



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 210 OF 2017

PREVIOUSLY HCC NO. 69 OG 2006

FERNANDO VISCHI

KENZO QUACIARI.....PLAINTIFFS

VERSUS

ALBERT MUKARE MULEWA.....1ST DEFENDANT

FRANCIS KAREMA MULEWA.....2ND DEFENDANT

BENJAMIN MUKARE MULEWA.....3RD DEFENDANT

PAUL CHAI MULEWA.....4TH DEFENDANT

THE LAND REGISTRAR.....5TH DEFENDANT

MUMBU HOLDINGS LIMITED.....6TH DEFENDANT

DREAMGEAST LIMITED.....7TH DEFENDANT

RULING

1. By a Notice of Motion application dated 17th October 2018, Dreamgeast Ltd (the 7th Defendant/Applicant) prays for orders as follows:
 2. *That this Honourable Court be pleased to strike out the Plaintiff's suit against the 1st to the 5th Defendants herein with costs to the Applicant herein.*
 3. *That this Court be pleased to strike out Mumbu Holdings Limited's Counterclaim herein with costs to Dreamgeast Ltd.*
 4. *That the costs of this application be provided for and be paid by Mumbu Holdings Ltd.*
2. The application which is supported by an Affidavit sworn by Pasquale Tiritto, a Director of the Applicant is anchored on the grounds that:
 - i) *The Plaintiff's suit against the 1st to 5th Defendants is unsustainable in law in view of the Ruling of the Honourable Justice Ouko dated 21st November 2006, and the fact that the suit premises were transferred to the Applicant upon purchase for valuable consideration;*
 - ii) *That the 6th Defendant Counterclaim is legally unsustainable in the absence of any specific relief sought against it by the Plaintiff in the Plaint and in the absence of any joinder thereof in the suit;*
 - iii) *That the 6th Defendant is estopped by deed and conduct from sustaining any Counter-Claim against the 1st to 5th and 7th*

Defendants having filed Malindi HCCC No. 78 of 2006 which suit it voluntary withdrew without paying costs to the said Defendants; and

iv) That the 6th Defendant's Counterclaim is time-barred, unsustainable and an abuse of the Court process in light of the fact that similar facts were raised in Malindi Misc. Application No. 27 of 2012 which allegations were discounted by the Judgment of Justice Angote J delivered on 26th April 2013.

