



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 136 OF 2017

ALEX MURIITHI KANGANGI.....PLAINTIFF

VERSUS

EUNICE WANJIRA NGATU (Sued in her capacity

as the Legal Representative of the Estate of Late

GEOFFREY NGATU GITHETHUKI).....DEFENDANT

RULING

The Notice of Motion dated 28th March 2019 is expressed to be brought under **Order 51 Rule 1, Order 2 Rule 15(1)(a), (b) & (d) CPR and Section 1A, 1B and 3A CPA**. The Applicant is seeking the following orders:

- 1. The plaintiff's suit vide plaint dated and filed in Court on 20th September 2017 be struck out and the plaintiff be ordered to vacate L.R. Title No. KIRINYAGA/GATHIGIRIR/1994 as ordered on 10th February 2009.***
- 2. That the costs of this application together with the entire suit be provided for.***

The application is supported by the affidavit of the defendant sworn on 28th March 2019, the annexures thereto and the grounds shown on the face thereof.

In opposing the said application, the plaintiff filed a replying affidavit sworn on 1st July 2019. The said replying affidavit is further supported by numerous annexures.

DEFENDANT'S/APPLICANT'S CASE

The defendant in her affidavit in support of this application sworn on 28th March 2019 deponed that she is the daughter of one Geoffrey Ngatu Githethuki (deceased) and also the administrator of the Estate of the said Geoffrey Ngatu Githethuki. Before he passed on, his father was the registered proprietor of land parcel No. KIRINYAGA/GATHIGIRIRI/994 which was issued to him pursuant to an award of Mwea Land Disputes Tribunal issued on 15th May 2007. The said award of the Tribunal was subsequently adopted by the Magistrate's Court at Wang'uru vide Arbitration Cause No. 8 of 2007. The order issued pursuant to that adoption is attached to the supporting affidavit dated 10th May 2007 and 10th February 2009 respectively. The two orders are also attached to the supporting affidavit.

The defendant/applicant further deponed that the plaintiff has used every trick to defeat justice by filing ELC Case No. 649 of 2013 (Kerugoya) which was ordered to be returned to Wang'uru Law Courts on 17th May 2017 and copied to the parties. She stated that an application to strike out pleadings can be made at any stage of the proceedings under **Order 2 Rule 15 CPR**. In conclusion, the applicant stated that after the plaintiff lost before the Mwea Land Disputes Tribunal, he should have appealed before the Provincial Land Disputes Appeals Committee and the Minister as the highest Apex under the **Land Disputes Tribunal Act No. 18 of 1990 (repealed)**. Having failed to exercise his undoubted right of Appeal as laid out under the Land Disputes Tribunal, the plaintiff should not be allowed to go on filing frivolous cases and abusing the process of this Honourable Court. He therefore wants this suit struck out.

PLAINTIFF/RESPONDENT'S CASE

The plaintiff through his replying affidavit sworn on 1st July 2019 stated that the application is made too late in the day and that the same

has been overtaken by events in that the same raises preliminary issues which ought to have been raised and disposed of before the concealment of full hearing and further that he has already testified and cross examined and what is remaining is for him to be recalled to produce original copies of two (2) documents which were not legible at the time he testified.

The respondent stated that at all material times to this suit, he was registered proprietor of L.R. KIRINYAGA/GATHIGIRIRI/994 having bought the same from one Geoffrey Ngate Githethuki for valuable consideration. The plaintiff/respondent further deponed that the defendant's husband the late Geoffrey Ngatu Githethuki sued him in the Land Disputes Tribunal claiming his title deed alleging he had acquired fraudulently and the elders proceeded to cancel his title deed in favour of the claimant and the same adopted by the Magistrate's Court at Wanguru on 10th May 2007. She appealed to the Provincial Land Disputes Appeals Committee vide Case No. 9/2007 (Kirinyaga) where the Appeal was successful as shown by annexure marked "A.M.K.2". The respondent stated that the deceased Geoffrey Ngatu Githethuki fraudulently concealed from the lower Court the fact that the award and subsequent decree adopted in the Magistrate's Court had been overturned and/or successfully appealed against vide the Provincial Land Disputes Appeals Committee and an award issued on 3rd December 2008.

