



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC CASE NO.780 OF 2015

ROSELINE AKINYI ONYUKA.....PLAINTIFF

VERSUS

JOSHUA KIMETICH.....1ST DEFENDANT

THE COMMISSIONER OF LANDS.....2ND DEFENDANT

RULING

1. **Joshua Kimetich**, the 1st Defendant, filed the notice of motion dated 29th may 2015 seeking to have the plaint dated 16th April 2009 struck out with costs for reasons that;

- a) That this suit is scandalous, frivolous and or vexatious.
- b) That that pending of this suit prejudice, embarrass and or delay the fair trial of this suit and is otherwise an abuse of the process of the court.
- c) That this suit as against the 2nd Defendant has abated and no amendment can cure the said defect.
- d) That equity does not aid the indolent.
- e) That this application is made in good faith and is deserving in equity.”

2. The application is supported by the affidavit sworn by John Kimetich Chepchieng on the 29th May 2015 whose depositions are as summarized herein below;

- a) That this suit was filed in April 2009 and the 1st Defendant filed his defence on 19th June 2009.
- b) That the matter was set down for hearing on the 7th July 2011 and later in June 2012 for an application to reissue summons for the 2nd Defendant but was dismissed vide the court ruling of 13th July 2012.
- c) That the Plaintiff did not prefer an appeal on the ruling of 13th July 2012 and therefore the suit against the 2nd Defendant has abated.

d) That the Plaintiff's case is superfluous without the 2nd Defendant as a party and as no amendment can cure that defect, any further delay prejudices the 1st Defendant.

e) That the Plaintiff has not taken any further steps after the ruling on 13th July 2012 to prosecute this case.

3. The application is opposed by the Plaintiff through her replying affidavit sworn on the 31st March 2016 summarized as follows;

a) That the delay in serving the 2nd Defendant with summons was not a fault of her own.

b) That the delay in filing an appeal on the court ruling of 13th July 2012 was because she was in the process of changing her representation from the firm of M/S Waruhiu K'owade & Nganga Advocates to M/S Rachier & Amollo Advocates.

c) That the orders sought against the 1st Defendant can still be considered on merit even without the 2nd Defendant being a party and that the suit discloses a reasonable cause of action.

d) That the suit is not scandalous, frivolous or vexatious and it is in the interest of justice and equity for the 1st Defendant's application to be dismissed.

e) That the pendency of this suit will not prejudice, embarrass and or delay the fair trial of the matter.

4. The application came up for hearing on the 11th April 2016 when counsel for the 1st Defendant informed the court that the counsel for the Plaintiff and himself had agreed to deal with the application through written submissions. Thereafter the counsel for the Plaintiff filed their written submissions dated 20th June 2016 on the same date. The counsel for the 1st Defendant filed theirs dated 23rd August 2016 on the 2nd September 2016.

5. The following are the issues for the courts determination;

a) Whether the Plaintiff discloses a reasonable cause of action against the 1st Defendant.

b) Who pays the costs of the application.

6. The court has carefully considered the grounds on the notice of motion, the affidavit evidence by both parties, the written submissions by counsel, the court record, pleadings filed and come to the following conclusions;

a) That from the Plaintiff's averments at paragraphs 8 and 10 of the plaint dated 16th April 2009, she blames the 2nd Defendant for issuing the 1st Defendant with a letter of allotment and lease for the suit property in 2003 to which she had already received a letter of allotment to in 1999. The Plaintiff seeks for prayers (a) and (b) which are for declaring the 1st Defendant's title document as fraudulently obtained and for the same to be cancelled and expunged from the Land Registry. The other prayer is (c) which is to compel the 2nd Defendant to register and issue title documents to the suit property to the Plaintiff. It is apparent from the statement of defence filed by the 1st Defendant dated 19th June 2009 that he denied the particulars of fraud or collusion with the 2nd Defendant.

b) That the Plaintiff failed to serve the 2nd Defendant with summons to enter appearance within the validity period of the summons. That the Plaintiff's application to have the summons reissued was rejected by the court vide its ruling dated 13th July 2012. The 1st Defendant has submitted that the

Plaintiff's suit against the 2nd Defendant has now abated as summons have not been served on them and no appeal has been preferred on the ruling dated 13th July 2012. The Plaintiff reply that the delay in appealing the said ruling was because of the process to change advocate is not convincing as no appeal has been preferred todate. That the Plaintiff having failed in their pursuit to have the summons for 2nd Defendant reissued, the suit against the 2nd Defendant became ripe for dismissal in accordance with **Order 5 Rule 2 (7)** of Civil Procedure Rules which allows the court to dismiss the suit at the expiry of twenty four months from the issue of the original summons. That for avoidance of doubt the Plaintiff's suit against the 2nd Defendant is hereby dismissed in accordance with **Order 2 Rule 2 (7)** of the Civil Procedure Rules.

c) That in the absence of the Commissioner of Lands or the Attorney General as a defendant in this suit, the Plaintiff's claim that the 1st Defendant's title documents were fraudulently issued by the Commissioner of Land in collusion with him cannot be proved. The orders sought against the Commissioner of Land in relation to prayers (b) and (c) cannot be issued. That the foregoing leads this court to find that the continuation of this suit that remains pending is an abuse of the court process as there is no reasonable cause of action remaining against the 1st Defendant.

d) That there has been inordinate delay on the part of the Plaintiff to prosecute this case as there is no evidence of any steps having been taken by her after the ruling of 13th July 2012 to the date the current application dated 29th May 2015 was filed on the 2nd June 2015. That a period of about three years had lapsed from the date of last step being taken and the suit was liable for dismissal after the lapse of one year without any action as provided for under **Order 17 Rule 2** of Civil Procedure Rules.

e) That the Plaintiff's replying affidavit sworn on 31st March 2016 and written submissions dated 23rd August, 2016 were drawn and filed by Rachier & Amollo Advocates without first filing and serving a notice of change of advocate contrary to **Order 9 Rule 5** of the Civil Procedure Rules. That though the counsel's role was not questioned by the 1st Defendant's counsel this court having noted the same must express its displeasure to the counsel's apparent disregard of the legal provisions. The documents therefore drawn and filed by the said Counsel for the Plaintiff are accordingly expunged from the courts record. That this leaves the 1st Defendant's notice of motion unopposed as no properly filed replying papers in accordance with **Order 51 Rule 14** of the Civil Procedure Rules by the Plaintiff are on record.

7. That flowing from the foregoing the court finds the notice of motion by the 1st Defendant dated 29th May 2015 has merit and is allowed as prayed. That the Plaintiff suit is hereby struck out with costs to the 1st Defendant.

It is so ordered.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 23RD DAY NOVEMBER OF 2016

In presence of;

Plaintiff Absent

1st Defendant Absent

Counsel M/S Otieno for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

23/11/2016

23/11/2016

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

M/S Otieno for Defendant

Plaintiff counsel absent

Court: Ruling delivered and dated in open court in presence of M/S Otieno for defendant only.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

23/11/2016