



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELC SUIT NO. 269 OF 2010

JOHN SIMON NJENGA NGIGI.....PLAINTIFF/RESPONDENT

VERSUS

TABITHA NYAWIRA WAMATHAI.....DEFENDANT/APPLICANT

RULING

What is before me is the defendant's Notice of Motion application dated 20th February 2014 brought under among others, Order 51 Rules 1 and 10 and Order 2 Rules 15(1)(b)(c) and (d) of the Civil Procedure Rules seeking the following orders:

1. That the suit herein be dismissed and or struck out
2. That cost of this application be borne by the plaintiff/respondent.

The application was heard by way of written submission.

Defendant's/Applicant's case:

The defendant relied on the grounds set out on the face of the application and on her supporting affidavit sworn on 20th February 2014 in support of the application. The defendant averred that the plaint dated 2nd June 2010 is defective and that the reliefs sought therein cannot be granted by the court since the plaintiff has not referred to the parcel of land in dispute by its distinct land reference number. The defendant averred that the plaintiff had filed a Notice of Motion application dated 18th December 2012 in which he sought to change the substratum of this suit by introducing into the suit many other plots which he claimed to be originating from L.R NO/RUIRU/EAST BLOCK 1/(GITHUNGURI)/1423. The defendant averred that the said application has no basis as it is grounded on the present suit which is a non-starter. The defendant averred that in the said application, the plaintiff admitted that the plots sought to be introduced in the case are in the possession of third parties who have not been joined in this suit. The defendant averred that in his plaint, the plaintiff referred to land parcel No. 1423 as the suit property yet the same had been subdivided into several plots. The defendant averred further that the plaintiff had not taken necessary steps with a view to prosecuting this suit. The defendant averred that the plaintiff had neither filed witness statements, bundle of documents nor agreed issues. The defendant urged the court to dismiss the plaintiff's suit with costs.

The Plaintiff's/Respondent's response:

In a replying affidavit sworn on 3rd February 2015 and filed in court on 4th February 2015, the plaintiff averred that she is the registered owner of a parcel of land known as RUIRU/EAST BLOCK

1(GITHUNGURI)1423("the suit property"). The plaintiff annexed to his affidavit a copy of the title deed for the suit property as 'JSNN1'. The plaintiff averred that he brought this suit to stop the defendant from committing acts of trespass on the suit property. The plaintiff averred that he is still the registered owner of the suit property and annexed a copy of the extract of the register of the suit property as 'JSNN2'. The plaintiff averred that the alleged subdivisions referred to in the defendant's application relate to a separate title known as RUIRU/EAST BLOCK 1 1423 which is in the name of the defendant. The plaintiff annexed a copy of the extract of the register of RUIRU/EAST BLOCK 1 1423 as 'JSNN3'. The plaintiff averred that the title referred to by the defendant is different from the title of the suit property. The plaintiff averred that the register for the defendant's title RUIRU/EAST BLOCK 1 1423 was opened on 11th September 2003 and that the register for the suit property, RUIRU EAST BLOCK 1(GITHUNGURI) 1423 was opened on 8th October 1996. The plaintiff averred that it was not necessary for him to mention the defendant's title or any of its subdivisions in this suit as his concern was only limited to the suit property which is still registered in his name and which has not been subdivided. The plaintiff stated that the extract of the register which he has exhibited shows that the suit property had not been subdivided and that attempts to subdivide the same is what prompted the suit herein. The plaintiff denied having lost interest in the suit. The plaintiff contended that he could not list the suit for hearing due to pending interlocutory applications filed by the defendant.

Determination:

As I have stated earlier, the defendant's application was brought under Order 51 Rules 1 and 10 and Order 2 Rules 15 (1) (b), (c) and (d) of the Civil Procedure Rules. Under Order 2 Rules 15 (1) (b), (c) and (d) of the Civil Procedure Rules, the court has a discretion to strike out a pleading on the grounds that it discloses no reasonable cause of action or defence or that it is scandalous, frivolous or vexatious or that it may prejudice, embarrass or delay the fair trial of the action or that it is otherwise an abuse of the process of the court. The defendant has sought the striking out of the Plaintiff filed herein by the Plaintiff on the grounds that; the Plaintiff is scandalous, frivolous or vexatious, the same may prejudice, embarrass or delay the fair trial of this suit and that, the same is otherwise an abuse of the process of the court. In view of the draconian nature of this remedy, it has been held that the court's power to strike out pleadings should be exercised with great circumspection and only in the clearest of cases. See, the case of, Chatte vs. National Bank of Kenya Ltd. Civil Appeal No. 50 of 1996 (unreported). See also the case of, D.T. Dobie & Company (K) Ltd. vs. Joseph Mbaria Muchina & Another, Civil Appeal No. 37 of 1978[1982]KLR 1, where Madan J.A stated as follows regarding the exercise of the power to strike out pleadings;

"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment."

In the case of, J.P. Machira vs. Wangethi Mwangi, Court of Appeal, Civil Appeal No. 179 of 1997(unreported), Omolo J.A, rendered himself as follows on the issue of striking pleadings;

" I do not think the unfettered power in the courts to allow amendments at any stage is to be used to enable the parties to create all sorts of fanciful defences in the course of litigation. Nor do I understand the decision of this court, particularly that of Madan J.A in the case of D.T.Dobie & Company(Kenya) Ltd. vs. Joseph Mbaria Muchina & another, Civil Appeal, No. 37 of 1978(unreported) to mean that no pleading could ever be struck out even where it is patently clear that no useful purpose could ever be served by a trial on merits.....I agree that these powers are drastic and as the court said.....the powers are to be exercised with great caution and only in the clearest of cases. But once such caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on the merits, the court is perfectly entitled to strike out a pleading for as I have said, there is no magic in holding a trial on the merits particularly where it is obvious to everyone that no useful purpose would be served by it."

In the book, Pleadings: Principles and Practice by Sir Jack Jacob and Iain S. Goldrein, a pleading or an action is said to be frivolous when it is without substance or unarguable. Examples of pleadings which are frivolous are those which are put forward to waste the court's time and those which cannot possibly

succeed. On the other hand, a vexatious pleading or action is defined in the said book as a pleading or action which lacks bona fides, is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Borrowing still from the same book, a pleading or action is said to be tending to prejudice, embarrass or delay fair trial when; it is ambiguous or unintelligible, when it states immaterial matter and in the process raises irrelevant issues, when it contains unnecessary or irrelevant allegations and when it involves a claim or defence which a party is not entitled to make use of. Lastly, an action which is an abuse of the process of the court is defined in the said book as one which is pretenceless or absolutely groundless.

It is on the foregoing principles that the defendant's application herein would be considered. The question that I need to answer is whether this is an appropriate case in which the court should exercise its discretion to strike out the Plaintiff. In answering this question, I would need to consider whether the Plaintiff filed herein is frivolous or vexatious, whether it is likely to embarrass or prejudice the fair trial of this suit or whether it amounts to an abuse of the process of the court. In addition, I would need to consider whether any purpose would be served by allowing the Plaintiff's claim herein to proceed to hearing. From what I have stated above, there is no doubt that the defendant's application herein has no merit and must fail. In his plaint dated 2nd June 2010, the plaintiff averred that he was the owner of the suit property and that sometimes in the year 2009, the defendant entered the suit property and purported to sub-divide it into several portions for sale. The plaintiff sought a permanent injunction restraining the defendant from trespassing onto the suit property and from interfering with the plaintiff's quiet and peaceful enjoyment thereof. In her defence, the defendant contended that she was the owner of a parcel of land known as LR.No. Ruiru/Ruiru East Bolck1/1423 and that she had subdivided the said parcel of land and sold portions thereof to third parties. The defendant contended that LR.No. Ruiru/Ruiru East Bolck1/1423 had never been owned by the plaintiff and urged the court to dismiss the plaintiff's suit.

On the material before me, it is clear that the plaintiff was at all material times the owner of the parcel of land known as LR No. Ruiru/East Block 1(Githunguri)/1423("the suit property"). The register for this parcel of land was opened on 28th October 1996 and the Plaintiff was registered as owner of the said parcel of land on the same date. The material on record shows that the plaintiff is still the owner of the suit property. As the owner of the suit property, the plaintiff has a right to maintain an action against trespassers on the suit property. I am not satisfied that the plaintiff's suit is frivolous vexations and an abuse of the process of the court. It is not clear whether the suit property and LR. No. Ruiru/Ruiru East Bolck1/1423 which is owned by the defendant is one and the same parcel of land. I have noted that the register of LR. No. Ruiru/Ruiru East Block 1/1423 was opened on 11th September 2003 and that the defendant was registered as the owner of the property on 19th January 2009 that is a period of about 13 years after the registration of the suit property in the name of the plaintiff. If the suit property and LR. No. Ruiru/Ruiru East Block1/1423 are one and the same parcel of land on the ground then, the plaintiff's title over the same seems to be the first in time and should take precedence over the defendant's title. The fact that the plaintiff and the defendant have titles for the same parcel of land does not render the plaintiff's suit defective or unmeritorious. It will be for the court to determine at the trial as to which of the two titles is valid. The court will at the same time determine the validity of the purported subdivision of LR.No. Ruiru/Ruiru East Block1/1423. The purported subdivision of LR.No. Ruiru/Ruiru East Block1/1423 does not therefore render this suit which seeks to protect the plaintiff's rights over the suit property incompetent or a non-starter as claimed by the defendant. The defendant had also sought the striking out of the suit herein on the ground that the plaintiff has lost interest on the same. Again, I find no merit on this ground. From the record, it is clear that the plaintiff is not to blame for the delay in the hearing of this suit.

In the final analysis, it is my finding that the defendant's application dated 20th February 2014 lacks merit and the same is accordingly dismissed with costs to the plaintiff.

Delivered and Signed at Nairobi this 26th day of July, 2017

S. OKONG'O

