



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO.879 OF 2012

JOTHAM KANJAU MWAI.....PLAINTIFF/APPLICANT

VERSUS

MICHAEL NDEGE KINYUA..... 1st DEFENDANT/RESPONDENT

DISTRICT LAND SURVEYOR, THIKA..... 2nd DEFENDANT/RESPONDENT

DISTRICT LAND REGISTRAR, THIKA..... 3rd DEFENDANT/RESPONDENT

HON. ATTORNEY GENERAL..... 1st DEFENDANT/RESPONDENT

RULING

The matter for determination is the 1ST Defendant's/Applicant's ***Notice of Motion*** application dated **20th December 2014**, brought Order 51 and Order 2 Rule 15(1)(b)(c) and (d) of the Civil Procedure Rules.

The Applicant has sought for the following orders:-

- 1. That the Plaintiff's suit be struck out.***
- 2. That cost of the application be borne by the Plaintiff.***

The application is premised on the grounds stated on the face of the application and on the ***Supporting Affidavit*** of ***Michael Ndege Kinyua***.

The grounds in support are:-

- i. The suit is scandalous, frivolous and vexatious.***
- ii. The suit may prejudice, embarrass or delay the fair trial of this action.***
- iii. The suit is an abuse of the Court process.***

In his ***Supporting Affidavit***, the Applicant averred that on **11th October 2008**, the Plaintiff's brother by the name of ***Hilton Daniel Nguru Kanja***, agreed to sell **0.2 Hectares** to the Applicant which was

supposed to be excised from

LR.No.Ruiru/Kiu Block 2/3701, owned by the two of them. He alleged that they engaged the services of a private surveyor who drew a sketch plan showing his portion measuring **0.2 Hectares** as 'A' and that of the Plaintiff measuring **0.3 Hectares** as 'B'. He further averred that the Plaintiff went ahead to seek the **consent** of the **Land Control Board** and the same was granted on **4th November 2008**. That on **22nd November 2008**, the Plaintiff, the Applicant and the Surveyor presented the Mutation form subdividing **LR.No.Ruiru/Kiu Block 2/3701** into two portions of **0.2 Hectares** and **0.3 Hectares** which were signed by a licenced Land Surveyor. He further alleged that the documents were processed by the 2nd Defendant and new numbers were issued; **0.3 Hectares as LR.No.Ruiru Kiu Block 2/6996** and **0.2 Hectares as LR.No.Ruiru/Kiu Block 2/6997**. He contended that the Plaintiff requested him to switch the ground position and therefore they went back with the Surveyor on **25th November 2010**, to the 2nd Defendant's office who advised them to take back the Mutation Forms to the licences Surveyor for countersigning after effecting the changes. It was his further contention that they did so on **29th November 2010**, and they were directed to the 3rd Defendant where they surrendered the cancelled and countersigned Mutation for Rim amendment. Further, that on **3rd March 2011**, the Plaintiff presented to the Registrar copy of Mutation, amended Rim and original title for registration of the new parcels of land. He also stated that on **21st July 2011**, he conducted official search which confirmed that **LR.No.Ruiru Kiu Block 2/6996** belongs to him and **LR.No.Ruiru Kiu Block 2/6997** belongs to the Plaintiff. It was his further contention that on **9th August 2011**, the Plaintiff applied to the Land Control Board for transfer of the said parcel of land to the Applicant and a Title Deed was issued to him at **Thika District Land Registry** on **14th September 2011**. It was his further contention that the Plaintiff actively participated in the subdivisions and subsequent registration and cannot purport that there was fraud. Therefore the Plaintiff has no cause of action and he prayed that the suit be struck off.

The application is **opposed** and **Jotham Kanjau Mwai**, the Plaintiff/Respondent filed his **Replying Affidavit** on **30th July 2015**, and denied all the allegations made by the Applicant. He averred that on **4th December 2008**, he signed a sketch plan for purpose of subdivision of **LR.No.Ruiru Kiu Block 2/3701**, which showed that subdivision 'A' of **0.3 Hectares** was for Plaintiff and subdivision 'B' of **0.2 Hectares** was for 1st Defendant. However, without the knowledge and consent of the Plaintiff, the 1st Defendant with connivance of a private Surveyor fraudulently and unlawfully altered the particulars appearing on the Mutation Form showing that portion 'A' was comprising of **0.2 Hectares** and portion 'B' comprised **0.3 Hectares** meaning that Plaintiff owned portion 'B' and 1st Defendant portion 'A'. He further averred that the 3rd Defendant fraudulently and negligently accepted the said Mutation Form and then proceeded to cancel title of **Ruiru Kiu Block 2/Githunguri 3701** and then issued titles for the new subdivisions as per the fraudulently altered Mutation Form.

He therefore contended that this suit is not scandalous, frivolous and vexatious. He averred that he has a cause of action and the instant application should be dismissed.

The application was **canvassed** by way of **Written submissions** which this Court has carefully read and considered. The Court has also considered the cited authorities therein and the relevant provisions of law.

