



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
AT MILIMANI LAW COURTS

ELC.NO. 550 OF 2013

MUKUNYI MWAKAVI.....PLAINTIFF/APPLICANT/
RESPONDENT

JOSPHINE SYOVATA WAMBUA.....2ND
PLAINTIFF/APPLICANT/RESPONDENT

VERSUS

JAMES MWAURA.....1ST
DEFENDANT/RESPONDENT/APPLICANT

BALOZI HOUSING COOPERATIVE SOCIETY LTD.....2ND
DEFENDANT/RESPONDENT/APPLICANT

CITY COUNCIL OF NAIROBI.....3RD
DEFENDANT/RESPONDENT/APPLICANT

R U L I N G

There are two Notices of Motion Applications herein pending determination. The 1st Notice of Motion is dated **10th May 2013** and is brought by the Plaintiffs Applicants against the defendants seeking for following Orders

1. *Spent*
2. *That pending the hearing and determination of this suit an injunction do issue restraining the 1st defendant from putting up illegal structures on L.R No 12422/497 in so far as the same interfere with the plaintiff's peaceful and enjoyable use of the plaintiff's property on LR No. 12422/497 and to the extent that the illegal structures are not authorized by the 2nd and 3rd defendants respectively.*
3. *Spent*

4. ***That a mandatory injunction do issue forthwith directed at the 1st defendant to demolish all the illegal structures on L.R No 12422/498 in so far as the same are unauthorized by the 2nd and 3rd defendants respectively.***

5. ***That cost be provided for.***

The application is premised on the grounds stated on the face of the application and on the Supporting Affidavit of ***Mukinyi Mwakavi***. These grounds are:-

- a. ***That the 1st defendant with the connivance and collusion of the 2nd and 3rd defendants has while constructing on his property registered under L.R No 12422/498 set up illegal structures t hereon which have interfered with the Plaintiff's peaceful and enjoyable use of this property on L.R No. 12422/497 that neighbours the 1st defendant.***

- b. ***That the 1st defendant's actions have adversely affected the plaintiff's rights to free access to clean environment such as light and fresh air and seriously undermined the Plaintiffs privacy and security.***

- c. ***That the Plaintiffs therefore stands to suffer irreparable loss and injury unless the orders prayed for herein are granted.***

- d. ***That the Plaintiffs have a prima-facie case with a very high probability of Success against the defendants as detailed in the plaint filed herein.***

In his supporting Affidavit the 1st applicant, ***Mukinyi Mwakavi*** averred that the Plaintiffs are the registered proprietors of all that parcel of Land and house registered as ***L.R No 12422/497***, situated in Balozi Estate, Muthaiga North. Further that the Plaintiff purchased the property from the 2nd Defendant with condition that any residential house to be set up shall be certified and must comply with 2nd Defendants by-law in order to have an organized and orderly estate. That the 1st Defendant is the Plaintiffs neighbour and his property is adjacent to the Plaintiffs property being ***L.R No 12422/498*** and therefore the 1st Defendant is also bound by the controlled development guidelines and rules set by the 2nd Defendant. Further that the 1st Defendant has breached the said guidelines and is constructing on his property which property has encroached on the applicants' property by way of erecting an illegal extension thereby interfering with the applicants' right to clean environment and privacy. He urged the court to allow his application.

This Notice of Motion is opposed by the 1st Defendant ***James Mwaura***, who swore his Replying Affidavit on ***3rd June 2013***, and Supplementary affidavit on ***8th July 2013***. He averred that this application is brought out of malice and that the 3rd Defendant has approved his development plans and that his construction is not illegal. He urged the court to dismiss the instant Notice of Motion.

The second Notice of Motion is dated **7th October 2013**, and is brought by the 1st Defendant herein **James Mwaura** under Section 3A of the Civil Procedure Act and Order 2 Rule 15(1), Order 13 Rule 2 of the Civil Procedure Rules and all other enabling provisions of law.

The 1st Defendant/Applicant has sought for the following orders:-

I. That the Plaintiff's (Respondents) Plaint filed on 10th May 2015 be struck out against the 1st Defendant.

II. That costs of the application be provided for

The application is premised on the grounds stated on the face of the application.

