



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MURANG'A

ELC N0 336 OF 2017

ANTHONY NYAGA NDUNGU.....PLAINTIFF/RESPONDENT

VS

JOSEPHAT MUCHOKI MUNGAIDEFENDANT/APPLICANT

RULING

1. The Defendant, Josephat Muchoki Mungai vide a Notice of Motion dated the 3/5/17 and filed on the 10/5/17 and brought under the provisions of Section 3A of the Civil Procedure Act, CAP 21, Order 2 Rule 15, Order 15 rule 1 and all other enabling provisions of the law seeking to strike out the Plaintiff's suit filed on the 7/3/2016.
2. The Plaintiffs application is premised on the grounds on the face of the application and the supporting affidavit by the Applicant.
3. The Applicant deponed that the Respondent in the said suit is seeking orders for claims of ownership of the parcel No. Loc 5/Kabati/567 by way of adverse possession. That the suit land has been subject to protracted legal cases starting with HCCC NO 1693 of 1979 between the fathers of both the Plaintiff and the Defendant where the Plaintiffs father was claiming title by adverse possession. Though the Plaintiff father succeeded in obtaining orders in the said suit vide the Ruling issued on the 26/2004 of JB Ojwang J (as he then was), the same orders were vacated and set aside by the said Court on 4/2/2005 for failing to disclose material facts to the Court. Subsequently the Plaintiff's father passed on and the suit was marked as abated on 8/2/08 and a subsequent application to set aside the orders for abatement was dismissed with reasons by the Court on 7/6/2011. The suit land therefore remained in the ownership of the Defendant's father.
4. The Defendant states that upon the demise of his own father he became registered as the owner of the suit land vide Succession Cause No. 1791 of 2008 and later subdivided the said suit land. That in 2013, he filed suit No 658 of 2013 seeking vacant possession of the suit property from the Plaintiff and his siblings which suit is still pending in Court. Though the orders of eviction were set aside, the Plaintiff and his siblings vacated the suit property and relocated to another parcel of land.
5. He further states that whilst the above cases remained pending and undetermined, the Plaintiff filed another suit at Kerugoya ELC No 307 of 2014 claiming ownership of the suit land through purchase. The claims in the two suits are for adverse possession (current suit) and ownership by purchase in the Kerugoya suit. In both the suit land is the same. The Defendant avers that the intention of the Plaintiff in all these suits is to fraudulently claim portions of the suit land belonging to him.
6. According to the Defendant the claims in this suit are frivolous vexatious and otherwise an abuse of the process of the Court and any orders that may be made in this suit may affect/or contradict those already existing in Thika CMCC No 658 of 2013 and/or future orders. That the Plaintiffs claim is likely to embarrass and prejudice the judicial process.
7. The application is opposed by the Plaintiff through the replying affidavit sworn by Anthony Nyaga Ndungu the Plaintiff herein who deposed that he is one of the administrators of his father's estate one Erastus Ndungu Mungai deceased and the Defendant too is the administrator of his father's estate, one William Mungai Gachui, deceased.
8. He further deposed that their fathers entered into a sale agreement and agreed to sell a portion of the plot No. 26 Kabati which was subsequently subdivided into Loc 5/Kabati/566 and 567. That his father sued the father of the Defendant for adverse possession in HCCC NO 1693 of 1979. That upon the death of the Defendant's father the Defendant vide Succ. Cause No 1791 of 2008 became registered as owner of all the suit land to the exclusion of the Plaintiff and his siblings.
9. Further the Plaintiff stated that the Defendant has subdivided the suit land into parcel numbers Loc 5/Kabati/1642-1660. That his father was interred in the suit land on his death on the 31/3/2006 despite unsuccessful objections and protestations from the Defendant. That the Defendant filed suit for eviction in CMCC No 658 of 2013 wherein the said orders were later set aside but not after sustaining a loss of over Kshs 10 million in property loss and damages during the illegal eviction. He avers that as a result he and his siblings are currently living on

rented houses. That he and his siblings desire to go back to the suit land and reconstruct their lives that have been so rudely interrupted by the eviction aforesaid. He asserts that the Defendant is in the process of disposing of the suit land to defeat his claim.

10. Further and in addition to the above averments, the Plaintiff in his Replying affidavit dated the 7/11/2017 stated that suit HCCC NO 1693 of 1979 was not heard on its merits and that in accordance to Art 159 of the Constitution he is entitled to be heard on the merit on his claim. He asserts that there are new causes of action that have arisen which entitles him to file a fresh suit and ventilate the new issues. That the cases earlier referred to have no bearing with this suit as this instant suit is seeking distinct reliefs and the Applicant's application should be dismissed.

Submissions

11. The application was canvassed by way of written submissions which were filed and exchanged.

12. The Defendant submitted that the suit should be struck out for being frivolous, scandalous or otherwise being an abuse of the Court process. He relied on the definition of abuse of Court stated in the case of **Tana and Athi Rivers Development Authority Vs Jeremiah Kimigho Mwakio & 3 others (2015) ECLR**. He further argued that the Plaintiff has not explained why he is prosecuting this case as well as the existing case at Kerugoya, the said suits relating to similar subject matter same parties but different facts.

13. Counsel for the Applicant further urged the Court to be guided by the indepth analysis of order 2 rule 1 in the case of **Transcend Media Group Limited Vs IEBC (2015) ECLR**. To paraphrase, the Counsel pointed the Court to the old tested principle that although the striking out pleadings is a jurisdiction which must be exercised sparingly and in clear and obvious cases so as not to drive a litigant from the seat of justice, the Court ought to act cautiously and carefully and consider all the facts of the case without embarking upon a trial thereof. He cited various case law which I have duly considered and urged the Court to find that the suit is an abuse of the process of Court and accordingly strike it out.

