



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC NO. 2 OF 2010

STEPHEN KING'OO MBUTI.....1ST PLAINTIFF
JOSHUA MAWEU KILONZO.....2ND PLAINTIFF
BENJAMIN KYALO MUTHOKA.....3RD PLAINTIFF
RAJABU KITHUSI MOHAMED.....4TH PLAINTIFF
SIMON MUIA MUINDI.....5TH PLAINTIFF
MUTWIWA MUTETEI.....6TH PLAINTIFF

VERSUS

MALILI RANCH LIMITED.....1ST DEFENDANT
THE PERMANENT SECRETARY MINISTRY OF
INFORMATION & COMMUNICATIONS2ND DEFENDANT
THE HONOURABLE ATTORNEY GENERAL.....3RD DEFENDANT

RULING

This suit was filed by the plaintiffs on 6/1/2010. Since then, no positive steps have been taken by the parties to have the same set down for hearing. For the last 6 years, the parties have kept themselves and the court busy with interlocutory applications which they have been filing one after the other. The first of such applications was filed by the plaintiffs together with the plaint on 6/1/2010 under certificate of urgency. The application which was brought by way of Chamber Summons dated 5/1/2010 sought temporary injunction to restrain the defendants from disposing of, transferring and/or interfering with the 1st defendants parcel of land known as LR No. 9918/3 situated at Machakos District (“the suit property”) pending the hearing and determination of this suit.

When the application was filed, there was no judge in the High Court at Machakos since the court was on vacation. The matter was placed before the Deputy Registrar on the same day who directed that the file

be sent to the High Court at Nairobi and be placed before the duty judge for appropriate action. The file was sent to Nairobi and placed before the duty judge (Nambuye J. as she then was) on 7/1/2010. The judge certified the plaintiffs' application as urgent, granted prayer 2 and 3 thereof and listed it for inter-parties hearing on 20/1/2010. The plaintiffs were directed to serve the application upon the defendants.

It is not clear from the record as to when the defendants were served with the plaintiffs' Chamber Summons application dated 5/1/2010. From the record, the 1st defendant appointed the firm of E. K. Mutua and Co. Advocates to act for it. The said firm of advocates entered appearance and filed a statement of defence on behalf of the 1st defendant on 8/1/2010. The two documents were filed at the High Court Central Registry, Nairobi. A sum of Kshs.150/= was paid therefor and an official receipt No. 3152739 dated 8/1/2010 was issued to the said firm of advocates.

Before the inter partes hearing date of 20/1/2010 that was given for the plaintiff's injunction application by Nambuye J. on 7/1/2010, the 1st defendant through its advocates E. K. Mutua and Co. filed a Notice of Motion application under certificate of urgency on 14/1/2010 seeking an order to discharge the exparte orders that were granted by Nambuye J. on 7/1/2010 aforesaid. The 1st defendant's application was placed before the duty judge, Rawal J. (as she then was on 15/1/ 2010. From the record of the proceedings of 15/1/2010, Mr. Mutua advocate appeared for the 1st defendant and Mr. Mutinda appeared for the Plaintiffs. The said advocates recorded a consent before Rawal J. to the effect that the orders of injunction that had been granted by Nambuye J. on 7/1/2010 had been overtaken by events. This consent order effectively disposed of the plaintiffs' application dated 5/1/2010 and the 1st defendant's application dated 14/1/2010. When the matter came up before Waweru J. on 20/1/2010 which was the date given earlier by Nambuye J. for the hearing of the plaintiffs' application for injunction, Mr. Mutinda, advocate and Mr. Mutua, advocate who appeared for the plaintiffs and the 1st defendant respectively, informed the court that the plaintiffs' Chamber Summons application dated 5/1/2010 had been overtaken by events and that, 1st defendants application dated 14/1/2010 had been disposed of by the consent order that was made by Rawal J. on 15/1/2010. It appears from the record that during all this time, the court file was in Nairobi. When the matter came up before Waweru J. on 20/1/2010, the advocates for the parties requested the court to have the matter mentioned in Machakos and, Waweru J. made the following order;

“This file to be forthwith taken back to Machakos High Court registry. Mention on 24th February 2010.Costs in the cause”.

Before the dust could settle, the 1st defendant filed yet another application on 9/2/2010 by way of Chamber Summons of the same date seeking security for costs from the plaintiffs in the sum of Kshs.13,000,000/=. The 1st defendant's application was heard by Waweru J. who dismissed the same in a ruling that was delivered on 28/9/2012. In the course of his ruling, Waweru J. observed at page 3 that:

“No statement of defence appears to have been filed by the 1st defendant or indeed by any of the other defendants.”

Again at page 4 of the ruling the judge stated as follows:

“As already pointed out the 1st defendant has not filed any statement of defence. Therefore the application for security for costs was made before a defence was filed.”