These grounds are:-

- 1. That the Plaintiffs/Respondents filed a suit for Nuisance on 10/05/13 and an Application for injunction on 10/05/13 all of which were directed at 1st Defendant/Applicant.**
- 2. That since filing of the latter, the Plaintiffs/Respondents has taken no step in prosecuting either the main suit or the Application filed thereunder including entering physical appearance in Court.**
- 3. That the 1st Defendant/Applicant had sought approval for building plans from the 3rd Defendant which fact the Plaintiffs/Respondents were aware of, being the neighbours of the Applicants.**
- 4. That the Plaintiffs'/Respondents cause of action is predicated on the premise that the 1st Defendant/Applicant is undertaking a Controlled Development without the requisite approved Building Plans from the 2nd and 3rd Defendants which Approved Building Plans from the 3rd Defendant (which is the overall Authority and to which any building rules by the 2nd Defendant are subject) have been presented to Court through a Supplementary replying Affidavit dated 08/07/2013 and:**
- 5. That in the circumstances it is clear that the Plaintiffs/Applicants Main Suit and his Application for an injunction are baseless, perpetuated by malice and revenge.**
- 6. That the Plaintiff's Plaint is a sham and does not disclose no reasonable cause of action in law against the 1st Defendant**
- 7. That the Plaint is frivolous, vexatious and intended to prejudice, embarrass, and harass the 1st**

Defendant/Applicant and is in abuse of Court process.

8. That for the foregoing reasons this Honourable should grant the 1st Defendant/Applicant prayers.

Though this application was served upon the Plaintiffs and 2nd and 3rd Defendants, the same is not contested as none of the above parties have filed their Replies.

On **24th November 2014**, the Court directed that the Notice of Motion dated **10th May 2013**, be canvassed by way of Written Submissions. The Plaintiffs/applicants were granted a period of 14 days to file and serve their written submissions while the Defendants/Respondents were granted 14 days to file theirs after service. The matter was scheduled for hearing on 12th February 2015. On 12/2/2015, the Plaintiffs/applicants had not filed their said written submissions and this Court extended time for filing of the said Written submissions to **16th April 2015**. However on **16th April 2015**, when the matter came up for mention, the Plaintiffs/Applicants and their advocate were not in court. The file was subsequently returned to the Registry with no further orders.

However on **7th May 2015**, the Law Firm of **Gitonga Kinyanjui & Company Advocate**, for 1st Defendant fixed the matter for hearing of their Notice of Motion dated **7th October 2013** on **20th July 2015**. This matter was adjourned to **21st September 2015**, when the Plaintiffs were granted time to file a Replying Affidavit to the Notice of Motion dated **7th October 2013**. It is clear that the Plaintiffs did not file any Replying Affidavit and the Court directed the 1st Defendant do file written submissions to his Notice of Motion dated **7th October 2013**.

This Court has only the benefit of the written submissions from the 1st Defendant. It is evident that the Plaintiffs/applicants filed their Notice of Motion dated **10th May 2013**. The said application was opposed and Court directed the Plaintiffs to file their written submissions to canvass the said application and advance their position. However, the Plaintiffs/applicants did not file their respective submissions. The court finds that the Notice of Motion dated **10th May 2013**, is not prosecuted and consequently, the Court finds the said application is not merited and it is dismissed entirely with costs to the 1st Defendant herein.

This Court will now turn to the 2nd Notice of Motion dated **7th October 2013**, seeking to have the suit struck out against the 1st Defendant.

The application is premised under Order 2 Rule 15 of the Civil Procedure Rules which provides that:

“At any stage of the proceedings, the Court may order to be struck out or amended any pleadings on the ground that:-

- (a). It discloses not reasonable cause of action or defence in law.**
- (b). It is scandalous, frivolous and 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.**

The application is not opposed. However, this being an application for striking out a Plaint or suit, the

Court has to analyze the facts and evidence to arrive at a reasoned conclusion on whether the said application is merited or not.

The power to strike out pleadings is discretionary one and the Court has to exercise this discretion judicially see the case of *Nguruma Ltd Vs Shompole Group Ranch & others Civil Appeal No 373 of 2004 (2007)* where the Court held that:

“The power to strike out the pleadings is a discretionary one. It must be exercised with greatest care and caution and this comes from the realization that the Court must not drive away any litigant however this case may be from the seat of justice. At the same issue, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is non-starter”.

