



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ELC CIVIL SUIT NO. 158 B OF 2015

TROPICAL TREASURES LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

KRYSTALLINE SALT WORKS LIMITED.....1ST DEFENDANT/APPLICANT

MOMBASA BOND WAREHOUSE LIMITED.....2ND DEFENDANT

LAND REGISTRAR, MOMBASA.....3RD DEFENDANT

AND

NATIONAL LAND COMMISSION.....INTERESTED PARTY

RULING

1. The 1st Defendant moved the Court vide his notice of motion dated 18th November 2015. The application is brought pursuant to the provisions of section 1A, 1B, and 3A of Civil Procedure Act and Order 2 rule 15 (1) (b) (c) and (d) and Order 51 of the Rules. The applicant seeks for orders;

- a. **The plaintiff's** **plaint** dated 14th day of July 2015 be struck out for being scandalous, frivolous, vexatious and otherwise an abuse of the process of the honourable Court;
- b. **The plaintiff's** **Notice of Motion Application** dated 14th July 2015 be similarly struck out upon the striking out of the Plaintiff.
- c. **The costs of this suit and of the Plaintiff's application as well as this application be awarded to the Defendant.**

2. The application is supported by the grounds set out on the face of it and the affidavit deposed by Hasmita Patel. The 1st defendant deposes that the plaintiff has no legal or beneficial interest in the two parcels Nos L.R 29026 and 29027 which forms the subject matter of this suit. Secondly that the plaintiff has no legal or beneficial interest in the land L.R No 28534 since the disputed land is not registered in their name.

3. The application is opposed by the Plaintiff/Respondent. The Plaintiff in the replying affidavit deposed to by Abdul Swamad Abeid Said deposes that it is the registered owner of land No L.R 28534 registered as CR No 53828. He narrated the history of how the land was acquired by Mwanyule Mangi Yaa – deceased. The Plaintiff deposed that they acquired the property by purchasing it from the beneficiaries of the estate of Mwanyule Mangi Yaa on 10th June 2010.

4. The Plaintiff deposes that during the adjudication exercise in Kilifi, portions of their land was allocated to other people. That they investigated and identified the 1st Defendant as the alleged trespasser upon which they lodged a formal complaint with National Land Commission.

5. The Plaintiff deposes that there are legal and triable issues which must be canvassed for Justice to be met. Further that striking out pleadings must be done sparingly and only where pleadings is a total sham. He urged the Court to dismiss the application as it is scandalous, frivolous, and vexatious and an abuse of the Court process.

6. The advocates for the parties filed written submissions on both applications (the Plaintiff's application dated 14th July 2015 and the current application under determination). In regard to this application, the applicant reiterated the contents of his affidavit in support of the application. The 1st defendant went further to give analysis of the documents annexed by the plaintiff. For instance at page 9 of their submissions where they submit that it is shocking that the parcel of land in question was allotted to Mwanyule Mangi Yaa – deceased six years after his death.

7. In support of the submission that a dead person has no right to own any property, they cited the case of **Kenya (Rtf) Ltd vs PS Ministry of Lands & 2 others (2013) eKLR**. The 1st defendant submit that it is farcical and non sensical that a property which did not belong to a deceased person's estate's at the time of his death could form part of that person's estate and therefore capable of being disposed. The 1st defendant went ahead to quote the contents of a letter dated 31st October 2013 drawn by the Plaintiff.

8. The 1st defendant's submission is quite detailed on this matter. In my view the contents of their submissions literally amount to evidence that should not be adduced from the bar. The decision of **Kenya (RTF) Ltd vs PS Ministry of Lands** supra was reached after hearing the case on its merits and not at the interlocutory stage as in this instance.

9. The applicant wants the suit dismissed on account that the suit property was not owned by the deceased before his death therefore there was no good title capable of being passed. How can this Court reach such a determination at an interlocutory stage where no facts have been laid and tested vide cross – examination during a hearing?

10. In the Plaint filed, the Plaintiff has laid a claim to L. R No 28534. The Plaintiff pleaded that the 1st defendant's titles Nos 29026 and 29027 comprises part of their land. In the replying affidavit, the plaintiff annexed a copy of the grant for L. R 28534 which shows that a transfer was registered in its favour on 14th December 2011. For these issues to be resolved i.e. whether the Plaintiff acquired a good title or whether the 1st Defendant's land forms part of the plaintiff's; it is only prudent that each party is granted an opportunity to present their case.

11. In the leading case of **Dt Dobie (K) Ltd vs Muchina (1982) E. A I**, the Court of appeal held that striking out should only be done in very clear cases and where the pleadings cannot be cured even by amendment. The instant case is not a clear one. The judgement in Nairobi HCC JR Case No 172 of 2014 annexed as "HP6" to the supporting affidavit of the 1st defendant dealt with the question of whether the National Land Commission – Respondent (in that case) had jurisdiction to hear and determine the Interested Party's complaint. It had nothing to do with the ownership of the parcels of land in question.

12. In the case annexed, the question of the legality of the plaintiff's title was not in issue and was not determined. It is therefore premature to ask the Court to strike out the present suit based on some of the

evidence presented during the proceedings in the judicial review case. In any event, judicial review deals with process of decision making and not merits or otherwise of a case. Consequently I find no merit in this notice of motion dated 18th November 2015 and I hereby dismiss it with costs to the plaintiff.

Ruling dated and delivered at Mombasa this 6th day of September 2016

A. OMOLLO

JUDGE