



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC NO. 183 OF 2014

MAMBRUI PROPERTIES LTD.....PLAINTIFF

VERSUS

MICHELE SERVO.....DEFENDANT

RULING

1. By a Notice of Motion application dated and filed herein on 8th September 2017, the Defendant Michele Servo prays for the following:-

1. That the Court be pleased to strike out the Plaintiff's suit in its entirety for it is scandalous, frivolous or vexatious AND OR that it is otherwise an abuse of the process of this Court.

2. That the costs of this application and the entire suit be borne by Jaffer Ali Kassam.

2. The application is supported by the annexed affidavit of Gaida Giovanni and is premised on the following grounds:-

a) That the defendant appointed Gaida Giovanni to be his attorney in Kenya and has made the application through the attorney;

b) That the Plaintiff purports it is an incorporated legal entity and claims to be the proprietor of Plot Numbers 654 and 656 Mambui where the subject matter of the dispute is located when it is not and therefore lacks the locus standi in law to bring the suit;

c) That the Defendant conducted a search to ascertain ownership of the aforesaid land at Mombasa Lands Registry and found the same registered in the names of Mambui Real Properties Limited which a different name from the Plaintiff;

d) That the defendant thereafter conducted a company search at the registry in Nairobi with a view to establishing the existence of the Plaintiff Mambui Properties Limited, but did not find any official legal existence of the same;

e) That the Plaintiffs agent one Jaffer Ali Kassam purportedly filed this suit on the authority of Mamburi Property Management Ltd who is not a proprietor of the suit properties and;

f) That the suit as presently filed is bad in law and neither can it be resuscitated by way of an amendment as there is no formal requisite authorization from Mambui Real Properties Ltd to bring this suit which has been filed by a busybody who has no locus stand.

3. In a Replying Affidavit sworn by Jafarali Kassam Abdulla and filed herein on 8th November 2017, the Plaintiff states that the suit was erroneously filed under the name of Mambui Properties Ltd but the real names ought to be Mambui Real Properties Ltd.

4. The Plaintiff avers that they instructed the law firm Ombachi Moriasi & Company Advocates to institute the suit against the defendant. They handed the said law firm all documents relating to the suit including the Company's Certificate of Incorporation which bears the name Mambui Real Properties Ltd but the Advocate made a mistake in omitting the word 'Real' in the Plaintiff's name when the suit was filed.

5. The Plaintiff contends that the suit was instituted through a bona fide mistake and that Mambui Real Properties Ltd is the registered owner of the Plot Nos 654 and 657 Mambui which are in contention herein and this Court ought to exercise its discretion to order an amendment of the Plaintiff's name to reflect the correct position.

6. I have considered the application and the response thereto. I have equally considered the written submissions and authorities placed before me by the Learned Advocates for the parties.

7. This suit was instituted vide a Plaint filed herein on 2nd October 2014. In the said Plaint, the Plaintiff described as Mambrui Properties Ltd seeks an order of injunction to restrain the defendant from making alterations to an adjoining Villa to the Plaintiff's own pursuant to a Lease Agreement executed by both the said Plaintiff and the Defendant with a third party named Caluwa Limited.

8. In his Statement of Defence filed on 3rd November 2015, the Defendant denies inter alia, that it has blatantly refused and/or neglected to honour the provisions of the lease and avers that in making the alterations, the defendant accorded to the full compliance of the law by engaging NEMA to give it a licence and a permit from the County Government before doing so.

9. From the record, the Plaintiff filed an application dated 30th September 2014 seeking temporary orders of injunction to restrain the defendant from constructing, altering, renovating and/or in any other way alienating and or changing the design of villa no. 5 situated within Karibuni Villas, Mambrui pending the hearing and determination of this suit. Having considered the application and the relation between the parties herein, the Honourable Angote J. then seized of the matter allowed the injunction application on 19th June 2015.

10. In the application before me filed on 8th September 2017, the Defendant now prays that this Court be pleased to strike out the Plaint on the basis that the party named in the Plaint is not an incorporated legal entity, and has no valid claim or locus standi to bring the case over the suit property.

11. On its part, the Plaintiff admits that indeed the Plaint was instituted by mistake in the name of Mambrui Properties Ltd instead of the company's correct name which is Mambrui Real Properties Ltd. They blame the omission of the word "Real" from the name of the Plaintiff herein on their former Advocate who according to them had all documents including the company's Certificate of Incorporation when he filed the case but made a mistake on the name.

12. Order 1 Rule 10(1) of the Civil Procedure Rules states as follows:-

"...the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order that any other person be substituted or added as the Plaintiff in the suit or added as a Plaintiff upon such terms as the Court thinks fit."

13. In addition, Order 1 Rule 10 (2) of the same Rules provides:-

"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as a Plaintiff or a defendant, be struck out, and that the name of any person who ought to have joined, whether as a Plaintiff or a defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit be added."

14. Having considered the pleadings filed herein and the circumstances as demonstrated by the documents filed by both parties I am persuaded that the omission to include the word "Real" in the Plaintiff's name was a bonafide mistake capable of being cured through an amendment. In the circumstances before me, I am not persuaded that the Defendant has made out a case to warrant the striking out of the Plaint or the suit.

15. Accordingly I make the following orders:-

i) The application dated and filed herein on 8th September 2017 is dismissed with no order as to costs.

ii) The Plaintiff is hereby granted 14 days within which to amend its Plaint to reflect the proper parties herein.

iii) The Defendant shall also have 14 days within which to amend his Statement of Defence if need be.

iv) The costs of this application shall be in the cause.

Dated, signed and delivered at Malindi this 28th day of September, 2018.

J.O. OLOLA

JUDGE