



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO.226 OF 2016

HELLEN JEPKEMBOI KERICHI:..... PLAINTIFF/APPLICANT

VERSUS

MOSES KIPTOO KIBOR:.....DEFENDANT/RESPONDENT

RULING

INTRODUCTION

This ruling is in respect of an application brought by way of Notice of Motion dated 6th March, 2017 by the defendant /applicant who sought for the following orders:

1. That the plaintiff's suit be struck out with costs on the basis that:
 - a) It discloses no reasonable cause of action against the defendant.
 - b) It is scandalous, frivolous or vexatious,
 - c) It is otherwise an abuse of the court.
2. That the cost of this application be borne by the plaintiff in any event.

This application came up for inter parte hearing on 27th September 2017 when the defendant's counsel argued for the striking out of the plaintiff's suit as it is an abuse of the court process. From the pleadings on the court record, it seems that the suit land has had protracted dispute and history taking them back and forth the court corridors. At one point the dispute was before the Kibiyet land Disputes Tribunal whose award was subsequently quashed vide Judicial review proceedings ELDORET HIGH COURT MISCELLANEOUS CAUSE NO. 40 OF 2001 which was attached as an annexure to the defendant's replying affidavit. I will not therefore belabor much on the history and chronology of events that have taken place on this suit land.

Defendant's Counsel's Submissions

Counsel submitted that the plaintiff is the wife of one Peter Kibet Ngetich a fact which is not disputed. He further stated that there was previously a suit namely Environment and land court case No. 126/12 between Peter Ngetich and Moses Kiptoo Kibor the defendant herein in respect of the same subject matter which was dismissed on 20/3/15 by this court for want of prosecution.

Mr. Tororei Counsel for the defendant submitted that no application for reinstatement of the dismissed

suit has been made to date. He further stated that the plaintiff in this current suit is related to the previous registered owner whose case had been dismissed. The issues ought to have been canvassed in the previous suit which was dismissed. He argued that creating a multiplicity of suits is an abuse of the court process.

Counsel referred the court to the case of Peter **Chepkochoi Mitei v Esther Jelagat Ng'eny & 3 others [2014] eKLR** where Munyao J. struck out the suit for being an abuse of the court process. He urged the court to find that the current suit is an abuse of the court process hence dismiss it.

Plaintiff's Counsel's Submissions

Mr. Choge counsel for the plaintiff opposed the application and relied on the replying affidavit sworn by the plaintiff herein. Counsel submitted that by the time Case No 126/12 was dismissed for want of prosecution the applicant had passed away. He further submitted that the suit was never heard on merit, no judgement had been rendered by the court.

Counsel also submitted that the defendant applicant in this motion has a title deed but does not have the land so it would be in the interest of justice to hear the matter on merit to determine all the issues. It was counsel's submission that the court has discretionary powers and that the court may only strike out pleadings where they disclose no semblance of a cause of action. He urged the court dismiss the application and hear the suit on merit.

In response to the Counsel for the Plaintiff, Mr. Tororei submitted that the court has not been told when the previous applicant passed on and that when a party dies, you file substitution proceedings and not a new case. The onus of proof is on the party who alleges. Counsel urged the court to dismiss the suit.

Analysis and determination

As stated earlier, I will not go to the history and chronology of the cases filed in respect of the suit land. This is an application for striking out of a suit brought under the provisions of Order 2 Rule 15. The same provides as follows :-

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.

It is discernable that a pleading is liable to be struck out if :-

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

This is the order under which the application is premised. Courts have stuck out suits sparingly but when the suit is obviously an abuse of court process then the court must stamp its authority to stop such abuse.

Counsel for the plaintiff admitted in his submissions that the plaintiff in the previous suit that was dismissed passed away but did not give any proof of death. Be it as it may, when a party dies in a suit, the step to be taken is to either substitute or let it abate. No substitution was done, the plaintiff decided to approach the court through a different way by filing a fresh suit. Can the court allow this to stand? The answer is no. The other pertinent issue is that if a suit is dismissed for want of prosecution, what is to happen to the party whose suit has been dismissed. The party is to file an application to reinstate the suit if he or she has a good reason why the suit should be reinstated. There was no such application to reinstate the suit that was dismissed.

I find that the current suit is not proper before the court and the same is stuck out as it is an abuse of the court process.

The plaintiff to pay costs to the defendant

Dated and delivered at Eldoret on this 18th day of October, 2017.

M.A ODENY

JUDGE