



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 824 OF 2013

WILSON MWANGI RAMSON.....PLAINTIFF/RESPONDENT

VERSUS

MARY NYAMBURA NJUGUNA.....1ST DEFENDANT/RESPONDENT

KARIUKI MUHOI.....2ND DEFENDANT/RESPONDENT

ALEX MWANGI KAMAU.....3RD DEFENDANT/RESPONDENT

ANDREW GACHINGIRI NGAHU.....4TH DEFENDANT/RESPONDENT

DAVID NJARIA KAGUNDA.....5TH DEFENDANT/RESPONDENT

AND

JAMES MICHAEL CHEGE.....1ST INTERESTED PARTY

FREDRICK MAINA GATHURI.....2ND INTERESTED PARTY

RULING

The original parties in this dispute which involve land parcel No. LOC 2/KINYONA/217 (the suit land) were the plaintiff (**WILSON MWANGI RAMSON**) and the five defendants **MARY NYAMBURA NJUGUNA, KARIUKI MUHOI, ALEX MWANGI KAMAU, ANDREW GACHINGIRI NGAHU and DAVID NJARIA KAGUNDA**. By a plaint filed herein on 1st December 2013, the plaintiff sought the following orders against the defendants:-

- a. *A declaration that the plaintiff is the lawful registered proprietor of the suit land.*
- b. *A declaration that the defendants are trespassers.*
- c. *An order for the eviction of the defendants from the suit land.*
- d. *A permanent order restraining the defendants from entering and/or remaining on the plaintiff's suit land.*
- e. *Costs of this suit.*

The plaintiff's case is that since 9th March 1994, he has been the lawfully registered proprietor of the suit land but in the year 2012, the defendants without any authority from the plaintiff entered thereon where they continue to commit acts of trespass.

The defendants filed a defence (under extreme protest) in which they averred, inter alia, that the ownership of the suit land was determined in **NAIROBI HIGH COURT CIVIL APPEAL NO. 179 of 1995** when the Court confirmed that the same belongs to **HILDA NYAMBURA GATHURI** (deceased) and her rightful heirs would be applying to be enjoined in these proceedings. The plaintiff therefore, it was pleaded by the defendants, has no legal title to the suit land and further, there is **NAIROBI CIVIL APPEAL NO. 179 of 1995** still pending over the suit land.

The plaintiff's response to that defence was to file an application dated 4th February 2014 seeking orders that the defence be struck out and judgment be entered as prayed in the plaint. The basis of that application is that the defence is frivolous, scandalous and vexatious and does not disclose the slightest reason why the defendants should continue to trespass on the suit land and why they should not be evicted therefrom since the same belongs to the plaintiff as per the certified copy of the register and title following the sale of the suit land to the plaintiff by **CHARLES NJUGUNA KAMAU**. Further, that an application by the deceased **HILDA NYAMBURA GATHURI** in **NAIROBI HIGH COURT CIVIL APPEAL NO. 179 of 1995** seeking the transfer of the suit land to herself was dismissed and the plaintiff still remains the registered owner thereof and the defendants have no relationship with the deceased **HILDA NYAMBURA GATHURI**.

That application was opposed and in a replying affidavit filed by **ANDREW GACHINGIRI NGAHU** the 4th defendant herein, it was deponed inter alia, that the defendants have leased a portion of the suit land from the family of the deceased **HILDA NYAMBURA GATHURI** which is ancestral land occupied by her family which owns it and the plaintiff has never ventured therein and this suit is therefore an attempt to defeat justice.

That would not be the end to the matter. On 19th September 2014, the interested parties herein namely **JAMES MICHAEL CHEGE** (the 1st interested party) and **FREDRICK MAINA GATHURI** (the 2nd interested party) filed a Notice of Motion seeking to be enjoined in these proceedings and to file their statement of claim. The basis of their claim, as can be gleaned from the joint supporting affidavit is that they together with their siblings:-

TITUS KAMAU GATHURI

SUSAN WANJIKU GATHURI

BEATRICE WAITHIRA

GRACE WAIRIMU

HANNAH WANJIKU

LILLIAN WAMBUI and

LUCY WANGARI are

the children of the late **SAMUEL GATHURI** and the late **HILDA NYAMBURA GATHURI** and therefore her beneficiaries and the suit land is their ancestral land which was held in trust for them but was illegally transferred to the plaintiff whose title is illegal, irregular, invalid, void and fraudulent as no Land Control Board consent was obtained. Further, that this suit was filed behind their back and is the subject of a pending suit being **NAIROBI HIGH COURT CIVIL APPEAL CASE NO. 179 of 1995**, **NAIROBI HIGH COURT MISCELLANEOUS APPLICATION NO. 536 of 1995** and **MURANGA CIVIL SUIT NO. 15 of 1995**. That the proposed interested parties and their siblings live on the suit land which is their only source of livelihood.

The plaintiff, as would be expected, filed a replying affidavit in which he deponed, inter alia, that the interested parties have no right to file this application under **Order 1 Rule 1 and 10 of the Civil Procedure Rules** as that provision only applies to the plaintiff and not the defendant and not to parties

who are only interested. To allow this application would lead to absurdity as it would result in the plaintiff filing a suit against a person who has not wronged him. That the interested parties have not disclosed the issues pending and the Court case numbers and this application is fraudulent since the plaintiff is the correct owner of the suit land and further, the 2nd interested party is facing criminal charges in Kagumo Senior Principal Magistrate's Case No. 1197 of 2013 where he is facing four counts of making documents without authority contrary to **Section 357(a) of the Penal Code** which he has failed to disclose. That the false documents include the application for Land Control Board's consent and this application is only meant to delay this suit.