3. On 22nd October 2018, some five days after the 7th Defendant's application was filed, the Plaintiff filed a Notice of Discontinuance of the suit as against the 1st to 5th Defendants. The said Defendants did not accordingly respond to the application by the 7th Defendant.
4. However by an Replying Affidavit sworn and filed herein on 14th November 2018 by its Director John Kariuki Mbuu, Mumbu Holdings Ltd (the 6th Defendant) avers that the application is misplaced, filed in bad faith and amounts to an abuse of the Court process.
5. The 6th Defendant asserts that contrary to the 7th Defendant's application, they did make an application to be enjoined in these proceedings on 8th February 2006 and that the said application was not only allowed but the fact has also been acknowledged by the Applicant in subsequent proceedings between the parties.
6. The 6th Defendant further avers that Malindi HCCC No. 78 of 2006 was withdrawn to pave way for the current suit after it discovered the existence of the current suit and that the same was in order as it was meant to avoid proceedings which would be sub-judice.
7. The 6th Defendant asserts that this matter had already been certified ready for hearing and the present application is aimed at distracting the court from hearing the real issues in the suit herein and more so the fact that the 7th Defendant's title deed was obtained irregularly and illegally in disregard of the law and the Constitution.
8. I have considered the 7th Defendant's Application and the response thereto by the 6th Defendant. I have equally considered the written and oral submissions as filed and canvassed before me by the Learned Advocates for the two parties.
9. The matter before me has had a long and chequered history. Before it was moved to this Court in the year 2017, it had spent a considerable time at the High Court in Mombasa where it was filed as ***HCCC No. 12 of 2006***. In a Plaint dated 25th but filed in the Mombasa High Court on 27th January 2006, the two Plaintiffs initially sued only five Defendants named there in as Albert Mukame Mulewa, Francis Karema Mulewa, Benjamin Mukare Mulewa, Paul Chai Mulewa and the Land Registrar, Kilifi.
10. It was the Plaintiffs claim that by two Sale Agreements both dated 25th July 2005, they had bought two parcels of land from the Defendants for valuable consideration. The first Parcel, Chembe/Kibabamshe/387 was bought from the 1st and 2nd Defendants while the second parcel Chembe/Kibabamshe/406 was bought from the 3rd and 4th Defendants who owned it jointly with one Samuel John Mulewa (who had since passed away).
11. It was the Plaintiffs' case that in breach of the Sale Agreements, the 1st to 4th Defendants had wrongfully failed and refused to complete the transactions and were instead trying to sell the same to a third party. On or about 28th July 2005, the Plaintiffs lodged cautions against the suit properties claiming purchasers' interest but the Land Registrar Kilifi (the 5th Defendant) failed to register the caution and restriction thereon purporting that there were issues to be sorted between the families of the 1st to 4th Defendants on the one hand and M/s Mumbu Holdings Ltd (presently the 6th Defendant).
12. The Plaintiffs accordingly sought orders inter alia, to compel the 1st to 4th Respondents to take necessary steps to complete the sale transaction and an order to restrain the 5th Defendant from registering any further transactions or entry against the suit premises.
13. Subsequent to the institution of the suit, the said Mumbu Holdings Ltd (the 6th Defendant) was enjoined herein as the 1st Interested Party while the Applicant herein was enjoined as the 2nd Interested Party.
14. As it turned out and like the Plaintiffs herein, the 6th Defendant and the Applicant herein also contend to have bought the two suit properties from the family of the 1st to 4th Defendants at different times. Indeed on or about 30th May 2007, the 7th Defendant/Applicant was registered as the owner of the suit premises.
15. After a long lull in the proceedings herein, the 6th Defendant moved to Court on 26th February 2018 and filed a lengthy Written Statement of Defence and Counterclaim against the Plaintiff, the 5th and the 7th Defendants. It is that Counterclaim which appears to have triggered the flurry of activities herein including the application before me.
16. According to the 7th Defendant/Applicant, the 6th Defendant is estopped from bringing such a Counterclaim having withdrawn its suit being Malindi HCCC No. 78 of 2006 voluntarily, and more so given the fact that the prayers sought therein were similar to those in the Counterclaim and the fact that despite the withdrawal, the 6th Defendant has never paid the costs of the withdrawn suit. It is the 7th Defendant's case that by withdrawing the Claim on the 7th September 2007 and failing to file any other claim, 7th Defendant considering itself the registered owner of the suit property had since gone ahead and made very serious investments on the suit properties in the form of a prestigious hotel going by the name Jacaranda Inviagi Beach Resort and it would be unfair and unjust for the 6th Defendant to start claiming rights thereon after waiving the same eleven years ago.

17. In addition, the 7th Defendant contends that the 6th Defendant's Counterclaim offends the provisions of the Limitation of Actions Act the same being based on the ground of fraud and contract and the claim being brought outside the period provided under the statute.

18. I have had a long look at this file, the pleadings contained therein and the proceedings so far. It is evident to me that the dispute herein relates to who between the Plaintiffs, the 6th and the 7th Defendants were the rightful owners of the two suit properties.

19. It is not contested that the Court file went missing for a while and that indeed to-date the record herein remains incomplete in regard to the proceedings that took place at the initial stages following the institution of this suit. No party can be blamed for failing to file documents at a time when the Court file was missing. The matter was transferred from Mombasa to Malindi in June 2006 and it was apparent that not much happened therein until the 24th October 2017 when the High Court Malindi transferred it to this Court for hearing and disposal. In light of that history this Court on 20th November 2017 directed that the file be placed under lock and key.

20. As a Court of law, the primary duty of this Court is to ensure that substantive justice is served to all parties before it. A perusal of the record herein reveals that the 6th Defendant's title was cancelled and the 7th Defendant was instead registered as the owner of the suit properties in May 2007. The circumstances under which the cancellation and new registration occurred are matters that cannot be considered a sham to warrant the striking out of the 6th Defendant's pleadings at this stage.

21. In the circumstances of this case, I did not find any merit in the 7th Defendant's application. The same is dismissed with costs to the 6th Defendant.

22. On 8th February 2018, this Court granted all the parties herein 30 days leave within which to file and exchange their documents. As the Plaintiffs have discontinued their claim against the 1st to 4th Defendants, this suit shall hence proceed as between the Plaintiffs, the 5th, 6th and 7th Defendants.

23. Orders accordingly.

Dated, signed and delivered at Malindi this 8th day of October, 2019.

J.O. OLOLA

JUDGE