



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 95 OF 2017

(Formerly Machakos ELC 165 of 2011)

PETER JOHN THUO NGANGA.....PLAINTIFF

VERSUS

JOSEPH NGOSSOR.....1ST DEFENDANT

LOIS NALANGO ENE JOSEPH NGOSSOR.....2ND DEFENDANT

RULING

What is before Court for determination is the Defendants' Notice of Motion dated the 13th February, 2018 brought pursuant to Order 10 Rule 11 and Order 51 of the Civil Procedure Rules; Section 1A, 1B and 3A of the Civil Procedure Act; and Article 159 (2) (d) of the Constitution. The Applicants seek to set aside the interlocutory judgement entered against the Defendants; the 1st Defendant's name be struck out of the proceedings herein and the 2nd Defendant be granted leave to file her Statement of Defence out of time.

The application is premised on the summarized grounds that on 11th July, 2011, the Plaintiff instituted the suit herein against the Defendants in Machakos ELC Case No. 165 of 2011 (now Kajiado ELC No. 95 of 2017). The 1st Defendant is not the registered owner of the property known as L:R No. 44880/164 Ngong Town, Kajiado County hereinafter referred to as the 'suit land' and has never carried developments thereon. Upon being served with the Plaint dated 8th July, 2011, the 1st Defendant appointed the firm of messrs Naikuni, Ngaah & Miencha Advocates to represent him and have his name struck off the proceedings herein. The Plaintiff filed the Amended Plaint to include the 2nd Defendant's name in the proceedings herein and the 2nd Defendant also instructed the said firm to act for her. The Defendants have realized that although the firm of messrs Naikuni Ngaah & Miencha Advocates entered appearance on their behalf, they failed to file Statement of Defence within the prescribed timelines. Further, that an interlocutory judgment was entered and matter proceeded to formal proof on 6th October, 2014, although on 4th April, 2017, this Court directed the matter to proceed afresh. They aver that mistake of not filing the Statement of Defence in time was not as a result of negligence or lack of due diligence on the Defendants' part but an inadvertence on the part of the former firm of advocates' on record messrs Naikuni Ngaah & Miencha Advocates. Defendants should not be penalized for their former advocates' failure to file Statement of Defence within the timelines stipulated by law. The 2nd Defendant has a good and plausible Defence which raises triable issues and should therefore be given an opportunity to defend the suit and file a Counterclaim against the Plaintiff. Further, if the 1st Defendant is not struck off these proceedings, he stands to be prejudiced. If the prayer to file Statement of Defence and Counterclaim out of time is denied, the 2nd Defendant will be prejudiced and suffer irreparable harm as well as damage, as it is the Plaintiff's development which has encroached on her property.

The 2nd Defendant LOIS NALANGO ENE JOSEPH NGOSSOR filed a supporting affidavit where she reiterates her claim above and confirms being the wife to the 1st Defendant but the sole registered proprietor of the suit land. She recalls that in 2010, in view of a partnership with Cooperative Bank of Kenya she initiated development plans to construct a commercial complex strictly within the marked and fixed boundaries of the suit land. She discovered that effluent was being discharged from the adjacent premises LR No. 4480/ 163 Ngong Town, owned by the Plaintiff. Further, her workers informed her of being harassed by the Plaintiff including his workers as well as police with the Plaintiff believing the construction works on the suit land had interfered with the structure on his property. She explains the process they undertook to follow up on this suit and were puzzled that the 1st Defendant was still part of the suit yet he had no proprietary interest on the suit land. She claims that she stands to suffer prejudice given the fact that the Plaintiff's acts of trespass have stalled the planned commercial development on the suit land for over 7 years which has caused her to suffer untold losses including damages.

The Plaintiff opposed the application and filed Grounds of Concession and Opposition dated the 23rd May, 2019 as well as a replying affidavit. In the Grounds of Concession and Opposition he concedes to leave being granted to the 2nd Defendant to file Defence out of time subject to payment of thrown away costs. He however opposes the 1st Defendant's removal from the suit contending that he has always represented himself as the owner of suit land and has not made any prayer for removal but it is the 2nd Defendant pleading on his behalf. In the replying affidavit he confirms being the registered owner of LR No. 4480 Ngong Township, which abuts the suit land. He is averse to the

interlocutory judgement being aside and Applicants granted leave to file their Defence out of time but subject to payment of thrown away costs. He opposes the 1st Defendant being struck out of the proceedings herein. He contends that in 2009 the Defendants started excavating the suit land but the works were carried out in a non professional manner. He approached the 1st Defendant who carried himself as the owner of the suit land. He further confirms approaching the Public Health authorities who arrived at a conclusion that the Defendants need to heed to the law while constructing. Further that the 1st Defendant failed to heed the advise of the Public Health Official. He explains that he wrote to NEMA seeking their intervention and complained to the Public Health authorities that the Defendants' unlawful activities had damaged a large part of his property. Further, the Public Health Officer upon inspection ordered the Applicants to stop construction but the Applicants continued to do so and damaged his foundation. He claims as a result of the Applicants' unlawful action, on 1st July, 2011, the Public Health officer ordered for closure of the premises and directed him to demolish it after which he could reconstruct.

Both the Applicants and Respondent filed their respective submissions, which I have considered.

Analysis and Determination

Upon perusal of the instant Notice of Motion Application, Grounds of Concession and Opposition; Parties affidavits and submissions the issues for determination are whether the 1st Defendant should be struck off this suit; whether the interlocutory judgment should be set aside and the Defendants granted leave to file their statement of Defence including a Counterclaim.

As to whether the interlocutory judgement entered herein should be set aside and the Defendants allowed to file their Defence and Counterclaim. Since the Plaintiff filed grounds of concession and submitted that for equity to prevail, the interlocutory judgement could be set aside and the Defendants granted leave to file their Statements of Defence including counterclaim subject to their payment of thrown away costs. In the circumstance, I will not delve into analyzing the merit of the said prayer, but proceed to set aside the interlocutory judgement entered herein and direct the Defendants to file their Statement of Defence and Counterclaim within 14 days from the date hereof. I will direct the Defendants to pay the plaintiff Kshs. 15,000 as thrown away costs.

As to whether the 1st Defendant should be struck off the suit. The 1st Defendant insists he is not owner of suit land and he is wrongfully enjoined in this suit and hence should be struck off, which fact is vehemently opposed by the Plaintiff. Order 1 Rule 10 (2) of the Civil Procedure Rules stipulates as follows:

' (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.'

The Plaintiff contends that the 1st Defendant carried himself as owner of the suit land. I note the notices from the Ministry of Public Health and Sanitation were indeed copied to the 1st Defendant. Further, even the notice to stop construction was served upon him. The Plaintiff further submitted that the suit land is matrimonial property with the 1st Defendant having beneficial and disposable interest to it. In relying on the legal provisions cited above, I opine that these notices form part of the issues in dispute in the suit. I find that the 1st Defendant will hence be a necessary party for the proper determination of the suit herein. In the circumstance, I decline to strike him off the suit.

It is against the foregoing that I will proceed to allow the instant application dated 13th February, 2018 in the following terms;

- a) The interlocutory judgement entered herein as against the Defendants be and is hereby set aside
- b) The Defendants are granted leave of 14 days from the date hereof to file and serve their Statements of Defence including Counterclaim
- c) The Plaintiff is awarded thrown away costs of Kshs. 15,000/=

Dated and Delivered in Kajiado this 11th day of December, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Mocha for the defendants

No appearance for the plaintiff

Court assistant- Mpyoye