



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO. 1196 OF 2004

RANJI KANT NATHOO.....PLAINTIFF

=VERSUS=

EDWARD NTHULI & 4 OTHERS.....DEFENDANTS

RULING

1. This is a classic case of how applications and preliminary objections contribute to delay in finalization of cases. This suit was filed in 2004. The hearing has not taken off because a number of applications have been filed by both the Plaintiff and the second and third defendants. This file has passed through the hands of sixteen judges. Out of six applications filed between November 2004 and March 2016, only two have been determined and the ruling herein will determine the third one. The three remaining ones are all by the Plaintiff. The three applications seek similar orders and the problem could be because the plaintiff has been changing lawyers. The plaintiff is on his fifth advocate.

2. This ruling is in respect of a Notice of Motion dated 4th March 2016 which seeks striking out of the re-amended plaintiff. The grounds for the application are that the suit was filed by a non-existent person; that the suit contravenes section 12 and 13A of the Government Proceedings Act and that the re-amended plaintiff was filed without leave of court or after a long period after leave had been granted. Alternatively, the 2nd and 3rd defendants/applicants want the suit struck out for raising no reasonable cause against them.

3. The plaintiff/respondent has opposed the applicant's application based on a replying affidavit sworn on 17th March 2016. The respondent denies the allegations by the applicants and contends that the application is an attempt to delay the hearing of this suit. The respondent further contends that the suit property was allotted to him by the office of the defunct, Commissioner of Lands. He applied for approval of his development plans which were approved on condition that he had to re-locate the sewer lines which were running across the suit land before he could build. He states that as he waited to have funds to re-locate the power lines, he discovered that the 3rd applicant had moved on to the suit property and started constructing houses on it. He contends that he delayed in re-location of the sewer lines because he did not have money as his monies were held up in two banks which had collapsed.

4. The parties herein were directed to file written submissions. The applicants filed their submissions on 29th April 2016. The respondent chose to adopt his submissions which he had filed on 11th February 2016. These submissions were in respect of a Preliminary Objection which had been raised by the 2nd and 3rd defendants against the suit. The Preliminary objection was withdrawn by 2nd and 3rd defendants on 9th March 2016.

5. I have carefully considered the applicants' application as well as the opposition to the same by the respondent. I have also considered the submissions filed. The issue which emerges for determination is whether the respondent's suit should be dismissed based on the grounds stated by the applicants. The dispute herein relates to a property known as **LR No. 209/4537 at Westlands in Nairobi (Suit Property)**. The respondent contends that he was allotted the suit property on 6th July 1982. He was later issued with a grant on 2nd November 1983. He has since been paying rates.

6. The third defendant/applicant on the other hand claims that he has a grant over the same suit property which grant was transferred to him on 11th July 2007. The third applicant contends that he purchased the suit property from the second applicant who in turn claims to have bought it from the first defendant. It is alleged that the first defendant had a grant which was given to him on 23rd November 2001.

7. One of the grounds upon which the applicants want the respondent's suit struck out is that the re-amended plaintiff was filed without leave of court. I have perused through the court record which shows that an application for re-amendment of the plaintiff was made on 26th October 2005. This application came up for hearing on 29th November 2005 before Justice Mugo. When the Judge started hearing a preliminary objection which had been raised by the 2nd and 3rd defendants, the Judge noticed that the Commissioner of lands and the Attorney General were already parties. At this time the preliminary objection was withdrawn and the application proceeded. There was no opposition to the

application by counsel for 2nd and 3rd defendants. The court proceeded to allow the application for re-amendment and made further orders that the draft re-amended plaint be deemed as having been duly filed and served. The defendants were given 7 days to file their amended defence if any.

8. A further perusal of the court record shows that the plaintiff/respondent filed their re-amended plaint on 7th December 2005. There would have been no need for filing a re-amended plaint because the court had already made an order deeming the annexed draft as duly filed and served. The reason which may have made the respondent to file a re-amended plaint was perhaps to indicate the proper date when amendment was made because the annexed draft which had been deemed to have been duly filed and served bore the date of re-amendment as 26th October 2005. There was also the issue of court fees which had to be paid. I therefore do not find any basis for the applicants' argument that the re-amended plaint was filed without leave or that it was filed in 2007. This ground therefore fails.

9. The applicants contend that there was no compliance with Section 12 and 13A of the Government proceedings Act Cap. 40 Laws of Kenya. Section 12 of the said Act provides that all proceedings against the Government should be brought under the Attorney General. The Attorney General is the 5th defendant in the suit. I do not see how that section was contravened. Section 13A of the Act provides for notice to be given before a suit is filed against the Government. The notice has to contain the requirements set out in Sub Section 2. Sub Section 1 provides that no suit should be filed against the Government unless after expiry of 30 days notice which is given to the Government regarding those proceedings. A perusal of the court record shows that the respondent filed this suit on 5th November 2004. In answer to the applicants' claim that there was no compliance with Section 13A of the Act, the respondent has annexed a notice to the Attorney General dated 4th November 2004.

10. The respondent contends that the suit was filed before expiry of the notice period required but that cannot defeat the suit. The respondent states that the Attorney General entered appearance and filed defence and is not complaining. The applicants cannot complain on behalf of the Attorney General. In as much as I agree with the fact that the suit was filed before expiry of 30 day notice which is required, this cannot lead to dismissal or striking out the suit as that failure did not prejudice the applicants in any way. The court is here to dispense substantive justice and cannot be tied down to procedural technicalities which are discouraged by **Article 159 (2) (d) of the Constitution**, I therefore do not find any merit on this ground which is hereby dismissed.

11. The other ground raised by the applicants is that the plaintiff is non-existent. They contend that the Registrar of persons has confirmed that the plaintiff's name does not exist in their data base. This issue led the respondent to come to court for cross-examination as to the names appearing on his documents. The respondent was cross-examined at length over the variance of names in his documents. He gave a detailed account of the names and explained why they appear in the documents. He explained that Shah is family name. He also explained why the names in payment receipts were different. He said this was because he used to make payment in respect of two properties whose receipt could be issued in a particular name but the plot numbers will always be indicated. He said he is son of Nathoo and that he added the name "**bhai**" to make it Nathoobhai as a sign of respect for his father. He fully explained the names in his birth certificate and identity card as well as the names in the passport. I therefore do not find any basis for finding that the plaintiff is a non-existent person. I proceed to dismiss this ground for lack of merit.

12. The last point to be addressed is whether this suit discloses a cause of action against the applicants. There are two titles in contention. The respondent has title to the suit property. The 3rd applicant has also a title whose origin is traced to the first defendant who allegedly sold the suit property to the second applicant who in turn sold it to the third applicant. The issue of whether the third applicant is an innocent purchaser for value is a matter which can only be addressed in the main trial. The issue of the respondent suing the Commissioner of Lands is a matter which was well taken care of by the transitional provisions of the Land Registration Act. This suit was filed before the amendments to the Law which abolished the office of the Commissioner of Lands. This therefore cannot be used to defeat the respondent's suit. If there is need to amend, that amendment can be done. The respondent has a cause of action against the applicants and his suit cannot be struck out. I therefore find no merit in this ground. All in all, I find that the applicants application lacks merit. The same is hereby dismissed with costs to the Plaintiff/ Respondent.

It is so ordered.

Dated, signed and delivered at Nairobi on this 20th day of September, 2018.

E.OBAGA

JUDGE

In the presence of :

Mr Ingutya for Plaintiff

Hilda : Court Assistant

E.OBAGA

JUDGE