



REPUBLIC OF KENYA

IN THE ENVIROMENT & LAND COURT OF KENYA

AT KERICHO

ELC NO 151 OF 2015

GLADYS KOSKEYPLAINTIFF

VERSUS

BENJAMIN MUTAI.....DEFENDANT

R U L I N G

This Ruling determines the Defendant/ Applicant's application by way of Notice of Motion dated 6th September 2016. In the said application which is brought under Section 1A, 1B, 3A of the Civil Procedure Act, Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules the Defendant /Applicant seeks the following orders:

1. That the matter be certified as urgent and heard on priority basis
2. That the Honourable court be pleased to strike out the Plaintiff's plaint dated 11th August 2010 with costs to the Defendant
3. That any other or further orders be made as the court may deem fit and just
4. That the costs of this application be provided for

The Applicant's application is based on the following grounds:

- A. That the Plaintiff's case against the Defendant raises no cause of action
- B. That the Plaintiff lacks the *locus Standi* to institute the case against the Defendant
- C. That the Plaintiff's action against the Defendant is a claim based on trespass which has since been defeated by efluxion of time
- D. That the issues against the plaintiff's case go to the root of the suit before this honourable court and ought to be disposed of expeditiously
- E. That the Plaintiff's laid-back approach to this matter goes to accentuate that she initiated the suit to abuse the process of this Honourable court , is frivolous and vexatious and therefore should be

disallowed

F. That the Defendant continues to incur irreparable loss and damage should the matter be allowed to linger longer than the many years it has been pending in court

G. That in the interest of justice this matter should be heard and determined expeditiously

The Application is supported by the Affidavit of Titus K. Bittok sworn on the 6th September 2016 and that of the Applicant sworn on 20.09.2016. The Applicant depones that the Plaintiff filed a Plaintiff on 12th August 2010 seeking orders inter alia:

a) An injunction restraining the Defendant, his servants, workmen and /or agents from entering on and/or from erecting or causing to be erected thereon any structures, or from in any way interfering with the plaintiff's use and enjoyment of the plaintiffs said property L. R Number 21880 at Kapkatet Market:

b) An order of eviction from the said premises L.R Number 21880 at Kapkatet Market.

The Plaintiff in her pleadings claimed that the Defendant trespass upon her property and insists that the Defendant continues to trespass on her property. She claims that she was advised of the trespass by a surveyor known as Opiyo & Associates whom she hired to identify her premises.

The Defendant in his Defence denies that he has trespassed onto the Plaintiff's property.

He further alleges that the claim being one founded on trespass, is time barred under Section 4 of the Limitations of Actions Act as it was filed more than three years after discovery of the alleged trespass.

The Defendant further depones that the plaintiff lacks *locus standi* to institute this claim on behalf of the estate of ELIJAH KIMALEL KOSKEY (Deceased) as she did not follow the procedure laid down in the Law of Succession Act.

The Defendant therefore maintains that the Plaintiff's case is frivolous, vexatious and an abuse of the court process. The Defendant further depones that the Plaintiff's suit discloses no cause of action, is scandalous and fanciful and is incurably defective. The Plaintiff should therefore be struck out with costs to the Defendant.

In his submissions, the Applicant's counsel Mr. Bittok stated that the Applicant lacks *locus standi* to institute the suit as she alleges to have instituted it as the Administrator of the estate of Elijah Kimalel Koskey- Deceased based on the Letters of Administration issued on 9/10/2008. The title which has been attached as the basis of the suit is a title under Cap 281 under the name of Elijah Kimalel Koskei issued on 3/8/2005. According to the grant of Letters of Administration, the deceased died on 13/5/2005. In order for this property to form part of the estate of the deceased the Plaintiff must demonstrate that the property was for available to the deceased at the time of his death. In other words, it has to be free property that was available for distribution. Section 3 of the Law of Succession Act describes free property as follows:

"Free property in relation to a deceased person means the property of which that person was legally competent freely to dispose during his lifetime, and in respect of which his interest has not terminated by his death"

Counsel for the Applicant submitted that since the title for the suit property was issued after the demise of the deceased, it could not have been available to form part of the deceased's estate. He further submitted that the Plaintiff failed to state the capacity in which she has instituted the suit. In the circumstances, he submitted that the Plaintiff lacks the locus stand to move the court and consequently the suit ought to be struck out.

On the second limb the Applicant's counsel submitted that the act of trespass complained of happened way back in 2005. He stated that in his opinion, it ought to have been litigated within a period of three years of the discovery of the act of trespass which he claimed is a tort. He cited Section 4 of the Limitation of Actions Act. The Applicant's counsel also submitted that the Plaintiff bases her claim of trespass on a report prepared by a private surveyor, implying that that the said report is not credible as she ought to have engaged a government surveyor. He finally submits that the Plaintiff has not been diligent in prosecuting her case and that in view of this and the foregoing reasons, her Plaintiff ought to be struck out with costs.

In response to the Ground of Opposition filed by the Plaintiff, the Defendant's counsel submitted that the Plaintiff's suit is defective as the property in question was distributed among the plaintiff and three other persons, namely, Raymond Kipkorir, Lillian Chebet and Faith Chepng'eno who ought to have been enjoined in the suit or at least given their consent to the plaintiff to file suit on their behalf.

In his response counsel for the Plaintiff/Respondent, Mr. Maengwe relies on the Replying Affidavit dated 20/9/2016 together with the Grounds of Opposition bearing the same date. He submitted that the Plaintiff's suit is proper as she has described herself at paragraph 3 of the Plaintiff as the beneficial owner and personal representative of the Elijah Kimalael Koskey deceased who is the registered proprietor of the suit property.

