



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 450 OF 2017

ZELIMA ATIENO OGADA.....PLAINTIFF

VERSUS

FINTEL LIMITED.....1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

1. By a Notice of Motion dated 16th October 2018 expressed to be brought under Order 2 Rule 15(1) (d) and Order 51 Rule 1 of the Civil Procedure Rules, the 1st Defendant/applicant seeks orders that this suit be struck out. The application is premised on the grounds:

- 1. That the plaintiff's suit is a gross abuse of the Honourable court's process.**
- 2. That the plaintiff has not come to court with clean hands and her suit is full of misrepresentations, outright lies and the documents annexed do not support her claim whatsoever to justify a grant of any of the prayers.**
- 3. That this is the second suit involving the same parties and same subject matter the other being Civil Suit BO. 35 (sic) of 2015 which was withdrawn by the plaintiff.**
- 4. That there is nothing new that this suit has presented which could not have been presented in HCCC 350 of 2015. That the facts as represented in this suit by the plaintiff and as successfully enunciated in the defence by the 1st defendant are clear that the plaintiff cannot sustain this suit in any way as expostulated here below and in the pleadings.**
- 5. That from the previous suit HCCC 350 of 2015 it is evident that Chambedo Holdings Limited is said to have acquired the title on the 18th day of May 2011, three(3) years before it was incorporated as it was incorporated on 14th March 2014. This fact has cunningly been left out in this suit.**
- 6. That no transfer was effected to Chambedo Holding Limited by anyone for the property to vest in the said Chambedo Holdings Limited.**
- 7. That the plaintiff' acquisition of the title is a fraud perpetuated by the plaintiff hereof and her known agents meant to acquire the suit premises fraudulently.**
- 8. That the 1st Defendant is the legal owner of the premises with an indefeasible title having acquired the same through a transfer from the previous legitimate owner, Chambedo Limited.**

2. The application is supported by the affidavit of Hillary Maina Mwangi Thegeya a director of the Applicant sworn on 17th October 2018. It is deponed that this is the second suit brought by the Plaintiff against the same defendants in respect of the same suit premises seeking the same orders, the first suit being HCCC No.35 of 2015 in this court. Copies of the pleadings numbering pages 1 to 390 are annexed. That the said suit was withdrawn by the Plaintiff when she realized the futility of the same and has cunningly brought this suit and has selectively left out some of the documents she had attached to her pleading in HCCC NO.35 of 2015. Briefly, the 1st Defendant states that it acquired ownership of the suit property from Chambedo Limited vide a transfer dated 24th May 2011, the said Chambedo Limited having had the property transferred to it by the original owner, one Salimu Mwakirinzo on 23rd February 1997. Both the said transfers are annexed. It is the 1st Defendant's contention that the Plaintiff's claim of ownership of the suit property cannot stand because, as is Chambedo Limited did

not at any one time transfer the property to Chambedo Holdings Limited and that consequently, Chambedo Holdings never had any title to the property and could not therefore transfer any title or any proprietary interest to the plaintiff. The supporting affidavit further refers to an examination report by the Government Document Examiner, statements, charge sheet in Criminal Case No. 116 of 2018 at the Chief Magistrate's Court at Mombasa, among other documents. It is the 1st Defendant's contention that the acquisition of the alleged titles by both Chambedo Holdings Limited and the Plaintiff were all a fraud perpetrated by the Plaintiff together with her known agents in an attempt to acquire the property illegally. In the supporting affidavit, the 1st defendant has demonstrated why it thinks the title annexed by the plaintiff in her pleadings in HCCC NO.35 of 2015 and the current suit is not genuine and that it can only be a forged document. Reference has also been made and pleadings attached of another suit HCCC No 95 of 1995 and the Applicant questions why the Plaintiff hereof did not sue or has not sued Chambedo Holdings Limited or the alleged sellers as per the sale agreement or the recipient of the cheques in respect of the purchase price, one Abdalla Kengo Siri Siri. For these reasons and to avoid any more wastage of the court's time, the 1st defendant seeks to have the plaintiff's suit struck out with costs to the defendants.

