



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 851 OF 2017

(Formerly Machakos ELC Case No. 863 of 2016)

DANIEL NKATELE NASHA.....PLAINTIFF

VERSUS

JACKSON KIMEU & OTHERS.....DEFENDANTS

RULING

The application before Court for determination is the Defendants' Notice of Motion dated the 27th September, 2016 brought pursuant to Sections 1A, 1B, 3A, 5, 6, 7 & 63 (e) of the Civil Procedure Act, Order 2 rule 15(1) (b) and (d) of the Civil Procedure Rules and all the other enabling provisions of the law. It seeks the following orders:

- a. That the plaint be struck out.
- b. That the cost be to each Applicant/ Defendant on aggravated scale.
- c. That there be such other or further reliefs the Honourable Court deems fair and expedient to grant in the circumstances of the case.

The application is premised on the following grounds which in summary is that the case is likely to prejudice, embarrass and delay the fair expeditious trial of the case pending at Machakos High Court. The suit is otherwise an abuse of the process of the Court. The averments in the verifying affidavit are manifestly false. The dispute herein is similar to the one at Machakos Misc. Civil Application No. 141 of 2012 which is pending determination. The suit relates to the same LR. No. KAJIADO/ KAPUTIEI CENTRAL/ 509 which is the subject matter of the dispute pending in the High Court of Kenya Machakos Misc Civil Application No. 141 of 2012. The Plaint is scandalous, frivolous and vexatious.

The application is supported by the affidavit Reverend Jackson Mbinda Kimeu the 1st Defendant herein where he deposes that the Plaintiff herein is also the ex parte applicant in Machakos High Court Misc Civil Application No. 141 of 2012, where the Defendants herein are the Interested Parties and the subject matter being KAJIADO/ KAPUTIEI CENTRAL/ 509. He explains that the Machakos Misc Civil Application No. 141 of 2012 is scheduled for mention for directions on the ruling dated the 6th December, 2016 which date was fixed by the same Advocate representing the Plaintiff herein. He contends that this suit offends section 6 of the Civil Procedure Act and should not proceed at all. Further, that the Plaintiff's averments in the penultimate paragraph of his statement dated the 20th July, 2016 is incongruent with the averments of this case. He claims the admission by the Plaintiff in the penultimate paragraph of his verifying affidavit exemplifies impunity which court of law should not countenance. Further, that this suit is not filed by default but an abuse of the process of the court. He insists that the averments in paragraph 12 of the Plaint are false as the Defendants are bona fide purchasers and not trespassers, with the alleged eviction order by the Kajiado County Taskforce allegedly made on 23rd September, 2014 being an illegal edict with no legal consequences. He avers that it is the Plaintiff who has put the Defendants through great economic suffering and prolonged hardship after he voluntarily took their respective monies and now refuses to excise and transfer to them the parcels of land they purchased. He contends that the indefeasibility of the Plaintiff's title does not arise rather it's the issue of fraudulently receiving the purchase price for land and wanting to keep the land at the same time which equals to greed. He reiterates that on the 15th August, 2016 the Advocate for the Plaintiff served the Defendants' Advocates with a mention notice for the HCC Machakos Misc Application No. 141 of 2012. He states that the Advocate for the ex parte Applicant in the Machakos High Court Misc Application No. 141 of 2012 filed written submissions to his case on 14th May, 2015. Further that their Advocate entered appearance on behalf of the Defendants on 29th April, 2012 and the Attorney General filed a Notice of Appointment, Grounds of Opposition including Written Submissions on 12th October, 2012. He further contends that their Advocate filed written submissions on 5th March, 2012 and that the prayers sought by the Plaintiff herein are not available to him.

The Plaintiff claims to have filed a replying affidavit, which I note is not in the court file.

Both parties filed their respective submissions which I have considered

Analysis and Determination

Upon perusal of the Notice of Motion dated the 27th September, 2016 including the supporting affidavit as well as the submissions filed herein, the only issue for determination is whether the Plaintiff should be struck out.

Order 2 rule 15 of the Civil Procedure Rules provides as follows:

‘(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; or

(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.

(2) 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.’

The Court of Appeal in the case of *RAMJI MEGJI GUDKA LTD –Vs- ALFRED MORFAT OMUNDI MICHIRA & 2 OTHERS [2005] eKLR held as follows:*

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in *DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1* in which Madan J.A. at p. 9 said:-

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham.”

I note at paragraph 19 of the Plaintiff, the Plaintiff has raised allegations of fraud while the 6th Defendant/Plaintiff in the Counterclaim has also averred that the Plaintiff is seeking to use fraudulent means to obtain land that she has already sold. These are triable issues which cannot be determined at an application stage but only once viva voce evidence adduced to enable the Court arrive at a proper determination of the suit.

At this juncture and in relying on the overriding objective of this Court as governed by Section 3 of the Environment and Land Court Act which directs courts to ***facilitate the just, expeditious, proportionate and accessible resolution of disputes***, I find that it would be pertinent if the suit was set down for hearing on its merits to enable the court make a final determination of the dispute at hand.

It is against the foregoing that I will decline to allow the 6th Defendant/Plaintiff’s in the Counterclaim Application dated the 5th May, 2017 to strike out the Defence in the Counterclaim and Claim against him in the original suit and direct that the parties do comply with Order 11 within 30 days from the date hereof and set the suit down for hearing.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 14th day of June, 2018.

CHRISTINE OCHIENG

JUDGE