REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 416 OF 2012

TITU KENYA JUMBA ::1ST PLAINTIFF

GEORGE MUREMBA KENYA::2ND PLAINTIFF

SARAH INGAIZU KENYA::3RD PLAINTIFF

ALEX IDIONYI::4TH PLAINTIFF

VERSUS

JOHN KONGWALEI SAWE::1ST DEFENDANT

CAROLINE J. KIPTUGEN::2ND DEFENDANT

NATHANIEL KIBET CHEPKENER::::::::::::::::::::::::::::::::::::3RD DEFENDANT

RULING

INTRODUCTION

This ruling is in respect of an application brought by way of Notice of Motion dated 18th April, 2017 by the defendant/applicants who sought for the following orders:

1. That the Honourable court be pleased to strike out this suit for not disclosing any reasonable cause of action, being frivolous and abuse of the court process.

2. That the costs of this application be borne by the plaintiffs.

This matter came up for the hearing of the current application on 18th July 2017 when the 5th plaintiff confirmed that he had withdrawn his case against the defendants. The same was endorsed and the Counsels agreed to canvass the application by way of written submissions.

Defendants Counsel's Submissions

Counsel relied on the grounds on the face of the application and the supporting affidavit by the 1st defendant. It was Counsel's submission that the suit was filed by the plaintiff 5 years after the defendant had held the title to the suit land. He submitted that the ownership of the suit land was with the Settlement Fund Trustee until 2003 when the defendant was registered as owner and took possession thereof.

Counsel further submitted that by virtue of section 41 of the Limitation of Actions Act Cap 22 Laws of Kenya, adverse possession could not run in favour of the plaintiffs and therefore the same could not form the basis of the suit. He further submitted on the evidence as per the affidavits and supporting documentation. Counsel also cited some authorities in support of his client's position. He urged the court to strike out the suit as there is no need to proceed with the main suit.

Plaintiffs' Counsel's Submissions

Counsel for the plaintiffs opposed the application dated 18th April 2017. He submitted that the court should note from the record that the defendants have filed several applications to have the suit dismissed on unfounded reasons and have never been ready to have the matter heard inter partes on merit.

Mr Tarus further submitted that the titles held by the 1st defendant were as a result of Eldoret Succession Cause No. 117 of 1996 where the 1st defendant fraudulently disinherited his brother. Counsel also submitted that the defendant is trying to introduce evidence through the back door as such the matter should be heard on merit.

It was Counsel's submission that the documents on record by the defendants and the plaintiffs are not conclusive unless they are produced by the concerned parties. He further submitted that summary procedure can only be adopted when it can be clearly seen that the claim on the face of it is obviously unsustainable.

Analysis and Determination

This is an application for striking out of a suit on the ground that it is an abuse of the court process. The principles applicable in applications of this nature are well settled.There are various authorities in respect of such applications but I will rely on the case of *D.T Dobie & Company Limited vs Muchina [1982] K.L.R I* where the following principles were laid down.

> *The words "reasonable cause of action" in Order VI Rule 13 (1) means an action with some chances of success when the allegations in the plaint only are considered.*
>
> *As the power to the strike out a pleading is exercised without the court being fully informed of the merits of the case through discovery and oral evidence it should be exercised sparingly and cautiously.*
>
> *The power to strike out should be exercised only after the court has considered all the facts but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike our pleadings, no opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing of the case.*

In this current application I will not belabor much to go into the substance of the issues. The application is premised on facts and opinions as to whether the plaintiff filed this suit while the 1st defendant had held title for five years. Issues whether the land was registered in the name of the Settlement Fund Trustee are what the court should be able to determine but not striking out the suit at this stage. Issues of limitation of actions and when time started running for a claim of adverse possession should be canvassed by viva voce evidence.

I notice from the court record that the 1st defendant has in several occasions unsuccessfully tried to dismiss this case without going for the full hearing. Striking out of pleadings and disposing of suits without hearing the parties must be exercised sparingly and cautiously. The affidavits and submissions in support of the application are full of opinions and facts which should be tendered in evidence and subjected to cross examination to enable the court conduct a fair trial for all the parties.

It cannot be said that the plaintiff's suit is frivolous and an abuse of court process. The plaintiff's case

raises issues that need to be determined on merit. From the foregoing and the above reasons, I find that the 1st defendant's application dated 18th April 2017 lacks merit and is therefore dismissed with costs.

Dated and delivered at Eldoret on this 9th day of October, 2017.

M.A ODENY

JUDGE