



Board of Governors Changamwe Secondary School v Commissioner of Lands & 2 others (Land Case 162 of 2007) [2018] KEELC 4917 (KLR) (13 June 2018) (Ruling)

Board of Governors Changamwe Secondary School v Commissioner of Lands & 2 others [2018]eKLR

Neutral citation: [2018] KEELC 4917 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
LAND CASE 162 OF 2007
AA OMOLLO, J
JUNE 13, 2018

BETWEEN

THE BOARD OF GOVERNORS CHANGAMWE SECONDARY SCHOOL PLAINTIFF

AND

THE COMMISSIONER OF LANDS 1ST DEFENDANT

THE ATTORNEY GENERAL 2ND DEFENDANT

TURF DEVELOPERS LIMITED 3RD DEFENDANT

RULING

1. For determination is the application dated 17th October 2017 brought under the provisions of Order 45 of the Civil Procedure Rules and Section 1A, 1B 3A & 80 of the *Civil Procedure Act*. The 3rd defendant/Applicant prays that:
 1. This Honourable Court be pleased to review its Orders given on the 31st August, 2017 by varying or setting aside the same.
 2. The Orders sought in the Notice of Motion dated 11th April, 2016 be granted as prayed.
 3. The costs be provided for.
2. The application is premised on the grounds:
 - a) The plaintiff has failed to comply with the Order of this Honourable Court given on the 31st August, 2017 in that it has failed or neglected to amend the plaint dated 4th July 2007 by adding the Applicant as a party and or to serve an Amended Plaint upon the Applicant's Advocates on record within the period as prescribed.



- b) The consistent failure on the part of the plaintiff to comply with and or obey the Orders of this Honourable Court is a sufficient reason to review, vary and or set aside this Honourable Court's earlier Orders issued herein and to grant an Order allowing the Applicant's application dated 11th April, 2016 as prayed.
3. The application is also supported by the affidavit of Ashok Doshi sworn on the 17th October 2017. He deposed that it is almost 2 years since the ruling of 30th October 2015 and almost two months since the ruling of 31st August 2017 yet the plaintiff has not filed & served the amended plaint as provided in the timelines. The applicant deposes that the plaintiff has no interest in having this matter determined consequently the same should be struck out for want of compliance and or failure to obey this Court's order. He also deposed that following the withdrawal of the declaratory reliefs by the plaintiff on 16th December 2014, there is no competent suit before the Honourable Court. He therefore urged the Court to review the orders made on 31.8.2017 and allow the prayers sought therein.
4. The application is opposed by the plaintiff and the 1st & 2nd defendants. The 1st & 2nd defendants filed the following grounds of opposition on 7th December 2017;
1. That the ruling of 31/8/2017 is well reasoned and should not be reviewed.
 2. That this application is frivolous and not the proper way to challenge a judgment.
 3. That this application is filed for purposes of forcing the plaintiffs file a pleading.
 4. That the applicants are merely filing this application to delay the prosecution of this suit thus delaying justice.
 5. That the applicant has meddled hearing this suit by filing numerous applications all which have delayed of this suit.
5. The plaintiff also filed its grounds of opposition on 8th November 2017 citing the following grounds;
1. That we have not been able to receive instructions from our client and therefore unable to file our amended plaint.
 2. That the plaintiff needs more time to agree on the way forward since the matter touches on public land and that the client needs to get directions from the School's Board of Management which has not been created.
 3. That interest of justice requires that we cannot proceed without instructions from the schools Board of Management.
 4. That the plaintiff being a school should be given time to deliberate and give us instructions on the way forward.
 5. That the plaintiff is unable to meet now and give instructions until the new term begins since all Public schools are now closed.
 6. That no prejudice will be suffered by the Interested Party.
6. The parties argued the application by filing of written submissions which I have had occasion to read. The 1st and 2nd defendants submit that the application fails to meet the threshold of Order 45 as there are no new important matters that have been discovered. They also submit that the plaintiff being a learning institution, there can be a delay in their giving of instructions. This is the same reason given by the Respondent both in their grounds & submissions. The plaintiff also submitted that the 3rd



Defendant/Applicant is not deserving of the orders since they had filed a notice of appeal against the decision of this Court made on 31.8.2017.

7. The Applicant on its part submits that based on the grounds filed by the plaintiff, it appears the firm of Oddiaga & Co Advocates have had no instructions to represent the plaintiff in this matter from its inception. The Applicant submits that the ruling of 31.8.2017 should be read together with the ruling delivered on 30.10.15 where the Court stated that the plaintiff failed to disclose the existence of HCC No 485 of 2000 which involved the same subject matter. According to the Applicant, the plaintiff had already been evicted by the decree issued in HCC 485 of 2002 in 2004. For this reason, the Applicant urged the Court to strike out the suit as prayed in the application dated 11th April 2016.
8. By the application dated 11th April 2016, the Applicant herein had moved the Court to dismiss or strike out this suit. After considering the arguments presented by both sides, I made a decision on 31.8.2017 granting leave to the Plaintiff/Respondent to amend its plaint within 21 days from the date of the ruling. The 21 days from 31st August 2017 would then lapse on 20th September 2017. As at the time the present application was filed and argued, no amended plaint had been filed. The plaintiff's advocate says that he has not filed amended plaint for lack of instruction from the school. In defence of the application, he filed grounds of opposition which cannot annex evidence from the school administration to confirm that indeed there has been no Board of Management constituted. This matter was filed in 2007 thus the full instruction ought to have been given to the advocate on record to be capable of amending its pleading from then. It's not possible for the Court to know when the term of members of the School Board begins or ends from the grounds of opposition filed for the Court to agree with the plaintiff that this constitutes a genuine reason for the failure to amend the plaint.
9. Secondly, the Applicant has made reference to a decree obtained in MSA HCC 485 of 2000. The suit involved the same parties as the ones in the present case. Justice Onyango Otieno (as he then was) found that the land L.R MN/VI/3XX8 belonged to Turf Developments Limited. This is the same parcel of land the subject of the present dispute. The Applicant was not enjoined to this proceedings at the inception of this case and only applied to do so when vide its application of 12th January 2010 which was determined by this Court on 30th October 2015.
10. This Court was made aware of the decision in HCC No 485 of 2000 as I made reference to it in my ruling of 30.10.2015. In spite of that decision I still gave the plaintiff a chance to amend its pleadings to enable it bring its claim against the 3rd Defendant/Applicant who had just been joined. Once the amendment was done then the 3rd defendant would file its defence and the Court would have been in a position to be informed whether a different cause of action from that in HCC 485 of 2000 had arisen. The plaintiff has neglected and or failed to do so and should not be allowed to delay the prosecution of this matter merely because it is a School as justice must be served to both parties equally. The plaintiff did not even plead how long it required to effect the amendment.
11. I am therefore in agreement with the 3rd Defendant/Applicant that in the absence of an amendment, there is no competent suit before the Court following the withdrawal of the substantive prayers made on 16th December 2014. Secondly no valid reason having been given why the amendments have not been done, it is only prudent that the application be reviewed instead of a party filing a new application to strike out the suit. In light of the foregoing, I hereby review my orders of 31.8.2017 dismissing the 3rd Defendant's motion dated 11.4.2016 and substitute it with an order dismissing the plaintiff's suit for not disclosing any reasonable cause of action against the defendants. I also make an order that each party shall bear their respective costs of this application and the suit.

DATED, SINGED & DELIVERED AT MOMBASA THIS 13TH JUNE 2018



A. OMOLLO
JUDGE

