



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 39 OF 2009

KENYA ANTI-CORRUPTION COMMISSION.....PLAINTIFF

VERSUS

1. AGIL MAHAMOUD SALIM

2. ACADEMY PROPERTIES LIMITED

3. WILSON GACANJA.....DEFENDANTS

RULING

1. By a notice of motion dated 19th July, 2018 expressed to be brought under Order 36 Rule 1 of the Civil Procedure Rules, the 2nd Defendant/applicant seeks orders that this suit be dismissed with costs. The application is premised on the grounds that the High Court in a Ruling delivered in Miscellaneous Civil Application No.10 of 2011 has conclusively dealt with the issues raised in this suit having quashed Gazette Notice No.15570 and that since no appeal has been lodged against the said order, the same is binding on the parties and there is no need on litigating on what the court has already adjudicated. The application is supported by the affidavit of the Abdalla Salim sworn on 23rd July 2018 in which he has exhibited the ruling dated 6th February 2012 and Order dated 14th February 2012 in Mombasa HC Miscellaneous Civil Application NO. 10 of 2011.

2. The plaintiff/respondent opposed the Application by filing grounds of opposition dated 2nd August 2018 stating as follows:

1. That the 2nd Defendant's Application is incurably bad in law, grossly incompetent, fatally defective, misplaced, misguided, misconceived, overtly presumptuous and legally untenable.

2. That the 2nd Defendant's said Application is an utter abuse of the court process.

3. That the 2nd Defendant's said Application as taken out contravenes the provision of 1A (3) of the Civil Procedure Act and Order 36 Rule 1 of the Civil Procedure Rules 2010.

4. That proceedings and Ruling in Mombasa Miscellaneous Civil Application No. 10 of 2011 are distinct and distinguishable from the Plaintiff/respondent's suit.

5. That proceedings and ruling dated 12/2/12 in Mombasa Miscellaneous Civil Application No. 10 of 2011 does not bind and does not restrain this Honourable Court from hearing and determining the plaintiff/respondent's suit.

6. That the 2nd Defendant's said Application as filed are unduly grounded on generalities, conjectures and suppositions in respect to triable issues in the Plaintiff/respondents' suit.

7. That neither the 2nd Defendant nor any of the Defendants have contravened the Plaintiff/Respondent's prima facie pleaded facts and filed evidence in respect to propriety of the alienation of the suit land.

8. That the 2nd Defendant's Application and the orders sought therein is manifestly aversive to public interest, conspicuously oppressive and statutorily prejudicial to discharge of the Plaintiff/Respondent's mandate under Section 11 (1) (j) of the Ethics and Anti-Corruption Act, 2011 as read with provisions of Anti-Corruption and Economic Crimes Act.

9. That the remedy sought by the 2nd Defendant in its Application is not only draconian in nature but also aversive to public interest in recovery irregularly, illegally and corruptly acquired public property.

3. The Application was canvassed by way of written submissions. The 2nd Defendant's counsel, M/s Balala & Abed Advocates filed their submissions on 11th April 2019 in which they submitted that by virtue of the ruling in the High Court Civil Miscellaneous Application Number 10 of 2011 this suit is now overtaken by events and that litigation must come to an end. It was further submitted that continuing with this suit may amount to a court of similar jurisdiction seating on an appeal.

4. The Plaintiff counsel Mr. Makori filed his submissions on 5th July 2019 in which it was submitted that the Application lacks merit for reasons that the proceedings in Mombasa Miscellaneous Civil Application No. 10 of 2011 are distinct and distinguishable from the plaintiff's suit herein and as such proceedings and ruling in Mombasa Miscellaneous Civil Application No. 10 of 2011 do not bind and does not restraint this court from hearing and determining this suit since the plaintiff was not a party in that Application. Secondly, it was submitted that the issues in the Plaintiff's suit herein have not been heard and determined conclusively by this court in accordance with the law. The Plaintiff's counsel submitted that the 2nd Defendant's Application and orders sought therein are manifestly aversive to public interest, conspicuously oppressive and statutorily prejudicial to discharge of the Plaintiff's mandate under Section 11(1)(j) of the Ethics and Anti-Corruption Act, 2011 as read with provisions of the Anti-Corruption and Economic Crimes Act. That the remedy sought by the 2nd Defendant is not only draconian in nature but also aversive to public interest in recovery of irregularly, illegally and corruptly acquired public property. It was further submitted that the Application is an abuse of the court process and a mere afterthought having been filed over 9 years after the plaintiff filed the suit, and that the remedy sought in the application is not supported by reliable, reasonable and sufficient factual basis or prima facie evidence. The Plaintiff's counsel therefore urged the court to dismiss the application with costs.