He further submitted that the suit was filed in 2010 and the Defendant did not deem it fit to apply to strike out the Plaintiff until seven years later. He submitted that the Defendant in his Defence filed in August 2010 did not give any notice of a preliminary objection to apply for striking out of the Plaintiff and that the application is therefore an afterthought.

Counsel for the Plaintiff submitted that the Plaintiff has *locus standi* by virtue of the fact that she is the widow and administrator of the estate of Elijah Kimalael Koskey- Deceased. He explained that that certificate of Confirmation of Grant only proposes how the property of the late Elijah Kimalael Koskey should be distributed and stops short of stating that pursuant to the said Grant, the beneficiaries all have a right to sue on behalf of the estate of the deceased.

On the issue of the report of the private surveyor, the Plaintiff's counsel submitted that the report is valid as "a surveyor is a surveyor" and should there be any doubt as to the validity of the survey report, the court is at liberty to summon the County surveyor to verify the position in respect of the suit property. In any event, he submitted that the suit had not yet been set down for hearing nor has Order 11 of the Civil Procedure Rules been complied with. It would therefore be premature for the Defendant to discredit the surveyor's report without the benefit of calling witnesses. He submitted that the Defendant admits that there is a boundary dispute between the Plaintiff and the Defendant which ought to be determined at a full hearing. He therefore concludes that the suit is one that ought to be heard on the merits.

The key issues for determination are as follows:

1. Whether the suit for trespass is statute barred according to section 4 of the Limitation of Actions Act
2. Whether the Plaintiff has locus standi to institute the case
3. Whether the suit land forms part of the deceased's estate.
4. Whether the suit should be struck out for disclosing no cause of action.

On the first issue, the suit is founded on trespass which is a tort. Under section 4 of the Limitation of Actions Act, an action founded on a tort must be instituted within three years. However, as the Plaintiff indicates, the trespass is continuous and the Limitation of Actions Act does not come into play. This is supported by the case of **Nguruman Limited V Shompole Group Ranch & 3 Others Civil Appeal No 73 of 2004 reported in 2007 KLR**. Citing Clerk and Lindsel on Torts 16th Edition, paragraphs 23-01the

Court of Appeal stated that:

“Every continuance of a trespass is a fresh trespass in respect of which a new cause of action arises from day to day as the trespass continues”

On the second issue concerning locus standi, the plaintiff has in her plaint stated that she is suing in her capacity as the widow and administrator of the estate of Elijah Kimalel Koskey – Deceased. She has attached a certificate of Grant of Letters of Administration in respect of the estate of Elijah Kimalel Koskey- Deceased. Furthermore in paragraph 3 of the plaint she has described herself as the personal representative and beneficial owner of the estate of Elijah Kimalel Koskey. Locus standi is purely a question of law and should be resolved on priority basis. See the case of **Mary Wambui Munene V Peter Gachuki Kingara and 6 Others Supreme Court Petition No 7 of 2013 (2014) KLR.**

In the instant case, it is my considered view that the Plaintiff’s description in the heading of the Plaint as well as paragraph 3 is adequate and the submission by counsel for the applicant to the contrary is a question of semantics.

On the third issue which raises the question whether the suit property forms part of the estate of Elijah Kimalel Koskey. It has been submitted by counsel for the Applicant that the title in respect of L.R No 21880 (original Number 260) at Kapkatet Market was issued on 3rd August 2005 while the deceased passed away on 13th May 2005 hence the title did not form part of his estate as it was not free property that was available for distribution in accordance with **section 84 of the Law of Succession Act**. Whereas the issuance of a title in the name of a person confers ownership rights to that person, the mere absence of a formal title does not mean that an owner who has validly acquired the land is not the true owner. I take judicial notice that land titling is a process that takes time and it is not unusual for one to own land for which he has no title. In my view the issue of ownership of the suit land herein lies at the core of this suit and can only be determined if the matter goes to full trial.

On the fourth and final issue the Applicant claims that the Plaintiff’s claim against the Defendant raises no cause of action as it is frivolous and vexatious and should therefore be struck out. It is further submitted on behalf of the Applicant that the plaintiff’s suit is an abuse of the process of the court and is scandalous and fanciful.

The principles guiding the court when considering an application for striking out of pleadings are well documented and the law is settled by dint of several legal authorities. I refer to the leading authority of **DT Dobie & Company (Kenya) Ltd V Muchina (1982) KLR** in which Madan JA (as he then was) stated as follows:

“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 the merits of the case for that is the 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” 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.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overreact by considering itself in a bind as to summarily dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by an amendment. If a suit show a mere semblance of a cause of action, provided it can be injected

with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”

The decision of Madan JA in the above case has been consistently followed and is sound law. In the case of **Crescent Construction CO Ltd V Delphis Bank Ltd Civil Appeal No 146 of 2001** the court after quoting the above case further stated:

“However one thing remains clear, and that is, the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the Court must not drive away any litigant however weak his case may be from the seat of justice. This is a time honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter”

In my considered view the plaint herein raises triable issues which can only be determined after a full hearing. It is for the foregoing reasons that I arrive at the finding that the application is not merited and the same is herewith dismissed with costs.

Dated signed and delivered at Kericho this 28th day of February 2017.

JANE M. ONYANGO

JUDGE

In the presence of:

Mr. Kirui for Mr. Bittok for the Applicant

Mr. Maengwe for the Respondent