



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
MILIMANI LAW COURTS
ELC. CASE NO. 2028 OF 2007

BENTA KALARA ACHIENG.....1ST PLAINTIFF
EVERLYNE ATIENO ACHIENG.....2ND PLAINTIFF
CECILIA WANJIRU GICHURU.....3RD PLAINTIFF
MARY NDUNGE MUTUKU.....4TH PLAINTIFF
WILSON MUTUMBA WOMEN GROUP.....5TH PLAINTIFF

(DULY REGISTERED AS A SELF HELP GROUP WITH MEMBERSHIP OF 2,907 WOMEN)

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 27th November 2013 in which the Defendant/Applicant seeks for the following orders:

1. That the court do visit the disputed site being Land Reference Number 209/10610 (hereinafter referred to as the “suit property”);
2. That the Plaintiffs’ Amended Plaint dated and filed on 21st December 2012 be struck out and or dismissed with costs.
3. That the 5th Plaintiff through whom the 1st to 4th Plaintiffs claim through lacks the juridical status to own property;
4. That the costs of the suit and of this Application be borne by the Plaintiffs.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Silas Mc’opiyo sworn on 27th November 2013 in which he averred that he is the Director of Planning and Development in the Police Headquarters at Nairobi under which all physical development planning falls. He further averred that the court should visit the suit property in order to appreciate the great investment that the Government has made therein in order to reach a fair and just determination of this

suit. He further averred that the Amended Plaint is scandalous, frivolous and vexatious for the reason that the Plaintiffs are not the legal or beneficial owners of the suit property, that the Defendant/Applicant possesses a valid title to the suit property registered at the Land Titles Registry as I.R. 129371, that the Plaintiffs do not have any correspondence file with the Ministry of Lands, that the Plaintiffs lack the legal capacity to institute this action and that the Government embarked on a project to build house units for security personnel on the suit property in 2005 to the tune of more than Kshs. 1.4 billion. He further averred that the title held by the Plaintiffs is a forgery.

The Application is contested. The Plaintiffs filed their Grounds of Opposition dated 19th March 2014 in which they stated as follows:

1. That this Application has been brought after unreasonable delay being 7 years after the suit was filed.
2. That the Application seeks for striking out of the Amended Plaint and at the same time seeks for the court to visit the suit property.
3. That the Amended Plaint should not be struck out as it raises triable issues such as whether the Defendant/Applicant holds title to the suit property or it is the Plaintiffs/Respondents who do, whether the development of the suit property by the Government can confer a superior rite or title to it and whether the title for the suit property held in the name of the 5th Plaintiff/Respondent is a forgery.

I have considered this Application, the affidavits and the written submissions together with the authorities relied upon. The main issue the court has been called upon to make a determination is whether the Amended Plaint dated 21st December 2012 raises any triable issue or is a sham and should be struck out. The applicable law on this issue is Order 2 Rule 15 of the Civil Procedure Rules, 2010. The said Rule 15 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.

(supra). As far as possible indeed, there should be no opinion expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial Judge in disposing of the case in the way he thinks right.”

A look at this Application reveals that the Defendant/Applicant has gone into lengthy details to explain and justify the grounds upon which the Amended Plaint should be struck out and have in essence delved into the realm of actual evidence in order to justify their case for striking out the Amended Plaint. The Defendant/Applicant has alleged that the title held by the Plaintiffs in respect of the suit property is a forgery, further alleging that the title held by the Government is the valid one. To prove such fraud, evidence is required which can only be adduced at a full hearing. Indeed the question of ownership of the suit property is at the heart of this suit and can only be determined upon consideration of all the evidence adduced by all the parties at the trial. Accordingly, in bringing up that issue and seeking to rely on it in support of this Application is, in my opinion, embarking upon a trial of this case at this stage to the detriment of the parties in this suit. In the circumstances, the Defendant/Applicant cannot make a claim the Amended Plaint does not raise any cause of action. A cause of action does not necessarily mean that a party suing is bound to succeed in the action or that the party must have a right to that which he or she has claimed. In the case of **Wenlock vs. Maloney & Others (1965) 1 W.L.R 1238** the court held that,

“This summary jurisdiction of the court was never intended to be exercised by a minute and a protracted examination of documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do that is to usurp the position of the trial judge and 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 me to be an abuse of the inherent power of the court and not a proper exercise of that power”

In light of the foregoing, I find that this Application is not merited and I hereby dismiss it with costs to the Plaintiffs.

It is so ordered.

DELIVERED AND SIGNED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE