REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

CIVIL SUIT NO. 287 OF 2016

KATANA FONDO BIRYA..... PLAINTIFF

VERSUS

KRYSTALLINE SALT LTD & TWO OTHERS…… DEFENDANTS

RULING

1. By a Plaint dated 26th October 2016 and filed herein on 27th October 2016, the Plaintiff Katana Fondo Birya prays for Judgment against the three Defendants, jointly and severally for:-

> ***(a) A finding and/or declaration that the Plaintiff is the lawful and/or legal owner of the suit premises, being 34 Hectares, known as Giriama Village Island situate at Marereni within Kilifi County;***
>
> ***(b) A finding and/or declaration to the effect that the suit premises, being 34 Hectares known as Giriama Village Island was fraudulently and/or illegally and/or unlawfully included to be part of Plot LR No. 13427 and consequently revoke and/or nullify the same for purposes of re-surveying and/or carrying out and/or exercising the suit premises from Plot LR No. 13427 and ultimately issuing a separate title to the Plaintiff in respect of the excised portion of land measuring 34 Hectares, being the suit premises herein;***
>
> ***(c) Any and/or further consequential and/or incidental orders and/or reliefs and/or remedies as the Court may deem fit and just in the circumstances; and***
>
> ***(d) Costs of this Suit.***

2. A perusal of the Plaint reveals that the above prayers are premised on the Plaintiff's averment that at all times material to this suit, he was, and remains, the lawful and/or legal owner of the parcel of land measuring 34 Hectares and more particularly known as Giriama Village Island situated in Marereni within Kilifi County.

3. It is the Plaintiff's case that in or around the year 2005, or thereabout, he discovered that M/s Krystalline Salt Ltd sued herein as the 1st Defendant, had caused the said Parcel of land to be registered in its name by fraudulently including the acreage of the suit premises to the part of its parcel of land, that is LR No. 13427 which initially measured 2000 Hectares. As a result of the fraudulent inclusion of the Plaintiff's Parcel of land, the 1st Defendant's Parcel of land now measures 2,034 Hectares instead of the earlier 2000 Hectares.

4. In their Written Statement of Defence dated and filed in Court on 26th January 2017, the 1st Defendant avers that there is no parcel of land which has been adjudicated, surveyed and/or registered as Giriama Village Island measuring 34 Hectares as stated by the Plaintiff. It is accordingly the 1st Defendant's contention that the so-called "Suit premises" does not exist and that even if it does exist, the Plaintiff does not have any legal or beneficial interest therein.

5. Shortly after filing their Written Statement of Defence, the 1st Defendant filed the Notice of Motion Application before me dated 3rd February 2017 seeking the following Orders:-

> ***(a) That the Plaint filed herein on 26th October, 2016 be struck out for disclosing no reasonable cause of action against the 1st Defendant.***
>
> ***(b) That the said Plaint be struck out for being frivolous, vexatious, scandalous and otherwise an abuse of the Court process.***

(c) That the costs of this Application and the entire suit be awarded to the 1st Defendant/Applicant.

6. The said Application is premised on a number of grounds stated on the body thereof and which may be summarized as follows:-

i. That the said Plaint fails to disclose a reasonable cause of action against the 1st Defendant;

ii. That the said Plaint is scandalous, frivolous and vexatious given a number of admissions and arguments advanced in its favour; and

iii. That the said Plaint is an abuse of the Court process given the above mentioned grounds.

7. In response to the Application, the Plaintiff/Respondent filed a Statement of Grounds of Opposition dated 25th April 2017 wherein he states-

i. That the 1st Defendant's application is misconceived and non-mentorious;

ii. That the 1st Defendant's application is frivolous and/or scandalous, vexatious and an abuse of the Court process;

iii. That the 1st Defendant's application is premature and therefore bad in law and/or incompetent; and

iv. That for the above said reasons, the Application dated 3rd February 2017 ought to be dismissed with costs.

8. I have considered the Application as well as the Grounds of Opposition thereto. I have equally considered the written submissions and authorities brought before me by the Learned Advocates appearing for the parties herein.

9. Order 2 Rule 15 of the Civil Procedure Rules provides as follows:-

"15(1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:-

(a) It discloses no reasonable cause of action or defence in law;

(b) It is scandalous, frivolous or vexatious; or

(c) It may prejudice, embarrass or delay the fair trial of the action; or

(d) It is otherwise an abuse of the process of the Court and may order the suit to be stayed or dismissed or Judgment to be entered accordingly, as the case may be.

10. Striking out of pleadings is certainly a drastic remedy that should only be resorted to where a pleading is a complete sham. As Madan J.A. (as he then was) stated in his Judgment in the case of ***DT. Dobie & Company Kenya Ltd –vs- Muchina (1982)KLR*** 1:-

"The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

11. In the matter before me, the Plaintiff's suit is premised on the fact that he was at all times material to this suit the lawful owner of a parcel of land measuring 34 Hectares and more particularly known as Giriama Village Island situated within Marereni in Kilifi County. It is the Plaintiff's case that in or around the year 2005, he discovered that the 1st Defendant herein had taken over his 34 hectares of land and caused the same to be registered as part of the 1st Defendant's land which land then increased from its original acreage of 2000 hectares to 2034 hectares.

12. It is not however clear from the pleadings how the Plaintiff acquired the said Giriama Village Island and/or how he came to the conclusion that the said village measures 34 hectares. It is apparent from the arguments advanced herein that the Plaintiff so far solely relies on the title issued to the 1st Defendant to argue that the said title encompasses land that ought to belong to him.

13. In the application before me, the 1st Defendant has attached as annexures "HP1" and HP- 2 a Deed Plan dated 12th July 1985 and a letter of allotment dated 18th January 1984 showing how the land(then unsurvyed and said to be approximately 2000 hectares) was initially allocated to one General Jackson Mulinge before being acquired by the 1st Defendant. The land was later on surveyed and found to be measuring 2034 hectares and a Title Deed therefore issued to the 1st Defendant on 10th December 1985.

14. The 1st Defendant has further attached to its Supporting Affidavit sworn by Hasmita Patel on 3rd February 2017 that the Plaintiff applied on 25th October 1998 to be allocated an undisclosed parcel of land measuring approximately 16 hectares. The allotment subsequently issued to the Plaintiff was however cancelled by the Commissioner of Lands on 15th November 2002 on the grounds that it related to a parcel of

land which was already comprised within the land belonging to the 1st Defendant.

15. I note that the Plaintiff has not controverted in any way the numerous assertions made by the 1st Defendant in its Defence and in the current application before me. Instead, the Plaintiff has chosen deliberately or otherwise to only file Grounds of Opposition thereof denying himself a chance to respond to the issues of fact being raised by the Applicant. As was observed in ***Kennedy Otieno Odiyo & 12 Others –vs- Kenya Electricity Generating Company Ltd (2010)eKLR*** *where the Respondents similarly only field grounds of opposition to an application:*

> ***"Grounds of Opposition address only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus what is deponed to was not rebutted by the Respondents. It must be taken to be true…."***

16. It is instructive that the Plaintiff does not deny that he applied to be allocated 16 hectares of land and not 34 as claimed in October 1998. As at that time, the 1st Defendant's title had been in existence for about 13 years, the same having been issued on 10th December 1985. The Commissioner of Lands therefore rightfully cancelled the subsequent Letter of Allotment as his officer lacked power to allot land which had already been alienated and was comprised in an existing title. Again, the Plaintiff does not deny that the Letter of Allotment erroneously issued to him in regard to a portion of LR No. 13427 was cancelled on 5th November 2001.

17. It is indeed apparent that the only argument on which the entire suit is premised is the fact that the original allotee-one General Jackson Mulinge-was allocated 2000 hectares and not 2034 hectares. A perusal of the Letter of Allotment reveals that the said General Mulinge was allocated an unsurvyed land whose measurement is said to be 'approximately' 2000 hectares. The boundaries of the parcel of land which was later purchased by the 1st Defendant and registered as LR No. 13427 are indicated on a sketch plan attached to the allotment letter. A perusal thereof reveals that it is the same sketch reproduced in the Physical Development Plan and Survey Maps for LR NO. 13427. The said LR No. 13427 is registered in the 1st Defendant's name and the allegations that there was another property known as Giriama Village Island whose property was subsequently illegally appropriated into LR No. 13427 is unsupported and unconvincing.

18. As was pointed out above, Order 2 Rule 15 of the Civil Procedure Rules allows pleadings to be struck out if the same are scandalous, frivolous and vexatious. In ***Dawkins –vs- Prince Edward of Save Weimber (1976) I QBD 499***, the Court held that:-

> ***"A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting the Court's time; or (v) when it is not capable of reasoned argument."***

19. Again as stated in ***Bullen & Leake and Jacobs Precedents of pleading(12th Edition***) at 145:-

> ***"a pleading or action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.***

20. Arising from the foregoing, I am satisfied that the Plaintiff's claim does not disclose a reasonable cause of action against the 1st Defendant. The pleadings comprised in the Plaint dated 26th October 2016 are frivolous and vexatious and therefore amount to an abuse of the Court process.

21. The Chief Land Registrar and the Honourable the Attorney General(the 2nd and 3rd Defendants respectively) were presumably sued herein due to the alleged acts of fraud which were alleged to have been committed by and/or in collusion with the 1st Defendant. I say presumably because other than their mention in the descriptive paragraphs 3 and 4 of the Plaint, the two are not mentioned elsewhere in the Plaint and no wrongdoing whatsoever has been attributed to them.

22. Having found that the suit against the 1st Defendant is unwarranted and amounts to an abuse of the Court process, it follows that the suit as currently framed cannot subsist in the absence of the claim against the 1st Defendant.

23. The upshot is that I find merit in the 1st Defendant's application dated 3rd February 2017. Accordingly, the Plaint dated 26th October 2016 and filed herein on 27th October is hereby struck out with costs to the 1st Defendant.

Dated, signed and delivered at Malindi this 22nd day of February, 2018.

J.O. OLOLA

JUDGE