

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO.738 OF 2013

PARAMJIT KAUR alias MANDEEP KAUR.....PLAINTIFF

VERSUS

AVTAR SINGH SURI.....DEFENDANT

RULING

This suit was commenced vide the plaint dated 24/06/2013 in which the Plaintiff seeks a permanent injunction to restrain the Defendant from dealing with the Plaintiff's half share of all the property known as L.R No. 4275/44 ("the Suit Property"), an order of specific performance directed to the Defendant to honour the lease and issue to the Plaintiff half share of the accumulated rent proceeds from the Suit Property, and an order nullifying all lease agreements entered into between the Defendant and the tenants in respect of the Suit Property without the consent of the Plaintiff. The Plaintiff also sought an order for the subdivision of the Suit Property into two halves and that separate title deeds be issued for the subdivided portions. He also sought for general damages as well as costs of the suit. The Defendant filed his defence and counterclaim dated 15/07/2013.

Parties have filed two separate applications which are for determination before this court. The applications are dated 15/05/2019 and 28/02/2019. The court will first determine the application dated 15/05/2019 brought by the Plaintiff seeking reinstatement of the suit as well as costs. This suit stood dismissed on 01/04/2019. The application was based on the ground that there was no notice to show cause issued by the court in terms of Order 17 Rule 2(1) of the Civil Procedure Rules. The application was supported by the affidavit of **Virinder Goswani**, counsel for the Plaintiff sworn on 15/05/2019. He deponed that on 01/04/2019 this suit came up for hearing of the Defendant's application to amend his defence and counterclaim. He further deponed that on that day, counsel who held his brief informed the court that parties were involved in a mediation process before the Welfare Committee of the Ramgharia Sikh Temple but the court dismissed the suit. He deponed that the said dismissal was unfair and unprocedural since the Plaintiff had not been issued with any notice to show cause why the suit should not be dismissed.

The Defendant filed grounds of opposition dated 20/05/2019 and argued that it was the suit that was coming up for hearing on 01/04/2019 and not its application when the court dismissed the case for want of prosecution due to the Plaintiff's absence. The Defendant also contended that the Plaintiff's application was not made without unreasonable delay since it was filed 45 days after the court issued the dismissal order.

Counsel for the parties submitted on this issue. The Plaintiff sought to be given an opportunity to prosecute his case since the Defendant had pulled out of the mediation process. The Defendant submitted that the Plaintiff failed to attend court on 01/04/2019 when the suit came up for hearing and that not having explained the reason for his absence, the suit should not be reinstated.

The court has considered the application, the response and the rival submissions by both parties. The issue for determination is whether the Plaintiff's case deserves to be reinstated. The court is convinced that indeed parties were trying to resolve this matter out of court before the welfare committee of the Ramgharia Sikh Temple as can be seen from the report of the East African Ramgharia Board filed before this court. The Defendant did not deny being part of that mediation process. The Plaintiff submitted that the mediation process had stalled because the Defendant pulled out. Failure by the parties to bring to the court's attention the fact that they were pursuing mediation, and that it was taking long which therefore caused delay in the progress of the suit is a mistake that is excusable. To achieve substantive justice to the litigants, the court allows the Plaintiff to prosecute its case which was filed in 2013, within one year failing which it will stand dismissed. Prayer one of the application dated 15/05/2019 is allowed and the costs of the application shall be in the cause.

The second application is dated 28/02/2019 and was brought by the Defendant seeking to amend his defence and counterclaim. The application for amendment was based on the ground that the Plaintiff had through misrepresentation or sheer fraud obtained absolute proprietorship of the suit land despite the fact that the Defendant holds 50 percent share in it and that the amendment sought seeks to correct this position. Further, that it would be necessary to allow the Chief Land Registrar to be joined as a party to the suit since he is the custodian of titles and oversees all registrations affecting land. The application was supported by the 1st Defendant's supporting affidavit sworn on 28/02/2019 in which he deponed that he has always held fifty (50) percent shares in the suit land being land reference no. 4275/44, Nairobi. He further deponed that on or about 28/01/2004, he entered into a contract with Mohinder Singh Suri, now deceased, to buy 50 percent share in the suit property, and that the sale and ownership of the property is the subject matter of this suit. He further deponed that the lease of the property was for 99 years from 1911 and the lease was set to end in 2010 but that unknown to him, the Plaintiff applied for the renewal of the lease of the suit property and registered a transfer by assent as if he were the sole and exclusive owner of the property without reserving the Defendant's half share. He annexed a copy of the new title with the renewed term. He further deponed that he had written to the Land Registrar for rectification of the title but he did not get a response.

The Plaintiff opposed the Defendant's application through the grounds of opposition filed on 25/03/2019 and affidavit dated 19/03/2019. She deponed that the suit property is registered in the joint names of the Defendant and himself and that it was incorrect for the Defendant to insinuate that it is only registered in his name. She further deponed that by the consent order dated 18/03/2014, the Defendant had agreed to subdivide the property into two, with him holding one half and the Plaintiff the other, and annexed a copy of the order.

The court has considered the Defendant's application, response by the Plaintiff as well as the submissions by counsel. The court has also considered the Defendant's draft amended defence and counterclaim. Under Order 8 Rule 3 of the Civil Procedure rules, the court has discretion to grant leave to amend pleadings at any stage. Without going into the merits of the Defendant's case, the court is satisfied that the proposed amendments are necessary for purposes of determining the real question in controversy between the parties. There is no evidence that the amendments sought will prejudice the Plaintiff in any way.

The Defendant's application dated 28/02/2019 is allowed. Costs of the application shall be in the cause.

Dated and delivered at Nairobi this 17th day of October 2019

K. BOR

JUDGE

In the presence of: -

Ms. C. Muhonja holding brief for Mr. Goswami for the Plaintiff

Ms. W. Mburu holding brief for Mr. Nyawara for the Defendant

Mr. V. Owuor- Court Assistant