3. The application is opposed by the plaintiff through a replying affidavit sworn by herself on 4th June 2019 in which she deposes inter alia that the motion is made in bad faith and intended to have the suit terminated prematurely without resolving fundamental issues pertaining to the ownership of the suit property on its merits after evidence by parties. The plaintiff avers that she is the registered owner of the property known as LAND REFERENCE NO. KWALE/GALU KINONDO/34 measuring 0.8 hectares having acquired it on 22nd August 2014 vide a transfer of 29th September 2014 from the previous owner, Chambedo Holdings Limited for a consideration of Kshs.18,000,000 which the plaintiff stated was paid. The plaintiff states that before acquiring the property she conducted official searches at the Registry in Kwale 19th June 2014 and 30th June 2014 wherein she confirmed that the true owner then was Chambedo Holdings Limited. That after successful transfer of the property in her favour, she also conducted a search over the property on 29th September 2014 and the search indicated that the Plaintiff was the registered absolute owner. The plaintiff has attached copies of Title Deed in her name, the transfer form in her favour as well as copies of the said Certificate of Official Search. The Plaintiff further states that despite having rightfully purchased the suit property the Defendant has been on the land illegally and has even proceeded to construct and erect a wall on it despite the existence of this suit. The Plaintiff states that as a result, of the encroachment and trespass, she has been deprived of and denied of her right to use, utilize and enjoy her property and has consequently suffered loss and damage. It is the plaintiff's contention that the defendant has exhibited total impunity and abuse of the legal and court process, and that the same is being done in bad faith.

4. The application was canvassed by way of written submissions. The 1st Defendant's advocates, M/s Kimani Githongo & Company Advocates filed their submissions dated 5th July 2019 and filed on 8th July 2019 in which they reiterated the grounds in support of the motion and the averments in the supporting affidavit. It is their submission that the current suit is an attempt by the Plaintiff to manipulate all systems to illegally acquire the suit premises and get the land in this suit and money through the criminal case, adding that this is a gross abuse of the process of this Honourable court. It is further submitted that the plaintiff has not come to court with clean hands and that her suit is full of misrepresentations and outright lies. That the remedies sought by the Plaintiff are equitable remedies and her conduct does not endear her for the grant of any of the remedies sought.

5. The 1st defendant's counsel further submitted that Chambedo Holdings Limited did not have any title to the property at the time of the alleged transfer to pass to the plaintiff and that the plaintiff consequently obtained no good title to the suit property. That the plaintiff was all along aware of this position, as the statement above was produced by her in HCCC No. 35 of 2015. The 1st Defendant's counsel relied on the case of **Agnes Naipanoi Pasha –v- Stephen K. Wangombe & 2 Others High Court Civil Suit No. 123 of 2011** quoted in **Peter Njoroge Nganga –v – Kenya Reinsurance Corporation Limited (statutory manager for United Insurance Company & Another (2008) eKLR** where Msagha, J observed that "... The court can't countenance a situation whereby a party obtains a property through a criminal act, transfers the same to a third party and hold that the third party has a valid title". They further submitted that the provisions of Section 26 (1) of the Land Registration Act are operative in this suit in light of the fact that the certificate of title held by Chambedo Holdings Ltd was obtained through fraud and not valid and therefore the plaintiff's title was validly cancelled by the Land Registrar. The 1st Defendant submitted that Chambedo Holdings Limited did not possess any valid title to the suit property and could therefore not pass any valid title to the plaintiff, a fact, they state, the plaintiff knew. It is therefore the 1st defendant's submissions that this suit is an abuse of the court process and prays that the same be struck out.

6. In their submissions dated 9th July 2019 and filed on 10th July 2019, Ms. Khalid Salim & Company Advocates for the plaintiff submitted that the issue of whether the claim by the plaintiff is justified or not is an issue that can only be determined after viva voce evidence is adduced and witnesses called to shed light on the issue of ownership. That the said issue cannot be determined by mere glance of documentation without oral evidence and at an interlocutory stage. It is the Plaintiff's submission that the application is an attempt by the 1st defendant to prevent this court from getting into the root of the matter at the pretext that the suit lacks merit. Regarding the 1st defendant's contention that this suit is similar to HCCC No.350 of 2015 which was withdrawn by the Plaintiff, the plaintiff stated that the said suit never proceeded for hearing as it was withdrawn at the preliminary stages and was submitted that the plaintiff had the legal right and discretion to withdraw her suit pursuant to provisions of Order 25 Rule 1 of the Civil Procedure Rules and which action did not or does not prevent the plaintiff from and/or is not a bar from instituting another suit against the same parties, adding that the defendants' recourse is on costs which has already been awarded to the 1st defendant. It was further submitted that the earlier case is fundamentally and substantially different both in substance and prayers from the current suit. The plaintiff relied on the case of **Kofinaf Company Limited & Another –v- Nahason Ngige Nyagah & 20 Others (2017)eKLR** and **Beijing Industrial Designing Institute –v- Lagoon Development Limited (2015)eKLR**. It is the Plaintiff's submission that the suit is not an abuse of the process of the court and as such ought not be struck out, adding that striking out the suit is a draconian measure and of last resort. The plaintiff's advocates relied on the case of **Transcend Media Group Limited -v- Independent Electoral & Boundaries Commission (IEBC) (2015) eKLR**, and **Elijah Sikona & Georg Pariken Narok on behalf of Trusted Society of Human Rights Alliance –v- Mara Conservancy & 5 Others (2015)eKLR**. The plaintiff submitted that the suit raises fundamental and weighty issues touching on the authenticity, legality and or otherwise of Certificate of Titles in respect of the suit property with both parties contending that the Certificate of title in their possession is genuine and thus entitled to the parcel of land in issue. That the case is not clear and obvious for striking out. The Plaintiff's counsel submitted that the determination of such an issue will require the evidence of not only the parties but other concerned persons such as the land registrar, seller, directors of the company among others. The plaintiff therefore urged the court to dismiss the 1st defendant's motion.