With the 1st defendant's application for security for costs disposed of, it was now the plaintiffs turn to throw a salvo. The plaintiffs filed a Chamber Summons application dated 28/1/2013 on 22/2/2013 seeking an order that the 1st defendant's statement of defence be struck out and judgment be entered for the 1st defendant. The Plaintiffs' application was amended on 15/4/2013 and changed to a Notice of Motion. The “amended” Notice of Motion dated 12/4/2013 sought two substantive orders namely;

1. That the defence by the 1st defendant be struck out and judgment be entered for the Plaintiffs

- against the 1st defendant.
2. That E. K. Mutua ceases to act as advocate for the 1st defendant.

This is the application which is the subject of this ruling. The application was brought under the Civil Procedure Act, Cap 21 Laws of Kenya, Order 13 of the Civil Procedure Rules and all other enabling provisions of the law. The same was not supported by an affidavit. It was however brought on the following grounds:

- i. That the ruling by Waweru J. shows and confirms that the 1st defendant acted erroneously and unlawfully.
- ii. That the agreement for the sale of the suit property was between the 1st defendant and the Government of Kenya and not between the Government of Kenya and individuals or directors of the 1st defendant.
- iii. That the persons who are affected by the said transaction were not given opportunity to make their views known concerning the deal.

The Plaintiffs' application was opposed by the 1st Defendant through a replying affidavit sworn by the David Ndolo Ngilai, chairman and director of the 1st defendant on 23/5/2013. In the said affidavit, the 1st defendant denied that Waweru J. had in any way made a finding that the 1st defendant had acted illegally in selling the suit property to the 2nd defendant. The 1st defendant contended that the suit property was sold to the 2nd defendant following a resolution by the members of the 1st defendant in a general meeting. The 1st defendant contended that there is no basis on which the orders sought by the plaintiffs could be granted.

Due to the unavailability of Environment and Land court Judge at the High Court in Machakos, the plaintiffs' application was brought to Nairobi Environment and Land Court for hearing and disposal. The plaintiffs filed written submissions on 23/2/2015 in support of the application. They also wrote several letters to the court on the merit of the application which letters are on record. The 1st defendant filed its submissions in reply on 14/12/2015. When the application came up for hearing on 17/12/2015, the 1st Plaintiff, Stephen Kingoo Mbuti addressed the court on the application on behalf of the plaintiffs while Mr. Wandati held brief for Mr. Mutua advocate for the 1st defendant. Mr. Wandati and the 1st defendant informed the court that they wished to rely on their written submissions. The 1st plaintiff added that the defence on record purportedly filed by the firm of E. K. Mutua and Co. Advocates on 8/1/ 2010 found its way into the court file irregularly. The 1st plaintiff argued that, whereas this case was filed at the High Court in Machakos, the purported defence was filed at the Nairobi High Court Central Registry. The 1st plaintiff argued further that in his ruling that was delivered on 28/9/2012, Waweru J. had made a finding that the 1st defendant had not filed a statement of defence. In response to the 1st plaintiff's submissions on this issue, Mr. Wandati submitted that the 1st defendant's statement of defence was filed at the High Court in Nairobi because the court file at that time was in Nairobi.

I have considered the Plaintiffs' application together with the submissions that were filed by the plaintiffs in support thereof. I have also considered the 1st defendant's reply to the said application and the submissions that were filed in opposition thereto. In addition, I have considered the authorities that were cited before me by both parties. As I have stated earlier in this ruling, the plaintiffs have sought an order for the striking out of the 1st defendant's statement of defence and an order barring E. K. Mutua and Co. Advocates from representing the 1st defendant in this suit. Before I consider the application on merit, I wish to put to rest the issue as to whether or not the 1st defendant had filed a statement of defence herein within time because it will become relevant when the merit of the application is being considered. On the material before me, I am satisfied that the statement of defence filed herein on 8/1/2010 is regular and proper. As I have mentioned earlier in this ruling, as at 8/1/2010 the court file for this case was at the High Court in Nairobi. The 1st defendant could not therefore have filed its statement of defence in the High Court at Machakos. There is nothing therefore irregular in the 1st defendant having filed its defence

at the High Court in Nairobi instead of doing so at Machakos. Again, as I have mentioned above, when the 1st defendant's statement of defence was filed, the same was paid for and an official court receipt bearing a date of 8/1/2010 issued. I have no evidence before me that this receipt the duplicate copy of which is in the court file is a forgery. In the circumstances of this case, I have no reason to doubt that the 1st defendant filed its statement of defence on 8/1/2010. I can see no reason why the 1st defendant would have attempted to back-date its statement of defence or forge a court receipt. I am in agreement with the Plaintiffs that Waweru J. had made an observation in his ruling of 28/9/2012 that it appeared as if the 1st defendant had not filed a statement of defence. In my view, the judge had chosen his words carefully. By saying that, it "appeared" as if no defence had been filed is not the same as saying that no defence had been filed at all. What the judge was saying was that he could not see a copy of the defence by the 1st defendant in the court file. In any event, the issue as to whether or not the 1st defendant had filed a statement of defence was not before the judge for determination. For the foregoing reasons, it is my finding that the 1st defendant filed a statement of defence within time.

