



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 787 2012

(Formerly Eldoret Hccc No. 213 of 2011)

DAUDI KIPTUGEN.....PLAINTIFF

VERSUS

COMMISSIONER OF LANDS.....1ST
DEFENDANT

CHIEF LANDS REGISTRAR, NAIROBI.....2ND
DEFENDANT

THE HONOURABLE ATTORNEY GENERAL.....3RD
DEFENDANT

HELDO FOOD STUFF LIMITED.....4TH
DEFENDANT

DISTRICT LAND REGISTRAR, ELDORET.....5TH
DEFENDANT

HARON CHEPKILOT KIPSANG T/A

HELDO FOOD STUFF.....6TH
DEFENDANT

SILAS KIPTUI KIPCHILAT (*Acting as the personal representative*)

of the estate of the late LEAH JELAGAT KIPCHILAT (DECEASED).....7TH DEFENDANT

RULING

The plaintiff prays that 4th defendant’s defence and counterclaim dated 24.12.2012 filed in court on 26.10.2012 and the 6th defendant’s defence and counterclaim dated 24.1.2016 be struck out and judgment against them to be entered. The plaintiff argues that the defences do not disclose a reasonable cause of action or defence in law and that the same are otherwise an abuse of process of court. That it is evident and obvious that the certificates of registration of business names sought to be relied by 4th and 5th defendants are fabricated documents and or forged and hence an abuse of process of the court.

The application is supported by the affidavit of Daudi Kiptugen who states that records as relating to his parcel have been falsified. He states that the allotment letter for 4th defendant was issued on 24.6.1999 and yet the 4th defendant was incorporated as a company on 1.12.2010 and therefore, court assert any right nor enter into any contracts before incorporation. In essence, the plaintiff has given a sworn affidavit as to why the defences and counterclaim should be struck out for raising no defence and no cause of action.

Haron Chepkilot Kisang, the 4th defendant filed a replying affidavit whose gist is the application is incompetent as the application premised on Order 2, Rule 15(1)(a) of the Civil Procedure Rules that does not need a supporting affidavit and Order 2, rule 15(b), (c) and (d) of the Civil Procedure Rules that require evidence and therefore, a supporting affidavit. Kimathi Shadrack Kemboi, one of the directors of the 6th defendant filed a replying affidavit stating that the application has been brought to delay the fair hearing of the suit. All parties to the application have filed submissions which the court has considered.

The application is premised on Order 2, Rule 15 of the civil Procedure Rules. This rule provides:-

5. Striking out pleadings [Order 2, rule 15.]

(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; or

(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

I will go straight to the first ground that the 4th defendant's defence and counterclaim raises no cause of action. It is trite law that for this ground to succeed, the defense and counterclaim must be so hopeless, frivolous and no evidence shall be admissible on such an application on such a ground **under subrule (1) (a) but the application shall state concisely the grounds on which it is made. The applicant has grossly violated this rule by giving evidence.**

The 4th defendant states that the plaintiff's title was obtained by fraud a fact that is particularized and will have to be tried by the court. The 4th defendant avers that he is the legal and lawful owner of the lease and the owner of the suit parcel Eldoret Municipality Block 7/154. Both plaintiff, 4th defendant and 6th defendant have title to the property and therefore, they all have cause of action. The 4th defendant prays for cancellation of certificate of lease issued on 22.10.2001 and all property documents held by the plaintiff in respect of the suit land. Moreover, the 4th defendant prays for an order that the plaintiff be evicted from the property.

I further do find that the defence and counterclaim cannot be described as abuse of the process of court. A pleading is an abuse of the process of the court if the same is frivolous, scandalous or meant to delay the fair trial or is res-judicata. The pleadings by the 4th defendant cannot be defined as scandalous,

vexatious, frivolous or abuse of court process.

I have further looked at the defence of counterclaim of the 6th defendant and do find that the 6th defendant's claim is based on fraud, mistake or misrepresentation in the issuance of title to the plaintiff and 4th defendant. The 6th defendant has particularized the fraud, mistake, misrepresentation, illegality and the unprocedural process. The 6th defendant claims to be the true owner of the suit property. He claims to have been allotted the property but the file went missing and a lot of irregularities happened. The 6th defendant prays that he be declared as the proprietor of the property. I do find that the defence and counterclaim raises a reasonable cause of action and defence. I do find that the plaintiff has not demonstrated how the 4th and 6th defendants' case is unarguable and abuse of the court process. The application in itself is dismissed with costs to the defendants.

Dated and delivered at Eldoret this 19th day of October, 2017.

A. OMBWAYO

JUDGE