



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.75 OF 2016

PRAFULLA ENTERPRESES LIMITEDPLAINTIFF

VERSUS

KATANGI DEVELOPMENT LIMITED1ST DEFENDANT

NORLAKE INVESTMENTS LIMITED.....2ND .DEFENDANT

J.O. JOSHAH T/A NYALUOYO AUCTIONE.....3RD DEFENDANT

RULING

1. **Prafulla Enterprises limited**, the Plaintiff, commenced this suit through the plaint dated 11th April 2016 against **Katangi Development Limited, Norlake Investment Limited and J.O. Josiah T/A Nyaluonya Auctioneers**, hereinafter referred to as 1st to 3rd Defendants respectively. The suit is filed through M/S Otieno, Ragot & Company advocates and seeks for permanent injunction in respect of **Kisumu Municipality/ Block 7/428**, refund of Ksh.6,787,400/= plus costs. The Plaintiff also filed the notice of motion dated 11th April 2016 for temporary injunction and a consent was entered on 20th April 2016 with counsel for 1st and 3rd Defendants, M/S Wasuna & Company Advocates, to maintain the status quo and that the parties to comply with **Order 11** of Civil Procedure Rules.

2. The notice of motion dated 15th August 2016 was then filed by 1st and 2nd Defendants through M/S Wasuna & Company Advocates. It seeks to have the Plaintiff's suit struck out with costs. The notice of motion is based on the ten grounds summarized as follows:

- The issues raised in this suit were directly and substantially in the issue in previous proceedings between the 1st Plaintiff and 2nd Defendant in Kisumu H.C.C.C. No.33 of 1999 and Kisumu C.C.A No.117 of 2006.
- That the issues raised in this suit have been fully heard and
- determined by the High Court and the Court of Appeal in the above two previous cases and the Plaintiff's claim is therefore res judicata.
- That the evidence the Plaintiff intends to rely on is similar to the one in the previous suits and in the alternative that evidence was available before and during the previous proceedings.
- That the Plaintiff has been vexing the 1st and 2nd Plaintiff by filing Business Rent Tribunal reference in 1993, Kisumu H.C.C. No.396 of 1994, 145 of 1997, 336 of 1999, Kisumu H.C. MISC. Application No.145 of 1998, Kisumu C.A. CA. No.117 OF 2006 and this suit.
- This suit is statute time barred, an abuse of the process of the court and should be struck out.

The application is supported by the affidavit sworn by Mitesh Fulchand Shah on the 15th August 2016.

3. The application is opposed by the Plaintiff through the replying affidavit sworn by Ramesh Madhavji Karia, on the 10th November 2016.
4. The application came up for hearing on the 23rd February 2017 when Mr. Shah, leading counsel for the 1st Defendant, and Mr Ragot, counsel for the Plaintiff made their submissions.
5. The following are the issues for the determination by the court;
 - a) Whether the issues raised in this suit have been decided upon by a court of competent jurisdiction.
 - b) Whether the suit is statute time barred.
 - c) Whether the suit should be struck out.
 - d) Who pays the costs.
6. The court has carefully considered the grounds on the notice of motion, affidavit evidence, the extensive written and oral submissions by the parties' counsel and come to the following determinations:
 - a) That the Court of Appeal in Kisumu C.A NO.117 OF 2006, **Prafulla Enterprises Limited –V- Norlake Investments Limited and The Attorney General upheld** the decision of the High Court in Kisumu H.C.C. No.336 of 1999 that Prafulla Enterprises Limited had not proved their case on a balance of probabilities. That in that case Prafulla Enterprises Limited sought for fifteen reliefs marked (a) to (o). That prayers (a) to (e) were for declaratory orders the plot they bought, and on which they have been conducting business on, is the one fronting Obote road and that therefore the R.I.M. map indicating otherwise was inaccurate, null and void. That the court found that the Plaintiff had failed to prove fraud on the part of the 1st Defendant and dismissed the suit.
 - b) That though there has been several suits filed by the Plaintiff in their efforts to sort out the issue of the ground position of **Kisumu Municipality/Block 7/428** among others as particularized in the pleadings filed herein and submissions by both counsel, it is the first time the position contained in the letters dated 31st August 2015 and 29th September 2015 by Director of Surveys and District Land Registrar Kisumu East & West respectively, has been introduced into the proceedings.
 - c) That what the Plaintiff seeks in this proceedings is a permanent injunction against the Defendants from interfering with their use of land parcel Kisumu Municipality/Block 7/428 and refund of the monies paid out as rent to the 1st and 2nd Defendants on the hitherto erroneous position that the plot the Plaintiff has been operating from was theirs. That in view of the contents of the two letters referred to in (b) above, the issues in this suit requires to go to full hearing for a determination on merit to be made and hopefully, bring an end to the dispute as to the ground position of the Plaintiff's plot Kisumu **Municipality/Block 7/428**.
 - d) That as the prayers sought in this suit and the Defendants are not entirely the same as in the previous suits, including Kisumu H.C.C.C. NO.336 of 1999 and Kisumu C.A.C.A No.117 of 2006, the court finds and hold that the notice of motion dated 15th August 2016 is without merit.
 - e) That though Norlake Investments Limited, the 2nd Defendant, were indicated to be the 2nd Applicant in the notice of motion dated 15th August 2016, there is no appearance entered by or on their behalf to date. That the memorandum of appearance dated 18th April 2016 and filed in court on the 19th April 2016 by M/S Wasuna & Company Advocates was for the 1st and 3rd Defendants only.
 - f) That in view of the foregoing, the notice of motion dated 15th August 2016 is without merit and is

dismissed with costs.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF JUNE .2017

In presence of;

Plaintiff Absent

Defendant s Absent

Counsel Mr. Otieno for Ragot for Plaintiff

Mr. Bagando for Wasuma for 1st and 3rd Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017

14/6/2016

S.M. Kibunja Judge

Oyugi court assistant

Mr Otieno for Ragot for Plaintiff

Mr Baganda for Wasuna for 1st and 2nd Defendants

Court: Ruling dated and delivered in open court in presence of Mr. Otieno for Mr. Ragot for the Plaintiff and Mr. Baganda for Wasuna for 1st and 3rd Defendants.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/6/2017