14. The Respondent too in his opposing submissions rehashed his responses as stated in his Replying affidavit and submitted that HCCC No. 1693 of 1979 abated and was not heard on its merits. That as per the provisions of Article 159 (1) (d) he is entitled to seek remedies that he feels entitled. Further he added that the file in the case could not be traced. He urged the Court that though there are many suits, the reliefs are different. That the current suit was filed pursuant to an illegal eviction which allegedly led to loss of property while the Kerugoya case ELC No. 307 of 2014 sought a distinct relief different from this one. The case at Thika CMCC No 658/2013 was arguably filed by the Applicant at a time when the said Court did not have jurisdiction to entertain the matter. He urged the Court to dismiss the application.

15. I have considered the application, the responses thereto, the rival written submissions and the key issue that emerges is whether the suit should be struck out for being an abuse of the process of the Court. The second issue is on costs.

16. The power to strike out pleadings is donated to the Court by Order 2 Rule 15 of the civil procedure Act. It states thus

“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; or
- b). it is scandalous, frivolous or vexatious; or
- c). it may prejudice, embarrass or delay the fair trial of the action; or
- (a) 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.

No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.

So far as applicable this rule shall apply to an originating summons and a petition”.

17. Being a discretionary power Courts are guided to so exercise its discretion sparingly and with circumspection and in the rarest of cases. It must be exercised in clear and obvious circumstances. See the case of **Elijah Sikona & George Pariken Narok on behalf of Trusted Society of Human Rights Alliance Vs Mara Conservancy & 5 others HCCC No 37 of 2013 ECLR**. That notwithstanding when the conduct of a litigant is so glaringly contumacious in intending to clog the legal system by filing a multiplicity of cases, such litigant deserves to be dealt with sternly. It is contrary to public policy to file multiple suits as in that way, precious judicial time is wasted dealing with the same issues at different stations and the same party is subjected to unnecessary vexing not to mention the costs involved.

18. In the case of **Joseph Okumu Simiyu Vs Standard Chartered bank K) Ltd [1994] KLR**, a case is frivolous if it has no substance, fanciful. It is vexatious if it has no foundation, no chance of succeeding. A pleading is an abuse of the process of the Court where it is frivolous or vexatious or both.

19. It is evident from the record that this is a matter that has been in Court for the last approx. 40 years, the case having been filed by the

fathers of the parties herein. As admitted by the parties, HCCC No 1693 of 1979 was marked as abated at the point that the two parties had been substituted in the case to represent their deceased fathers. CMCC No 658 of 2013, Thika filed by the Applicant against the Respondent is pending determination. It sought eviction against the Respondent from the suit land. It appears that the Applicant indeed succeeded, (at least by the admission of the Respondent in his pleadings), to remove the Respondent from the suit land albeit wrongfully. It is on record that the eviction order was set aside by the Court. Come the year 2014, the Respondent herein filed a case No ELC 307 of 2014 (OS) at Kerugoya ELC Court seeking title by way of adverse possession. It is admitted by the Respondent that this case is pending determination. As if that is not enough, the said Respondent while the case in Kerugoya subsisted, filed this case initially in Nairobi, under ELC No 220 of 2016, and later transferred to this Court, in which he has sought *inter alia* injunction restraining the Applicant from disposing the suit lands, damages arising from the impugned eviction exercise in the sum of Kshs 10.1 million, an order that he has acquired title by adverse possession, specific performance and damages for wrongful eviction. It must be noted that the main issue in both cases is a claim for title under adverse possession.

20. The Respondent has explained that notwithstanding the pending suits he is entitled under Art 159 of the Constitution to so file this suit so that new issues are addressed. Article 159 of the constitution was never intended to be a panacea or cure for all ills. It is in my considered view that Article 159 was not meant to override clear provisions of any statute unless such provisions were found or held to be unconstitutional. Allowing litigants to file multiple suits would be inviting a stampede into our Courts with huge losses in money and time. The new issues that the Respondent alleges to have arisen, if any, in my considered view can be entertained in the present suit through the necessary amendments.

21. Having analysed the cases this Court in principle has come to the conclusion that the parties in the two cases are primarily the same, and that the suits raise similar issues namely ownership of the suit lands between the two parties or group of parties. Filing a multiplicity of suits in respect to the same subject matter is clearly an abuse of the process of this Court. Relying on the case of **Chairman District Alcohol Drinks Regulation Committee & 4 others and 2 others exparte Detlef Heier & Anor (2013)** EKLR Justice Angote when confronted with similar situation stated as follows;

“ a party who wishes to file a suit which is similar to an existing suit must withdraw the first suit. This Court cannot allow parties to be filing a multiplicity of suits on the basis that they have found that the previous suit(s) wanting either in content or form. The Court must and should invoke its inherent jurisdiction to stop such abuse of the Court process. Abuse of the Court process includes where a party improperly uses judicial process for irritation harassment and annoyance of his opponent and to interfere with the administration of justice.

22. In view of the foregoing this Court is duty bound to so exercise its discretion and rightly so and find that this suit is an abuse of the process of the Court and is hereby struck out.

23. The costs shall be in favour of the Applicant.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 12TH DAY OF APRIL 2018.

J G KEMEI

JUDGE