7. I have considered the application, the affidavits in support and against, the rival submissions and the case law cited by the parties. I have also considered the pleadings herein. The issue for determination is whether the plaintiff's suit should be struck out or not.

8. The Application is brought under Order 2 Rule 15 (1)(d) of the Civil Procedure Rules. In the exercise of its power under Order 2 Rule 15, there are certain well established principles that a court of law must adhere to. In the case of **Mohamed Mohamed Hatimy –v- Lameck Oluoch t/a Lamathe Hygienic foods, Civil Appeal No. 93 of 2018** the Court of Appeal at Mombasa stated as follows:

“In as much as the power to strike out pleadings by a court is discretionary, it should be exercised sparingly and only in the clearest of cases. This is because the consequence of striking out a pleading is that a court does not subject the parties’ dispute to a full hearing. It follows, therefore that whenever a court is faced with the question of whether or not to strike out a pleading, it has to strike a balance between two competing rights; on one hand, a party’s right to have his/her case determined in a full trial and on the other, an opposing party’s right not to be unduly burdened with a suit which is otherwise a non-starter. This much was appreciated by this court in Kivanga Estates Limited –v- National Bank of Kenya Limited (2017) eKLR.”

9. In the case of **Yaya Limited –v- Trade Bank Limited (in liquidation) (2000)eKLR**, the Court of Appeal expressed itself as follows:

“A plaintiff is entitled to pursue a claim in our courts however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of court, it must be allowed to proceed to trial it cannot be doubted that the court has inherent jurisdiction to dismiss that which is an abuse of the process of the court.....”

And in the case of **DT Dobie & Company (Kenya) Ltd -v- Muchina (1982)KLR 1**, the Court of Appeal stated:

“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. ”

10. The overriding principle therefore to be considered in an application for striking out of a pleading is whether it raises any triable issue. I have looked at the plaint dated 1st December, 2017. In it, the Plaintiff’s pleaded claim is that she was and remains the registered owner of property known as TITLE NO. KWALE/GALU KINONDO/34 measuring approximately 0.8 hectares. The Plaintiff avers that she acquired the said property on 22/8/14 from Chambedo Holdings Limited, Mesalim Salim Kirinzo and Mwanajuma Salim Kirinzo and transfer was registered and title issued in her favour on 29/9/14. The plaintiff further avers that the 1st defendant has illegally, irregularly, unlawfully, fraudulently procured a title allegedly issued pm 24th May, 2011 with the assistance of the District Land Registrar, Kwale over the same property. The Plaintiff is seeking declaratory orders that she is the registered absolute and indefeasible owner of the suit property and the title issued to the 1st defendant in respect of the suit land was issued irregularly, fraudulently, unlawfully and illegally and is therefore null and void and an order for its revocation or cancellation. The Plaintiff is also seeking an order of permanent injunction restraining the defendants from interfering with the suit property. In the alternative, the plaintiff wants the defendants to compensate her for the loss and damage suffered and for cost of investment made by the plaintiff on the said parcel of land.

11. I note that in the statement of defence dated 10th April 2018 the 1st defendant has denied the plaintiff’s claim. It is the 1st defendant’s case that it has an indefeasible title to the suit property having acquired the same through a transfer from the previous rightful proprietor, Chambedo Limited. It is the 1st defendant’s contention that the acquisition of the title by the plaintiff was fraudulent.

12. In this case both the plaintiff and the 1st defendant claim to hold genuine titles to the suit property. Each of the parties is accusing the other of fraudulently acquiring title to the property. In my view, there are triable issues between the parties worth a trial by the court. I do not need to go into the merits of those issues. It suffices to state that from the pleadings, the suit raises triable issues in the sense of the law.

13. The 1st defendant also argued that the plaintiff had filed and withdrawn an earlier suit hence this suit is an abuse of the court process. However, under Order 25 Rule 1 of the Civil Procedure.

DATED, SIGNED and DELIVERED at MOMBASA this 28th day of October 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Thabhai holding brief for Khalid for plaintiff/respondent

No appearance for 1st defendant

Mkok for 2nd defendant

Yumna Court Assistant

C.K. YANO

JUDGE