The plaintiff/respondent also stated that the applicant's further through concealment stated above, obtained orders dated 10th February 2009 to the effect that his land L.R. No. KIRINYAGA/GATHIGIRIRI/994 be transferred to the defendant/applicant as shown in the decree marked E.W.N-5. The plaintiff/respondent further stated that the applicant's father moved the Honourable Court vide an application dated 18th November 2010 seeking to have the executive officer of the Court to execute all relevant documents to enable him be registered owner of the suit land, an application which he opposed and which the Court dismissed vide a ruling delivered on 25th January 2011.

The plaintiff also stated that in an application dated 20th June 2012, he moved the lower Court for the setting aside of the orders canceling the name of Geoffrey Ngatu Githethuki from L.R. No. KIRINYAGA/GATHIGIRIRI/994 and reinstating of his name on the title deed on grounds of irregularity. The plaintiff/respondent further deponed that on 6th November 2012, the Court directed that the Arbitration Case No. 8 of 2007 be transferred to the ELC for purposes of concluding the pending issues raised in his application dated 20th June 2012. Their lawyer then filed a consent order transferring that case as reflected in annexures marked "A.M.K.5 (a) & (b)".

He stated that upon transfer of Wanguru Arbitration No. 8 of 2007 to this Honourable Court, it was registered as ELC No. 649 of 2013 and parties duly notified and reflected in a notice by the Hon. Deputy Registrar and dated 30th April 2015. On 17th May 2017, the said Case No. 649/2013 came up before this Honourable Court where the Court directed that it be returned to Wanguru for safe custody for having been transferred improperly. The Court also directed the parties to explore an out of Court settlement on the dispute.

LEGAL ANALYSIS

I have considered the affidavit evidence and the rival submissions by the opposite party. I have also considered the applicable law. The gist of this application is to strike out the plaintiff's suit and the plaintiff be ordered to vacate the suit property L.R. No. KIRINYAGA/GATHIGIRIRI/994. The application is premised on grounds that it discloses no reasonable cause of action, its scandalous, frivolous, vexatious and an abuse of the Court process. The defendant further stated that there is a valid decree from a Court of competent jurisdiction which has heard and determined all the issues in dispute and which decree/order has not been appealed against and/or set aside.

The law on striking out of pleadings is stated in **Order 2 Rule 15 CPR** and the Courts have made a multitude of decisions on the principles applicable in such decisions. In the case of **D.T. Dobie & Company (Kenya) Ltd Vs Muchina (1982) K.L.R 1**, the Court of Appeal held as follows:

"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".

I agree with the decision by the Superior Court which is binding on me. Suffice to add that striking out pleadings is a draconian measure that must be employed sparingly and in the most deserving cases where such pleadings are shown to be plainly and obviously hopeless. In the present application, the grounds which the applicant heavily relies is that there is some orders issued by the Mwea Land Disputes Tribunal dated 15/7/2007 which was adopted by the Senior Resident Magistrate's Court in Arbitration Cause No. 8 of 2007 which order cancelled the plaintiff's title deed and ordered his eviction from the suit land dated 10/2/2009. The said orders have been denied by the plaintiff who contends that the alleged orders were set aside on Appeal before the Provincial Land Disputes Appeals Committee. He also attached copies of the said order. These arguments for and against the existence of Court orders are matters of fact which may require to be authenticated and even call the Deputy Registrar who signed such orders to confirm the existence or otherwise of the said orders.

I find that the argument raised by the plaintiff/respondent of the existence of another order from the Provincial Land Disputes Appeals Committee upsetting the earlier order issued by the Mwea Land Disputes Tribunal is a triable issue that should be allowed to go forward for determination at the main hearing.

In the final analysis, I find the application dated 28th March 2019 lack merit and the same is dismissed with costs.

READ, DELIVERED and SIGNED in open Court at Kerugoya this 18th day of October, 2019.

.....

E.C. CHERONO

ELC JUDGE

18TH OCTOBER, 2019

In the presence of:

- 1. Mr. Munene holding brief for Wambugu Kariuki*
- 2. Ms Wambui holding brief for Kahigah for Plaintiff*
- 3. Mbogo – Court clerk*