



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL CASE NO 162 OF 2007

THE BOARD OF GOVENORS CHANGAMWE SEC SCHOOL.....PLANTIIF

VERSUS

THE COMMISSIONER OF LANDS.....DEFENDANT

THE ATTORNEY GENERAL.....DEFENDANT

AND

TURF DEVELOPERS LIMITED.....APPLICANT

RULING

1. The 3rd defendant Turf Developers Ltd moved this court under the provisions of order 1 Rule 10 (4), Order 2 Rule 15 (1)(a), (b), (c), (d) of the Civil Procedure Rules and Section 1A, 1B, and 3A of the Civil Procedure Act in its application dated 11th April 2016 seeking for orders that:

- a) The Plaintiff's suit be struck out and or dismissed.**
- b) The Plaintiff be ordered to pay cost of the suit and the application.**

2. The Application is supported by the grounds listed on the face of the application inter alia that the plaintiff/respondent failed to comply with the earlier order given on 30th October 2015 by failing to amend the plaint and serve the applicant with summons to enter appearance. Secondly that the plaintiff having filed a declaratory suit has withdrawn the declaratory reliefs under prayer (a) and (b) in the plaint hence no suit is pending before this court. Lastly that the plaint discloses no reasonable cause of action against the Defendants including the 3rd Defendant. Therefore the same ought to be dismissed for being scandalous, vexatious and/or frivolous.

3. The plaintiff/respondent opposed the application by filing grounds of opposition dated 22nd April 2016. It listed these four grounds:

- i. That application is a contradiction as it seeks to dismiss a suit which it alleges to have been dismissed.**
- ii. The application is bad in law and an abuse of the Court Process.**
- iii. The application is incompetent.**

iv. The Applicant has not filed a defence.

4. The 3rd Defendant and the plaintiff filed their respective submissions in arguing the motion and the same were highlighted on 26th April 2017. The 3rd Defendant/Applicant submitted that the decree of 9th December 2009 having been set aside, it was incumbent upon the plaintiff to amend the plaint to join the applicant as a defendant in accordance with the provisions of Order 1 Rule 10 (4) of the Civil Procedure Rules. That once the amendment was done, the applicant would be served with Summons to enter appearance and the amended plaint to enable them file their defence. Therefore failure to do the amendment is a disobedience of the Court Order issued on 16th January 2016. To support this submission, the applicant cited the case of **JOHN KAMUNYA & ANOTHER -VS- JOHN NGINJYI MUCHURI & 3 OTHERS (2015) eKLR** pages 18 and 19.

5. The applicant submitted further that the plaintiff having withdrawn **prayer (a) and (b) of the plaint** also resulted in the withdrawals of **prayers (c)-(e)** which are merely consequential prayers. That their application is not contradictory and the same ought to be allowed. In rebutting the applicant's submissions, the plaintiff submitted that Rule 10 (4) does not specify a time period in which a plaint may be amended after an order of the Court. That this is a matter that can be taken up during case conference and failure to amend is not critical. Secondly that the applicant cannot apply to strike out a suit for which they are not yet parties to. Thirdly that the application is incompetent for failing to adduce evidence by way of affidavit. The plaintiff urged the Court to dismiss the application.

6. The provisions of Order 1 Rule 10 (4) do not give penalties for non-compliance with the rule. Therefore non-compliance only cannot be held to stand alone as fatal and/or a ground for striking out the suit. In any event no proceedings have taken place since the order that allowed the setting aside of the *ex parte* decree. The same is therefore distinguishable from the reference quoted at pages **18/19** in the case of **John Kamunya supra**. The non-compliance herein can be cured by this Court directing the Plaintiff to do so within a specified timeline. As was held in the case of **D.T. DOBIE Kenya Limited VS MUCHINA LTD (1982) KLR 1** that an order of striking out should only be granted where the defect cannot be cured even by amendment. If I allow the application on this ground, the same would contravene the precedence set by the Court of Appeal in the above case and the provisions of **Article 159 (2)(d) of the Constitution** that requires that justice shall be administered without undue regard to procedural technicalities.

7. The second issue for determination is whether the suit discloses any reasonable cause of action following the withdrawal of prayer (a) and (b) of the plaint by the plaintiff. The prayers that were withdrawn were as follows:

(a) A declaration that the allocation of Public Utility Land to an individual was and is illegal and null and void

(b) A declaration that the plaintiff being a Public Institution has a better title than the individual allocated.

8. The question this Court seeks to answer is whether the remaining prayers were all consequential to grant of prayers (a) and (b) above. Prayers:

(c) "an order cancelling and revoking Grant No.CR.28149 plot No.MN/VI/3458 Mombasa issued by the 1st defendant.

(d) Such other or further relief which the honorable Court deem fit to grant.

(e) Costs and interest.

9. I do agree with the 3rd Defendant that prayer (d) and (e) are consequential prayers. However my reading of prayer (c) is that it's capable of being granted on its own and it is not dependent on the

existence of prayers (a) and (b) that were withdrawn. It can be proved by adducing evidence if the pleadings are read as a whole. For instance, in paragraph 7 of the plaint is pleaded thus;

“The plaintiff avers that the 1st defendant has disregarded a report given by its local lands officer who recommended a cancellation of the title and up to date no action has been taken and the plaintiff lives in fear of being evicted.”

10. In addition, paragraph 9 of the plaint gives a further foundation for which prayer no (c) is sought. In the event the plaintiff's suit succeeds, the Court can make such other orders as it deems just under the consequential prayer contained in no (d). Accordingly, the argument that the withdrawal of prayers (a) & (b) left nothing to proceed for trial lacks merit. I find no reason to strike out the suit on this account too.

11. The plaintiff in submission stated that the applicant is a stranger to bring this application. It is my considered view that this was misplaced as the applicant had applied to be joined and the Court did allow that application. It is thus a misconception for the plaintiff in thinking that not having amended its plaint would disentitle the 3rd defendant from participating in these proceedings including filing the present application. Therefore it is my finding that the applicant had locus to bring the current application.

12. I conclude by making a finding that the application dated 11th April 2016 lacks merit for the reasons contained in paragraph 8, 9 & 10 above. The same is dismissed with an order that each party bears its costs. As a way forward, the plaintiff is directed to amend the plaint and serve the defendants within 21 days from the date of this ruling.

Ruling signed, dated & delivered at Mombasa this 31st day of Aug. 2017

A. OMOLLO

JUDGE