REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

ENVIRONMENT AND LAND CASE NO.75 OF 2013

JACKSON KIPKEMOI CHEBOCHOK.....PLAINTIFF

VERSUS

CHARLES KIBET CHEPKWONY.....1ST DEFENDANT

RAEL CHEPKURUI TUM.....2ND DEFENDANT

REUBEN LANGAT.....3RD DEFENDANT

RULING

(Application for dismissal of suit; matter already determined against the plaintiff before the Land Disputes Tribunal and decree in existence; plaintiff's motion for judicial review seeking to quash the award dismissed; plaintiff now filing suit for permanent injunction; defendants arguing that suit is res judicata; no pleadings to attack the findings of the award or to set aside the decree arising from the award; in his response to the application plaintiff admitting that he holds the land in trust for one of the defendants; in such instance plaintiff cannot therefore sue the same defendant to restrain her from the same land where she is beneficiary; suit is an abuse of process of court and is dismissed; applicants seeking summary judgment on the counterclaim; counterclaim seeking to enforce a decree issued in another suit; proper procedure is to execute the decree in the other suit and not to file a fresh suit; prayer for summary judgment on counterclaim declined)

The application before me is that dated 14 June 2016 filed by the defendants. It is an application said to be brought under the provisions of Sections 1A, 1B, 3, 3A , 7, 63 (e) and Order 2 Rule 15 (b), (c) and (d) of the Civil Procedure Act, Cap 21, Laws of Kenya. The applicant seeks two principal orders which are prayers 2 and 3 of the application, being :-

> *(i) That the plaintiff's suit be dismissed with costs to the defendants.*
>
> *(ii) That pursuant to the prayer above, summary judgment be entered in favour of the defendants/applicants as prayed for in their defence and counterclaim.*

The grounds upon which the application is based are inter alia as follows :-

> *(a) The plaintiff's suit is now res judicata. The High Court dealt with the matters touching on the subject land parcel number Kericho/Kapsaos/725 in Kericho High Cout Judicial Review No. 30 of 2010 and concluded the same vide a ruling/order issued on 30 August 2013.*

(b) The respondent's suit does not raise any triable issues.

(c) Order 2 Rule 15 of the Civil Procedure Rules, 2010, empowers the court to strike out pleadings that disclose no defence in law and may prejudice, embarrass or delay fair trial.

The application is supported by the affidavit of Reuben Langat, the 3rd defendant in this suit. Before I go to the gist of that application and the reply by the defendant, I think it is prudent that I lay down the nature of the suit before me and which suit is sought to be struck out.

This suit was commenced by way of plaint that was filed on 31 October 2013. In the suit, the plaintiff has pleaded that he is the registered owner of the land parcel Kericho/Kapsaos/725 (hereinafter the suit land) which was subject of a Land Tribunal case in Kericho Miscellaneous Application No. 68 of 2010. He has pleaded that the defendants have moved with speed into the suit land and have claimed part of it. In the suit, the plaintiff has asked for orders to have the defendants restrained by way of permanent injunction from interfering with the suit land together with costs and interest.

Upon service, the defendants entered appearance and filed a joint statement of defence and counterclaim. In their defence, they have pleaded that the plaintiff is not the absolute owner of the suit land. It is pleaded that the plaintiff admitted before the Land Disputes Tribunal at Ainamoi that the land is family land and that he holds the same as trustee. It is pleaded that the award of the Land Disputes Tribunal was adopted as an order of court on 13 April 2010. It is further pleaded that the plaintiff tried to have it quashed in Kericho High Court Judicial Review No. 30 of 2010 but lost. It is pleaded that the order adopting the award therefore remains unchallenged and ought to be executed. In the counterclaim, the defendants sought a mandatory injunction to issue to the plaintiff to prevent him from taking any action that could prevent the full execution of the Court order issued in Kericho Chief Magistrate's Court Misc. Application No. 68 of 2010 which is the suit which adopted the award of the Land Disputes Tribunal. The defendants have also sought to have the plaintiff execute all necessary documents to give full effect to the award together with costs and interest.

I have not seen any reply to defence or defence to counterclaim filed by the plaintiff.