The Application herein is brought under Order 2 Rule 15 of the Civil Procedure Rules which provides that:-

(1) 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 may prejudice, embarrass or delay the fair trial of the action

d. it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

Therefore from the above provisions of law, the Court has discretion to strike out pleadings at any stage of the proceedings on the above stated grounds. However, the said discretion must be exercised judicially. Further Courts have always held that power to strike out pleadings should be exercised cautiously. See the case of ***Cabro East Africa Ltd..Vs..Rusinga Investments Ltd (2013) eKLR***, where the Court held that:-

“The power to strike out pleadings should be exercised cautiously as the court would be striking the same out without first hearing the merits of the case”.

Further in the case of ***D.T.Dobie & Co. (Kenya) Ltd..Vs...Muchina, Civil Appeal No.37 of 1978***, the Court held that:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously disclosed no reasonable cause of action and is 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 real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”.

Therefore, this Court will consider the Plaint filed by the Plaintiff and then determine whether it is a candidate for striking out based on the grounds set out in Order 2 Rule 15.

In his Plaint, the Respondent has alleged that without the knowledge of the Plaintiff, the 1st Defendant connived with the private Surveyor and fraudulently altered the particulars of the Mutation Form to show that portion ‘A’ ***comprised 0.2 Hectares*** and ‘B’ ***comprised 0.3 Hectares*** effectively switching the position of the Plaintiff and 1st Defendant parcels of land on the ground. The Plaintiff further particularized the fraud perpetrated by the Defendants in the Plaint.

On his part, the 1st Defendant alleged that the Plaintiff herein participated in all the steps of drawing of Mutation Form and even the subsequent alteration. He alleged that the Plaintiff’s suit is an afterthought and abuse of the Court process.

The issues of whether the Plaintiff participated in the alteration of the Mutation Form or not or whether the 1st Defendant connived with the private Surveyor to change the positions of the parcels of land are disputed issues which needs to be canvassed in a full hearing. The said disputed issues raised a reasonable cause of action which should be allowed to go to the full cycle of a hearing. In the case of ***D. T. Dobie & Co. (K) Lrd... Vs... Muchina (supra)***, the Court held that:-

“The words reasonable cause of action, means chances of success when the allegations in the Plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer”.

In the instant case, the Court finds that there are disputed facts which facts raise a reasonable cause of action in the meaning of the findings ***in D.T. Dobie case (supra)***

The Applicant also needed to establish that the Plaintiff’s suit is frivolous, scandalous and vexatious. In the case of ***Trust Bank Ltd...Vs...Amin Company Ltd & Another(2000) KLR 163***, the Court held that:-

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raised irrelevant issues which may involve expenses which will prejudice the fair trial of the action”.

The Plaintiff has raised issues of altering the Mutation Form. Though the 1st Defendant has alleged that the Plaintiff participated fully in the alteration, those are issues that needs to be brought out at the full hearing. The said facts cannot be ascertained at this juncture. The Court finds that the Plaintiff’s action is ***not frivolous nor vexatious***.

The Court finds that the Plaintiff has sought for various prayers in his claim. These prayers are not frivolous and the Court finds that the action herein is not an abuse of the Court process.

Having now carefully considered the instant application, the Court finds that striking out a suit is draconian act which can only be resorted to in very plain cases. (***See Co-operative Merchants Banks Ltd...Vs...George Fredrick Wekesa, Civil Appeal No.54 of 1999***). Further, no suit should be dismissed unless it is hopeless and it is plainly obvious that it disclosed no cause of action and it is so weak as to be beyond redemption and incurable by amendment (***see Francis Kamande ...Vs...Vanguard Electrical Services Ltd, Civil Appeal No.152 of 1996***)

Again striking out a pleading should be done with tremendous caution because a litigant should not be driven from the seat of justice without being heard. (***See Prafulla Enterprises Ltd...Vs...Norlake Investment Ltd, Kisumu HCCC No.145 of 1997***).

By considering all the above positions held by various Courts and taking into account the available evidence herein, the Court finds that this suit is not a candidate for striking out.

For the above reasons, the Court ***dismisses*** the 1st Defendants/Applicant’s ***Notice of Motion*** application dated ***20th December 2014, entirely with costs to the Plaintiff/Respondent***.

Further, the Court has noted that this is a ***2012 matter***. The parties are directed to ***comply with Order 11*** within a period of ***30 days*** from the date hereof. Thereafter the matter to be mentioned before the Deputy Registrar for Pre-trial Conference and thereafter set the matter down for hearing expeditiously.

It is so ordered.

Dated, Signed and Delivered at NAIROBI this ***31st*** day of ***August, 2017***.

L. GACHERU

JUDGE

31/8/2017

In the presence of

Mr. Kagunda holding brief for Mr. Maina Wachira for Plaintiff/Respondent

Mr. Mabachi for Mr. Mitey for 1st Defendant/Applicant

No appearance for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

Catherine - Court clerk.

L. GACHERU

JUDGE

31/8/2017