When counsel for the parties appeared before me on 25th November 2015, it was agreed that both the applications dated 4th February 2014 and the one dated 19th September 2014 be canvassed together by way of written submissions. The submissions were filed as agreed.

I have considered the two applications, the rival affidavits and annexures thereto as well as the submissions by counsel.

The first application is the plaintiff's Notice of Motion dated 4th February 2014 seeking to strike out the defendant's defence and enter judgment in favour of the plaintiff as prayed in the plaint.

Order 2 Rule 15(1) of the Civil Procedure Rules which provides for the striking out of pleadings states as follows:-

“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”.***

While this Court has the power to strike out any pleading that is scandalous, frivolous or vexatious, which is the application herein, such power must only be exercised sparingly and then only in the clearest cases. This is because, such power is draconian in that it results in a case being determined in the absence of the other party. That is why such power should only be resorted to in plain and obvious cases. In **D.T. DOBIE & COMPANY (KENYA) LTD VS MUCHINA (1982) K.L.R 1** the later **MADAN J.A** (as he then was) summed up that power as follows:-

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with matters without discovery, without oral evidence tested by cross-examination in the ordinary way” emphasis added

The plaintiff's contention is that the defendants' defence is scandalous, frivolous and vexatious. Such a defence can be described as one that is fanciful and does not disclose any real issues that ought to engage the Court's time. In **MPAKA ROAD DEVELOPMENT LIMITED VS KANA 2004 1 E.A 124, RINGERA J.** (as he then was) stated at **page 165** that:-

“A pleading is frivolous if it lacks seriousness. if it is not serious then it would be unsustainable in Court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matter which are irrelevant to the action or defence. In short, it is my discernment that a scandalous, frivolous or vexatious pleading is ipso facto vexatious” emphasis added

I have looked at the defence herein. It raises such issues as this suit being res-judicata since the issues of ownership of the suit land has been determined by another Court. It also raises such issue as the plaintiff's title being illegal as the suit land belongs to the heirs of the late **HILDA NYAMBURA GATHURI**. I would not consider those issues to be frivolous, vexatious or scandalous. They raise serious matters that this Court ought to investigate and as was held in the case of **MOI UNIVERSITY VS VISHUA BUILDERS C.A CIVIL APPEAL NO. 296 of 2007**, even one triable issue must entitle the defendant to leave to defend.

The plaintiff's application seeking to strike out the defendant's defence and enter judgment in his favour is therefore without merit and must be dismissed.

The second application is the Notice of Motion dated 19th September 2014 and filed by the interested parties herein. It is premised, upon other provisions, on **Order 1 Rule 10(2) of the Civil Procedure Rules** which provides as follows:-

"The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added" emphasis added

In paragraph 5 of his replying affidavit, the plaintiff has deponed that the above provision is only restricted to a plaintiff or defendant and nobody else. It is clear however that, that is not what **Order 1 Rule 10(2) of the Civil Procedure Rules** states. That provision allows the Court to enjoin any party **"whose presence before the Court may be necessary"** to enable it adjudicate upon and settle all the questions involved. The interested parties herein claim that they are the rightful heirs and beneficiaries of the suit land which is ancestral land and that the plaintiff's title thereto was obtained illegally. That is a serious issue and certainly one that this Court would need to investigate in order to **"completely adjudicate upon and settle all questions involved in the suit"**. Commenting on this provision, the authors of **SARKAR'S CODE OF CIVIL PROCEDURE (11th EDITION RE-PRINT 2011 VOL. 1** state at **page 887** that:-

"The section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit but all persons necessary for a complete adjudication should be made parties"

The Court of Appeal affirmed that position in the case of **CENTRAL KENYA LTD VS TRUST BANK & 4 OTHERS C.A CIVIL APPEAL NO. 222 of 1998** when it said:-

"... all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other property which cannot properly be compensated for in costs"

Bearing all the above in mind, it is noted that this case is not even ready for trial. Pre-trial directions have not been taken yet. The interested parties claim to the suit land and their assertion that the plaintiff's title to the suit land is illegally obtained are all matters that this Court has to consider while adjudicating this dispute. And that cannot be effectually done if the interested parties are shut out of these proceedings. The Notice of Motion filed by the interested parties on 19th September 2014 is therefore well merited and I allow it.

Ultimately therefore, upon considering the two applications subject of this ruling, this Court makes the following orders:-

1. ***The plaintiff's Notice of Motion dated 4th February 2014 is dismissed.***
2. ***The interested parties Notice of Motion dated 19th September 2014 is allowed.***

3. *The interested parties are granted 14 days within which to file and serve their respective claims.*
4. *The plaintiff and the defendants will have 14 days after service upon them of the interested parties' claim to amend their pleadings should they wish to do so.*
5. *Each party to bear their own costs of the two applications.*

Before I leave this matter, it has become clear to me in the course of hearing this application that perhaps this suit may well be res-judicata. I was not addressed on that issue and so I cannot make any decision on it. But if indeed there is a pending matter in the High Court Nairobi involving the same parties and issues, then counsel would do well to stay these proceedings. I leave it to counsel and their clients to decide. That decision be communicated to this Court on 31st August, 2016 when this matter shall be mentioned for further orders.

B.N. OLAO

JUDGE

12TH MAY, 2016

Ruling dated, delivered and signed in open Court this 12th day of May, 2016

Mr. Macharia for Mr. Mwangi Ben for the Respondents present

Mr. Muigai for the Applicant absent

No appearance for the Interested parties.

B.N. OLAO

JUDGE

12TH MAY, 2016