In the supporting affidavit to this application, the deponent has averred that the parties had a dispute before the Ainamoi Land Disputes Tribunal being Claim No. 26 of 2010. The Tribunal made its decision on 12 May 2010. It is said that the award was adopted by the Chief Magistrate's Court at Kericho on 13 April 2010. The Tribunal proceedings, award and the court order adopting the same are annexed. It is deposed that during the Tribunal proceedings, the plaintiff admitted that he was holding the land as trustee. He has further deposed that the plaintiff filed a Judicial Review cause, being Kericho High Court Misc. Application No. 30 of 2010, to quash the award but the same was struck out. He has quoted what he has claimed is part of the judgment where it is said that the Judge who dealt with the Judicial Review application stated that unless the award is quashed, the same shall remain the judgment of the court and therefore enforceable in law. It is deposed that the plaintiff has employed every trick in the book to make sure that the order of the Magistrate is not implemented.

The plaintiff has sworn a brief replying affidavit to oppose the motion. In the affidavit he has deposed that the 2nd defendant is the bona fide beneficiary of the suit land and that he holds the land in trust for her. He has stated that the 1st and 3rd defendants are total strangers and lack locus standi and that they are mere trespassers in the suit land. He has averred that the 2nd defendant is mentally challenged and needs protection from manipulation and that the 1st and 3rd respondents have taken advantage of her health.

In his submissions, Mr. Siele for the applicants argued inter alia that unless the award is quashed the plaintiff cannot now come to court and that his suit is res judicata. He was of the view that the replying affidavit admits the claim. He wondered how the plaintiff could sue the 2nd defendant if she was mentally challenged as claimed.

On his part, Mr. Korir, counsel holding brief for Mr. Maengwe for the respondent, relied entirely on the replying affidavit.

I have considered the matter. What I have is essentially an application to strike out suit. Order 2 Rule 15 does allow a party to apply for the striking out of a suit. The same is drawn 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.*

The main reason why the applicants have sought for this suit to be struck out is their claim that the suit is res judicata. They have argued that the issues herein have been determined before the Land Disputes Tribunal whose award was adopted as a decree of the court. They have pointed out that attempts to quash that award through the filing of a Judicial Review cause failed and therefore the award must be executed.

I have gone through the proceedings of the Land Disputes Tribunal, the order of the Magistrate's Court and the proceedings and decision in Kericho High Court Judicial Review Cause No. 68 of 2010.

The dispute before the Ainamoi Land Disputes Tribunal was filed by the defendants to this suit against the plaintiff. The Tribunal found that the original owner of the land was one Arap Chepngoimet, the father to Kiplangat Tum (3rd defendant herein) and the plaintiff. He was father in law to Raeli Tum (the 2nd defendant herein). Charles Kibet (1st defendant herein) is said to be an adopted child of Tabarno the first widow to the late arap Chepngoimet. The Tribunal was of the view that the land should be shared between the parties as follows :-

- Raeli Tum - 3.1 acres.
- Charles Kibet Chepkwony - 3.1 acres.
- Kiplangat Tum - 3.2 acres.
- Kipkemoi Chebochok - 4.446 acres.

Kiplangat Tum was also awarded 1.235 acres in a land parcel Kericho/Kapsaos/718. This award was adopted on 13 September 2010 by the Chief Magistrate's Court in Kericho and an order/decree issued to that effect. A right of appeal of 30 days was pronounced to the parties. Not being happy with the award, the plaintiff filed Judicial Review No. 30 of 2010 vide which he sought to have the award quashed for having been made outside jurisdiction. The court struck out this Judicial Review motion on 30 August 2013 for having been filed late.

I agree with the applicants that as matters stand, there is no order which has vitiated the award of the Ainamoi Land Disputes Tribunal or the ensuing decree of the Magistrate's Court. Neither has the respondent sought in this suit any declaration to have the award of the decree found to have been made out of jurisdiction or to have the same set aside. It follows that I have no pleadings before me which would make me affect the award. An order issued by a court remains an order of court which must be followed unless and until set aside. I do of course have doubts as to whether the award was made with jurisdiction but there is nothing before me seeking to set aside the decree of the Magistrate's Court which followed the award. The same remains in force and can be executed unless and until it is set aside. Although the applicants claimed that Justice Sergon, when hearing the motion for judicial review, directed that the decree be executed, I have not seen any such obiter from the proceedings of the judicial review tabled before me. But as I have mentioned, there is no bar to the said decree being executed. Given that there is a decree in force, I do not see how the respondent can now seek to have the applicants

restrained by an order of permanent injunction from the suit land. Such order cannot be granted unless there is an accompanying prayer to have the decree set aside of which there is none in this case.

That aside, I am at a loss as to why the plaintiff filed this case if he admits, and the admission is there in the Replying Affidavit, that he holds the land in trust for the 2nd defendant. The 2nd defendant, if indeed she is the true beneficiary of the land, has not complained that the 1st and 3rd respondents are trespassers in the said land. She has no issue with them or with the decree that followed the award of the Tribunal. I am surprised that the plaintiff has sued the 2nd defendant seeking to have her permanently restrained from the land yet at the same time he admits that she is the proper beneficiary of the suit land. I do not see how the plaintiff can pursue such a case given his own position. I also do not see how the plaintiff can pursue a case against the 2nd defendant, if by his own admission, he states that the 2nd defendant is of unsound mind. I am unable to reconcile the pleadings of the plaintiff with the depositions that he has made in his replying affidavit.

From my discourse above, I am prepared to find that the pleadings herein are an abuse of the process of court. I hereby order the same to be struck out. I have before arriving at this conclusion, warned myself that striking out of a pleading is a drastic remedy and the court ought to be slow in striking out a party's pleadings. See the case of ***DT Dobie vs Muchina DT Dobie & Co vs Muchina (1982) KLR 1*** where it was stated as follows:-

> *"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it."*

I am alive to the above dictum but I do not see how the plaintiff can maintain a suit which aims to overturn an existing decree, without first having a prayer, in whichever way framed, seeking to set aside that decree or attacking the decree in one way or another. The risk of proceeding with such suit is that you may end up with two decrees which may be in conflict with each other and the result is that it will embarrass the course of justice. I also do not see how the plaintiff can sustain a claim against the 2nd defendant seeking to have her permanently restrained while admitting that she is the true owner of the land. I also do not see how the plaintiff can sustain a suit against the 2nd defendant while at the same time stating that the 2nd defendant is of unsound mind. It is for the above reasons that I feel that the plaintiff's case is not well grounded and deserves to be struck out summarily.

There is the second prayer that summary judgment be entered for the applicants. The applicants wish to have their assertion in the counterclaim summarily allowed. I have looked at the pleadings in the counterclaim. Essentially, what the applicants want is an execution of the decree issued by the Magistrate's Court following the adoption of the award of the Tribunal. I am not comfortable permitting the prayer for summary judgment for the reason that an application seeking to have a decree executed, is supposed to be made in the suit where the decree was issued. Indeed, Section 30 of the Civil Procedure Act, provides that a decree is to be executed by the Court which passed it or the court to which the decree is sent for execution. Section 34 (1) bars the filing of a separate suit aimed at executing a decree. The same is drawn as follows:-

> *Section 34. Questions to be determined by court executing decree*
>
> *(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.*

My view, at least at this stage of the proceedings, is that the counterclaim is a separate suit and therefore the applicants did not need to file such a suit for purposes of obtaining orders to execute a decree issued in another suit. I am not convinced therefore that it is fit for me to allow summary judgment of the counterclaim. If the applicants feel that I am wrong in my observation that the counterclaim ought not to

have been filed in the first place, they can set down the same for hearing, and try and convince me that the same is merited. Upon hearing, I will make a final determination on merits.

For the above reasons, I do allow the prayer seeking to have the plaintiff's suit struck out as being an abuse of the process of court. I however dismiss the prayer to have summary judgment entered for the counterclaim. I will award the costs of the dismissed suit to the defendants/applicants together with the costs of this application.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 28TH DAY OF OCTOBER, 2016.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

In the presence of:-

No appearance for M/s G.M Maengwe and Co. Advocates for Plaintiff/Respondent

Mr. Caleb Koech holding brief for Mr Siele Sigira for the Defendants/Applicants

G. Wambany Court Assistant