



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KAJIADO
ELC CASE NO. 594 OF 2017
(Formerly Milimani ELC Case No. 1376 of 2013)

LETOIRE NTIRORI.....1ST PLAINTIFF

JOHN OSHUMU.....2ND PLAINTIFF

VERSUS

ZACHARIA MANYURA.....DEFENDANT

RULING

The application before Court is the Defendant's Notice of Motion dated 17th November, 2015 brought pursuant Order 2 Rule 15(1)(b)(c) and (d) and Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B and 3A of the Civil Procedure Act and all the other enabling provisions of the law. The application which seeks to strike out the Plaintiff is based on the following grounds which in summary is that the suit filed herein against the Defendant is frivolous, vexatious and an abuse of the court process. The Plaintiff lacks any locus to commence this suit against the Defendant. The Plaintiff and the entire suit is fatally defective as it discloses no reasonable cause of action and cannot be sustained.

The application is supported by the affidavit of ZACHARIA MANYURA the Defendant herein where he deposes that the title number KAJIADO/KITENGELA/32454 is not registered in his name but currently registered to REUBEN MICHIRE MUGO. He avers that he has never owned and or dealt with properties known as KAJIADO/KITENGELA/49536, KAJIADO/KITENGELA/60089 and KAJIADO/KITENGELA/6793 and as such the Plaintiffs' lack the locus standi to commence the suit against him. He claims the suit discloses no cause of action against him and from the foregoing it can be deemed to be vexatious, scandalous and an abuse of the court process. He reiterates that the suit discloses no reasonable cause of action, is misconceived and an abuse of the court process and the same should therefore be struck out with costs.

The application is opposed by the 2nd Plaintiff who filed a replying affidavit dated 18th December, 2015 where he deposes that the Defendant's Notice of Motion application is a replica of the Notice of Preliminary Objection dated 27th November, 2013 which the Court heard and dismissed vide a ruling dated 11th July, 2014. He claims that the facts stated in the instant application and the previous one are similar and the same is vexatious and an abuse of the court process hence it ought to be dismissed in the first instance. He states that the Applicant herein never appealed or applied for review against this court's ruling on the preliminary application. He avers that although the Applicant denies ever being a registered owner of land known as KAJIADO/KITENGELA/32454 but they have a document to prove he actually

did. Further, that the records at the Kajiado County Land Registry indicate the Defendant owned the land, which was fraudulently obtained. He insists the current application by the Defendant is diversionary, tactical and attempting to search for technicalities to evade exposure of fraud as pleaded in the plaint.

The application is further opposed by the 1st Plaintiff RICHARD SERENJI LETOIRE who swore a relying affidavit where he deposed that the suit herein is properly before court and that the instant application had earlier been brought before court in the form of a preliminary objection in which a ruling was delivered whose contents are similar to the instant application. He avers that justice as provided under the Constitution and other relevant provisions of law is not about technicalities but fairness and equity.

Both parties filed written submissions, which I have considered.

Analysis and Determination

Upon perusal of the instant Notice of Motion application dated 17th November, 2017 including the supporting and replying affidavits, I note that the issues for determination at this juncture are whether the Plaintiffs have locus to institute this suit against the Defendant and whether the Plaint should be struck out as it discloses no cause of action against the Defendant.

The Defendant claims the suit against him is frivolous, vexatious and an abuse of the court process. Further that the Plaintiffs lacks any locus to commence this suit against him, and the Plaint and the entire suit is fatally defective which discloses no reasonable cause of action and cannot be sustained. The Defendant relied on the case of **Jackson Njuki Kagendo vs. Martin Were Opi & 3 others [2006] eKLR** to support his argument.

I however note the Defendant filed a Preliminary Objection dated 27th November, 2013 which stated as follows: **‘That the Plaintiffs lack locus to institute this suit against the Defendant since they have never been the registered owners/proprietors of the suit property known as KAJIADO/KITENGELA/32454.’** I note that this is one of the grounds under which the instant application is based. I further note that the Preliminary Objection was heard and dismissed on 11th July, 2014.

I note that there are allegations of fraud within the Plaint, which are triable issues that can only be determined once oral evidence is presented. In the case of **UCB Vs Mukoome Agencies (1982) HCB22** it was held that: **‘where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit’.**

In relying on this case, I find that it would be pertinent if the Plaintiffs were granted an opportunity to be heard to enable the court make a determination on the ownership of the suit properties.

In the circumstances I find that the application to strike out Plaint is premature as the issues raised had already been dealt with in the Preliminary Objection dated 27th November, 2013 which was dismissed. I proceed to dismiss the Defendant’s Notice of Motion application dated the 17th November, 2015. The costs will be in the cause.

The parties are urged to comply with Order 11 and set the suit down for hearing as soon as possible.

Dated signed and delivered in open court at Kajiado this 17th day of January, 2018.

CHRISTINE OCHIENG

JUDGE

Present :

C/c Mpoye

Ochako for Plaintiff

Machora holding brief for Mungai for Defendant