sworn by Sheila Nandako the Land Registrar Kajiado, which document was expunged from record by the 3rd Defendant on 21st March, 2019 as it was not commissioned. She disputes that the said affidavit cannot be deemed as one, within the meaning of the Law as it was commissioned by the firm of Onchiri & Company Advocates and should hence not be relied upon by the Court. She reiterates that the allegations of fraud by the Interested party are baseless as the 2nd Defendant as part of due diligence when purchasing the suit land carried out a search on 8th November, 2011 which confirmed that the property belonged to the 1st Defendant and the same had been subdivided into various portions, consolidated into Kajiado/ Kisaju/ 4610 but later subdivided into Kajiado/ Kisaju/ 4611, 4612, 4613, 4614 and 4615 respectively; that are claimed by the 2nd Defendant. Further, that the 1st Defendant provided the 2nd Defendant with all the completion documents necessary for the registration of titles into 2nd Defendant's name which was done on 16th March, 2012. She states that in December, 2012, the 2nd Defendant undertook a search on the suit property which confirmed they had obtained a good title. She questions the annexed registry index map and explains that when the property was registered in the name of Ngara East Women Group, it was subdivided into portions that were known as Kajiado/ Kisaju/ 1743 upto Kajiado/ Kisaju/ 1882 respectively.

The Parties filed their respective submissions, which were highlighted on 15th May, 2019.

Analysis and determination

Upon consideration of the Notice of Motion dated the 2nd April, 2019 including the affidavits, submissions as well as the annexures thereon, the following are the issues for determination:

- Whether the orders made in this suit on the 2nd day of December, 2014 should be set aside.
- Whether this suit should be dismissed for being frivolous and an abuse of the Court process

As to whether the orders made in this suit on the 2nd day of December, 2014 should be set aside. The Applicant contends that orders of injunction granted on 2nd December, 2014 should be set aside, a fact disputed by the 2nd Defendant. The said orders of injunction were granted to the Plaintiff/ Respondent who claimed ownership of land parcel number Kajiado/ Kisaju/ 1794. I note the orders were mainly to preserve the substratum of the suit pending the determination of the same. I do not see any prejudice any party will suffer if the said orders subsist. In the circumstances, I will decline to set aside the orders issued on 2nd December, 2014.

As to whether this suit should be dismissed for being frivolous and an abuse of the Court process. The Applicant contended that the suit was frivolous since it was anchored on land, which was fraudulently acquired. The Respondents opposed the application and insisted they were legally registered as owners of the suit lands after undertaking due diligence. They challenged the annexed affidavit of Sheila Nandako Land Registrar Kajiado and insisted the same should be expunged from record. They relied on the cases of **Geoffrey Githinji Mwangi & 2 others V Jubilee Party & 11 other (2018) eKLR; Trust Bank Limited V Amin Company Ltd & Another (2000) KLR 164** to buttress their arguments.

Order 2 Rule 15 (1) of the Civil Procedure Rules provides that :’ **(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.**

In the Court of Appeal decision of **RAMJI MEGJI GUDKA LTD –Vs- ALFRED MORFAT OMUNDI MICHIRA & 2 OTHERS [2005] eKLR** it was held as follows:

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said:-

“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 otherwise 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.”

In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham.”

Further, in the case of **Patel V EA Cargo Handling Services Ltd (1974) EA 75 William Outfus P** at page 76 stated:

“... In this respect defence on merits does not mean, in my view, a defence that must succeed, it means as Sheridan J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication”.

In the current scenario, I note the 2nd Defendant’s Defence has explained how it acquired the suit land from the 1st Defendant. Further, I note that this suit is parheard. Insofar as the Interested Party contends that the suit should be dismissed, I note the Plaintiff including the Defendants’ dispute revolve around ownership of the suit land which was subdivided. I opine that the various pleadings herein raise triable issues on how each party acquired the suit lands, which is claimed by the Interested Party who alleges fraud. It is my considered view that these are triable issues which should proceed to full trial for adjudication and not dispensed with at an interlocutory stage.

In relying on the above cited Court of Appeal decisions as well as the facts as presented, I find that it would be pertinent if all the parties presented their evidence before court and the suit determined on its merits.

In the circumstances, I will disallow the Interested party’s Application dated the 2nd April, 2019 to dismiss this suit and direct that all the parties do comply with Order 11 and set the suit down for hearing.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 16th day of September, 2019

CHRISTINE OCHIENG

JUDGE