5. I have considered the application and the submissions made. I wish to observe that the application is brought under Order 36 Rule 1 which basically deals with summary judgment. In my view such an Application is usually made by a plaintiff who seeks for judgment (or a Defendant who has a counter-claim). In this application the 2nd Defendant is not seeking any judgment. In my view, the application ought to have been brought under Order 2 rule 15 which deals with striking out pleadings. Nonetheless, the overriding objective of the Civil Procedure Act as enshrined in Section 1A thereof is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. This court is mandated by Article 159 (2)(d) of the Constitution of Kenya to administer justice without undue regard to procedural technicalities. I do not think that the Application should fail for having been brought under Order 36 Rule 1. This was the holding in **Gitau –v- Muriuki (1986)KLR 211** which I now follow to hold that in as long as a party's invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise cause injury or prejudice to the other side, the court will not dismiss an application solely on account of wrong invocation of a wrong provisions of the law on which the application is grounded.

6. I now turn to the issue whether in the circumstances of this case, the court should dismiss the plaintiff's suit with costs. The power to strike out a suit is provided under Order 2 Rule 15. 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. Whereas the essence of the said provision is the striking out of a pleading, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases, and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a mini-trial thereof before finding that a case is otherwise an abuse of the court process. See the case of **DT Dobie & Company (Kenya) Limited –v- Muchina (1982)KLR**.

7. In this case, the court is urged to dismiss the Plaintiff's suit on the grounds that there is a ruling delivered in Mombasa High Court Miscellaneous Civil Application No.10 of 2011 which quashed the decision of the Registrar of Titles, Mombasa in Gazette Notice No.15570 which purported to revoke the 2nd Defendant's title over the suit property. It is the 2nd Defendant's argument that the said ruling conclusively dealt with the issues raised in this suit and since there is no appeal that has been lodged against that ruling, the same is binding on the parties and there is no need on litigating on what the court has already adjudicated.

8. I have perused the ruling and order in Mombasa High Court Miscellaneous Civil Application No. 10 of 2011. In that matter, the 2nd Defendant herein had approached the court seeking orders of judicial review against the Registrar of Titles, Mombasa which orders were granted. The question that arises is whether that ruling conclusively dealt with the issues raised in this suit.

9. In the case of **Penninah Nadako Kilishwa –v- Independent Electoral Boundaries Commission (IEBC) & 2 Others (2015) eKLR**, the Supreme Court of Kenya stated:

“The well-recognized principle in such cases, is that the court's target in judicial review is always no more than the process which conveyed the ultimate decisions arrived at. It is not the merits of the decision but the compliance of the decision making process with certain established criteria of fairness. Hence an Applicant making a case for judicial review has to show that the decision in question was illegal, irrational or procedurally defective. ”

10. In the case of **Municipal Council of Mombasa –v – Republic & Umoja Consultants Ltd & Another (2002)eKLR** the Court of Appeal held:

“Judicial Review is concerned with the decision making process, not with the merits of the decision itself; the court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decisions, the decision maker took into account relevant matters or did take into account irrelevant matters... The court should not act as a court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision. ”

11. In this case, the Plaintiff's claim against the Defendants is for for declaration that the allocation and/or alienation of KWALE/DIANI

BEACH BLOCK/1094 to the 1st Defendant and the subsequent transfer and subdivision of the same to create KWALE/DIANI BEACH BLOCK/1371 and the issuance of certificate of lease for the same were illegal, null and void. The Plaintiff seeks a declaration that the allocation to the 1st Defendant by the 3rd Defendant and subsequent issuance of the lease to the 1st Defendant over the said property was irregular, fraudulent and illegal subsequently null and void, and a declaration that the transfer of the suit property by the 1st Defendant to the 2nd Defendant and the subsequent subdivision of the same by the 2nd Defendant is null and void. The plaintiff is also seeking an order for rectification of the register by cancellation of the certificate of lease and all entries on the said parcels as well as general damages for fraud and breach of fiduciary duty as against the 3rd Defendant.

12. Taking all the circumstances of this case into consideration, and being guided by the decisions referred to hereinabove, I am not satisfied that the justice of the case will be attained by the dismissal of the plaintiff's suit. In my view, the judicial review decision in Miscellaneous Civil Application No. 10 of 2011 only dealt with the decision of the Registrar of Titles Mombasa in Gazette Notice No.15570 purporting to revoke the 2nd Defendant title to the suit property. It cannot be said that the court in those proceedings went to the merits of the case. This is because judicial review is concerned with the decision making process not the merits of the decision. The issues in this suit have not been heard and determined conclusively. Those issues, in my view, can only be heard and determined by this court. Moreover, Section 7 of the Civil Procedure Act only bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction. This is not the case in this matter.

13. For the foregoing reasons, I am inclined not to dismiss the suit. I find that the Notice of Motion dated 19th July 2018 has no merit and the same is dismissed with costs.

DATED, SIGNED and DELIVERED at MOMBASA this 17th day of October 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Mohamed for 2nd defendant and holding brief for Magolo for 1st defendant

Ms. Oyier holding brief for Njuguna for 3rd defendant

Makori for plaintiff

Yumna Court Assistant

C.K. YANO

JUDGE