Back to the merit of the application, I am in agreement with the 1st defendant that the plaintiffs' application has no merit. As submitted by the 1st defendant, the Plaintiffs' application was not supported by an affidavit. In the plaint filed herein, the plaintiffs contended that the 1st defendant had unlawfully sold to the 2nd defendant a parcel of land measuring 5000 acres which was comprised in LR No. 9918/3 ("the suit property"). The Plaintiffs contended that the suit property included portions of land which had been allocated to them by the 1st defendant. The plaintiffs contended that they did not consent to the said sale. In its statement of defence, the 1st defendant denied that it sold to the 2nd defendant the suit property. The 1st defendant contended that the land that was sold to the 2nd defendant was comprised in LR No. 9918/6 ("plot No. 9918/6") in which the plaintiffs have no interest. The 1st defendant contended further that plot No. 9918/6 was sold to the 2nd defendant lawfully following resolutions which were passed by the members of the 1st defendant and its board of directors. The 1st defendant contended further that the plaintiffs' suit is misconceived because the transaction which the plaintiffs have sought to restrain has already been concluded.

Order 2 Rule 15(1) of the Civil Procedure Rules gives this court power to strike out a defence and enter judgment for a plaintiff where the defence is unreasonable or where the same is scandalous, frivolous and vexatious or where the same may embarrass, prejudice or delay the fair trial of the suit or where it amounts to an abuse of the process of the court. The defence by the 1st defendant the contents of which I have highlighted above cannot be said to be any of the foregoing. In my view, the defence by the 1st defendant raises issues which should go to trial. The said defence cannot be said to be a sham or frivolous. The power to strike out a pleading is exercised by the court sparingly and only in clear cases where no life can be injected to a pleading by amendment. In the case of, **D.T. Dobie & Company (K) Ltd. vs. Muchina [1982]KLR1**, Madan J.A stated as follows regarding the exercise of this power to strike out pleadings; "**No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it is so weak as to be beyond redemption and incurable by amendment.**" In the case of, **Murri vs. Murri and another [1991] E.A 209(CAK)**, the court of appeal held that summary remedy of striking out pleadings is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse of the court process or is unarguable.

In the case before me, I can see no reason why the plaintiffs have called for the striking out of the 1st defendant's statement of defence. The ruling by Waweru J. on which the Plaintiffs have put heavy reliance is of no assistance to them. The ruling was on a different issue and the judge did not in any way suggest that the 1st defendant's defence which he did not even have an occasion to peruse is a sham. It is my finding that there is no basis for the plaintiffs' application to strike out the defence filed herein by the 1st defendant.

On the other limb of the application seeking the disqualification of E. K. Mutua and Co. Advocates from acting for the 1st defendant herein, again, I find no merit in this application. The 1st defendant has a

constitutional right to defend this suit through an advocate of its own choice. This court can only deny it that right for good cause. As I have stated above, the plaintiffs' application was not supported by an affidavit. It follows therefore that no factual basis has been laid for the disqualification of the firm of E. K. Mutua and Co. Advocates from acting for the 1st defendant in this suit. From the material before me, it is not in dispute that the firm of E. K. Mutua and Co. Advocates had acted for the 1st defendant in the sale of the suit property to 2nd defendant. This however cannot without more be a ground for the disqualification of the said firm from acting for the 1st defendant in this suit in which the validity of the agreement between the 1st defendant and the 2nd defendant has been brought to question. The plaintiffs had a duty to demonstrate to the court the prejudice that they would suffer if the said firm was to continue acting for the 1st defendant. No such prejudice has been shown. The plaintiffs have not even alleged possible conflict of interest.

The upshot of the foregoing is that the plaintiffs' application by way of amended Notice of Motion dated 12th April, 2013 has no merit. The same is accordingly dismissed with costs to the 1st defendant. It is my hope that there would be no more interlocutory applications in this matter. The parties should now take steps to set down this suit for pre-trial case conference with a view to having the suit heard and determined on merit.

Delivered, Dated and Signed at Nairobi this 18th day of March 2016

S. OKONG'O

JUDGE

In the presence of

Benjamin Kyalo Muthoka – 3rd plaintiff in person

Ms. Benbella for the 1st Defendant