



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 114 OF 2014

GREGORY SEMBEI WAMBUA.....1ST PLAINTIFF

PETER NGENGE WAMBUA.....2ND PLAINTIFF

VERSUS

GEORGE MWEMA SYENGO.....1ST DEFENDANT

ANGELINE MWENDE NJERU.....2ND DEFENDANT

EQUITY BANK LIMITED.....3RD DEFENDANT

DISTRICT LAND REGISTRAR – KITUI.....4TH DEFENDANT

RULING

1. In the Notice of Motion dated 21st June, 2018, the Plaintiffs are seeking for the following orders:

a) That this Honourable Court be pleased to strike out the Defendants' Defences herein for disclosing no reasonable cause of Defence.

b) That upon granting prayer 1 herein, this Honourable Court be pleased to enter Judgment for the Plaintiffs against the Defendants as prayed in the Pleint.

2. The Application is supported by the Affidavit of the 1st Plaintiff who has deponed that the original parcels of land known as Kyangwithya/Ndumoni /472, 166 and 475, were registered in the name of his deceased father, Wambua Nzula, who died on 4th April, 1993; that the deceased's Estate was distributed by the court in Kitui Succession Cause No. 16 of 1994 and that the suit land was curved out of parcel number 472 which was registered in favour of Nyula Wambua, Gregory Sembei Wambua, Mwaniki Wambua and Peter Wambua on 15th September, 1994.

3. According to the 1st Plaintiff, parcel number Kyangwithya/ Ndumoni/472 was sub-divided into parcel number 516 and 520 respectively; that their mother Nyula Wambua died on 23rd December, 2003 and that their mother having died, there could be no valid transaction with respect to Plot No. 520 before the Letters of Administration were petitioned and obtained.

4. The 1st Plaintiff deponed that the Sale Agreement of 25th November, 2004 is an illegality contravening Sections 45(1) and (2) of the Law of Succession Act and that a Defence cannot cure the said illegalities.

5. In his Replying Affidavit, the 1st Defendant deponed that the Defence by the 1st and 2nd Defendants raises triable issues; that striking out a pleading is an extreme measure and that the Application does not meet the requisite threshold to warrant the striking out of their Defence.

6. In his Further Affidavit, the 1st Plaintiff deponed that in April, 2013, he was arrested on the instigation of the 2nd Defendant and charged with the offence of forcible detainer; that the said charges are in relation to the suit land and that the trial court observed that the sale as contented by the Defendants raised serious doubts.

7. The Plaintiffs' advocate submitted that in disregard of Section 45 of the Laws of Succession Act, the Defendants went ahead and closed the register of land parcel number 520 and purported to create parcels number 531, 532, 533 and 534.

8. Counsel submitted that the Defendant's Defences are mere denials of the Plaintiffs' claim; that the Defendants contravened the law and that the said Defences should be struck out.

9. The Defendants' counsel submitted that notwithstanding the provisions of Order 2 Rule 15 of the Civil Procedure Rules, the 1st Plaintiff has set out evidence in his Affidavit in support of the Application; that the power to strike out a pleading should be resorted to sparingly and with extreme caution and that the issues raised in the Defence can only be determined after trial.

10. This suit was commenced by way of a Plaint dated 6th October, 2014. In a rather long Plaint, the Plaintiffs averred that they are the sons of the late Wambua Nzula and his late wife Nyula Wambua; that their late father's Estate comprised land parcels number Kyangwithya/Ndumoni/472, 166, 475 and Yatta B2/Kwa Vonza/38 and that they sub-divided parcel No.472 into parcels number 516-520 in Kitui Principal Magistrate Succession Cause No. 16 of 1994.

11. According to the Plaintiffs, parcel number 520 was registered in the first names of the beneficiaries including their mother Nyula Wambua who died on 23rd December, 2013. The Plaintiffs have averred that when they conducted an official search, they discovered that parcel number 520 had been divided into parcels number 531, 532, 533 and 534 and that the process of sub-dividing parcel No. 520 was unlawful and fraudulent.

12. In their joint Defence, the Defendants have averred that the 1st Defendant is the bona fide registered proprietor of parcel number 534.

13. The Plaintiff is seeking to have the Defendants' Defence struck out on the ground that the same does not disclose a reasonable Defence. According to the 1st Plaintiff, the sub-division of parcel number 520 and transfer of a portion thereof to the 1st and 2nd Defendants was contrary to the provisions of Section 45 of the Law of Succession Act.

14. What the 1st Plaintiff is asking this court to do is to examine the proceedings in a Succession Court which distributed the Estate of his father, then look at the titles that arose after the sub-division of parcel number 472, which, according to the Plaintiffs, gave rise to parcel number 520, amongst others, and then ascertain how the beneficiaries of the Estate of his late father agreed to share parcel number 520.

15. After ascertaining how the beneficiaries of the Estate of his father shared parcel number 520, the 1st Plaintiff wants this court, at this stage, to find and hold that his mother, being a beneficiary of a portion of parcel number 520, did not participate in the sub-division of parcel number because she was dead and to find that the whole process was contrary to the provision of Section 45 of the Law of Succession Act.

16. How can this court undertake such a mini trial by way of an Application, and arrive at a final decision that the Defendants do not have a reasonable Defence? Where are the documents that the court is to interrogate to arrive at such a finding? And even if the documents are there, have they been subjected to cross-examination?

17. The questions I have posed above leads me to only one conclusion; that it is not the business of the court to conduct a mini trial by way of an Application. The Plaintiff should fix the matter for hearing and proof the allegations that the suit land was transferred to the Defendants fraudulently. The court cannot aid him, by way of taking short-cuts to arrive at a decision that he desires.

18. In the circumstances, I decline to allow the Notice of Motion dated 12th June, 2018. The Application is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE