



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT 467 OF 2011

MZURI MALAU MLAI

JUMAA KOMBE CHARO

PETER K. KALAMA

JEFWA KAZUNGU KALUTE (Suing for his own and on behalf of Miritini Redeemed Gospel Church)

TRUSTEES OF REDEEMED GOSPEL

CHURCH INCORPORATED.....PLAINTIFFS/APPLICANTS

VERSUS

BLUE HORIZON PROPERTIES LIMITED.....1ST DEFENDANT

COUNTY GOVERNMENT OF MOMBASA.....2ND DEFENDANT

NATIONAL LAND COMMISSION.....3RD DEFENDANT

RULING

1. This is the Notice of Motion dated 28TH July 2016. It is brought under Order 2 Rule 15 (a) (b) and (d) of the Civil Procedure Rules 2010, Section 3A, 63e of the Civil Procedure Act., and all enabling provisions of the law.

2. It seeks orders that;

- a. The plaintiff's plaint herein be struck out.**
- b. Consequently this entire suit be dismissed.**
- c. Costs of the suit be awarded to the 1st defendant/applicant.**

3. The grounds relied upon are on the face of the application;

- a. That the suit herein does not disclose a reasonable cause of action in law or**

b. The suit herein is scandalous, frivolous or vexatious or

c. The suit herein is otherwise an abuse of the process of court.

d. That the plaintiffs herein have never held a lease or a letter of allotment for the government over the suit land herein

e. That the plaintiffs herein do not have a single document to prove their case

f. That the plaintiffs herein have not tendered any document in court to prove their allegations as particularised at paragraph 7 of the further amended plaint.

g. That the plaintiff herein have not tendered any documents in court in support of their allegations of fraud against the defendants.

h. That the 1st defendants' title to the suit property herein was legally and procedurally acquired as evidenced by the list of documents herein filed in court on 30th September 2015.

i. That the 1st defendant herein is a total stranger to the entire claim herein and therefore the same has no factual and legal basis nor does it have any effect on the 1st defendant's legal title to the suit property herein.

j. That this suit is incompetent, bad in law, scandalous and otherwise an abuse of the court process for offering the provisions of section 24,25, 26, 27 and 28 of the Land Registration Act, Number 3 of 2012, Sections (1) (a) and 7 of the Land Act Number 6 of 2012, Article 40 and 64 of the Constitution, and the same ought to be struck out and/or dismissed with costs.

k. The suit herein is subversive to the judicial process and the administration of justice.

l. That the suit herein inept hollow, hopeless and nonstarter in law and craving to be struck out and dismissed forthwith.

4. The application is supported by the affidavit of Abdulbasit Saleh Muhsim a director of the 1st defendant sworn on the 28th July 2016.

5. The application is opposed by the plaintiffs. The 2nd defendant's Counsel stated that they did not wish to participate in the application dated 28th July 2016 given that the issues were between the plaintiff and the 1st defendant.

6. On 28th February 2017 it was agreed by the plaintiff's counsels that the application be canvassed by way of submissions. I have considered the grounds upon which the application is based. I have also perused the plaint and defence. I have also considered the submissions filed. The issue for determination is whether this suit ought to be struck out under order 2 Rules 15 (a)(b) and (d) of the Civil Procedure Rules.

7. The plaintiffs/respondents have put forward the case of **OF D.T. DOBIE & COMPANY (K) LIMITED -VS- MUCHINA (1982) KLR** where the then madam J. A enunciated the principles applicable in considering whether or not to strike out pleading. The judge cited the case of **WENLOCK -VS- MOLONEY (1965) 1 WLR 1238** and states as follows; "this summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts for the case in order to see whether the plaintiff really has a cause of action. To do this is to usurp the position of the trial judge and to produce a trial of the case in chambers on affidavits only without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to be an abuse of the court and not a proper exercise of that power". Madan JA added "No suit ought to be

summarily dismissed unless it appears so hopeless, that it is plainly and obviously so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action provided it can be injected with a real life by amendment it ought to be allowed to go forward for a court of justice ought not to act in darkness without full facts of the case before it.” It is the plaintiff/respondents. Contention that this case ought to go full trial as it is not hopeless.

The 1st defendant in the other hand put forward the cases of **J.P. MACHIRA VS- WANGECHI MWANGI AND NATION NEWSPAPERS CA CIVIL APPEAL NO.179 OF 1997** and **PAOLO MUIRU –V- GIANI BATISTA MURRI AND ANOTHER CA CIVIL APPEAL NO 59 OF 1999**. In a nutshell the 1st defendant’s contention is that the suit herein is so hopeless and letting it go to full trial will be a wasted of the court’s time.

9. Order 2 Rule 15 (2) states; “ at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that

- a. It discloses no reasonable cause of action or defence in law; or**
- b. It is scandalous, frivolous or vexatious or**
- c. It is otherwise an abuse of the process of court and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.”**

Article 50 (1) of the constitution states; “Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body” I find that the plaintiff’s case ought to be heard on its merits. They claim they have been on the suit land for many years.

10. Article 159 (2) of the Constitution states; “in exercising judicial authority the court and tribunals shall be guided by the following principles-

- a. ,
- b. ,
- c. ,
- d. Justice shall be administered without undue regard to procedural technicalities”

11. I am alive to the above principles. I find that the plaintiffs ought to be given the opportunity to have their case heard on its merits. All in all I find that the 1st defendant has failed to satisfy this court that the plaintiff’s case is so hopeless to warrant the court to strike it out. I find that the application herein has no merit and the same is dismissed with costs to the plaintiff/respondent.

Orders accordingly

Dated and signed on the 11th day of July 2017 at Mombasa.

L. KOMINGOI

JUDGE

11/7/17

Ruling dated and delivered in open court on the 11th day of July 2017 in the absence of parties duly informed.

L. KOMINGOI

JUDGE

11/7/17