Further, this Court will also be guided by the findings in the case of *DT Dobie & Co.(K) Ltd Vs Joseph Mbaria Muchina & Another, Civil Appeal No 37 of 1988*, where the Court held that:-

“A pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. The court must see that the Plaintiff has got no case at all, either as disclosed in the statement of claim or in such affidavit as he may file with view to amendments and must not dismiss an action merely because the story told in the pleadings was highly improbable and one which it was difficult to believe could be proved----.

A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal”.

The 1st Defendant has averred that the Plaintiffs claim is predicated on the fact that he did not have approvals from the 3rd Defendant. It was his submissions that he did actually obtain approved development plans for the 3rd Defendant as evident from the annexures attached to his Supplementary Affidavit dated **8th July 2013**. He urged the Court to find that the Plaintiffs case has no base and should be struck out. The Plaintiff has not opposed that averment and submissions.

However, the Court has considered the Plaintiff and noted that apart from claiming that the 1st defendant did not obtain the relevant building approvals from the 3rd Defendant, it is also alleged that the 1st Defendant has breached the By-Laws and conditions laid down by 2nd Defendant and also encroached on the plaintiffs property, privacy and hindered their free movement. The Plaintiff pleadings therefore disclose a reasonable cause of action and this Court cannot hold that it is hopeless and that it plainly and obviously discloses, no reasonable cause of action and is so weak as to be beyond redemption (*see DT Dobie & Co (K) Ltd Vs Joseph Mbaria Muchina and another, Civil Appeal No 37 of 1978*).

However, the 1st Defendant has submitted that the suit has abated and that the Plaintiff should be struck out as no Summons have been taken out. The 1st Defendant relied on Order 5 Rules 1 & 2 of the Civil Procedure Rules to support its argument. The said section of the law reads as follows.

Order 5 Rule 1

“when a suit has been filed, summons shall issue to the defendant ordering him to appear within the time specified therein”.

The Court has perused the Court file and noted that indeed the Plaintiffs have not taken out summons and if summons have not been taken out, then the Defendants have not been served with the same requiring them to enter appearance. The 1st Defendant/applicant herein relied on the case of *Halima Kasi Tonui & 33 others Vs Board of Trustees Teleposta Pension Scheme Lloyd Masika Limited (2014) eKLR*, where the Plaintiff was struck out for reason among others that Summons to Enter Appearance had not been served upon the Defendants 24 months after filing of the Plaintiff, contrary to mandatory requirement under the Civil Procedure Rules.

The Court has also considered the findings in the case of “*Jairo Angote Okonda Vs Kenya Commercial Bank Ltd, Civil Appeal No 216 of 1999*” where the court held that:-

“where summons are not served within the prescribed period, the suit abates----- Failure to serve summons to enter appearance within the prescribed period results in the suit abating----”

The Court has noted that the Plaint was filed on 10th May 2013, and no summons were extracted or collected within the stipulated time as provided by Order 5 Rules 6 which read:

“Every summon except where the court is to effect service shall be collected for service within thirty days of issue or notification whichever is later, failing which the suit shall abate”.

By the time of filing this application on **7th October 2013**, it was well after a period of 30 days, since the suit was filed. The summons had not been collected and there was no extension of time was given by the Court. Consequently, this Court finds as provided by the law, that this suit stands abated for failure to collect the summons and serve them within the prescribed time.

As a consequence thereof, the Court finds that the suit herein has abated and accordingly, the Plaint is struck out accordingly with costs to the 1st and 3rd Defendants who entered appearance and filed Defence.

It is so ordered

Dated, signed and delivered at Nairobi this 23rd day of JUNE, 2017

L GACHERU

JUDGE

23/6/2017

In the presence of the

Hon. Gacheru Judge

Court Assistant- Hilda

Plaintiffs/Applicants/Respondents Mr. Muchiri holding brief for Mr. Muli

1st Defendant/Respondent/Applicant – No appearance though served with Notice

2nd Defendant/Respondent – No appearance

3rd Defendant/Respondent – No appearance

COURT: Ruling read in Open court in the presence of the above stated advocate.

L GACHERU

JUDGE

23/6/2017