



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 296 OF 2016

PETRO CANNOBIO

PRAWNY PROPERTIES LIMITED

DANIEL N. KIIHIKO.....PETITIONERS

VERSUS

DIRECTOR OF CRIMINAL INVESTIGATIONS DEPARTMENT

THE ATTORNEY GENERAL

KATEEMWAZA

ERNEST MUNYI

EDWARD MZEE KAREZI

CHIERA WAITHAKA

CFC STANBIC BANK LIMITED

KILIFI BEACH PROPERTIES LIMITED

FULSON COMPANY LIMITED

REGISTRAR OF TITLES MOMBASA

THE CHIEF MAGISTRATES MOMBASA

THE DIRECTOR OF SURVEYS.....RESPONDENTS

RULING

1. For determination is the notice of motion dated 16th December 2015. It is brought under the provisions of Rule 3 (5) and 19 of the constitution of Kenya Practice Procedure Rules. The Applicant seeks the following orders:

1) The petition be struck out and or dismissed in view of the Court of Appeal decision in Civil Appeal No. 161 of 2009 delivered on 14th November, 2014 which decision did set aside orders issued in Mombasa High Court (JR) Miscellaneous Application No. 20 of 2008 (Republic Vs The Senior Registrar of Titles).

2) Costs of this application and the petition be borne by the petitioners.

2. The application was filed by Cootow & Associates for the 6th Respondent. The application is supported by the grounds *inter alia*

a) The petitioners filed Judicial Review proceedings in Mombasa High Court Miscellaneous Application No. 2 of 2008 in which they sought to compel the Senior Registrar of Titles to register a Transfer on Plot No. LR. 17835 registered as C.R. No. 35336 in favour of Brawny Properties Limited, the 2nd petitioner herein.

b) The Court granted prayers as sought and as a result dissatisfied parties appealed the said decision to the Court of Appeal being Civil Appeal No. 161 of 2009.

c) The decision in the High Court Miscellaneous Application No. 2 of 2008 was the basis for filing the present petition.

d) The Court of Appeal having set aside the decision of the Court in High Court Miscellaneous Application No. 2 of 2008 the petition herein has been overtaken by events.

3. The application is also supported by the affidavit sworn by Mr Wafula advocate. The affidavit reiterated the facts set out in the grounds as highlighted above. He deposed that the Court of Appeal having set aside the High Court decision in miscellaneous application No 2 of 2008, this petition has therefore been overtaken by events and is incompetent and ought to be struck out or dismissed. He annexed a copy of the judgement in Court of Appeal C. A No 161 of 2009.

4. In a replying affidavit deposed to by Petro Cannobio, the 1st petitioner opposed the application. The 1st petitioner deposed *inter alia* thus:

i) That I am advised by my advocates on record which advise I verily believe to be true that the court of appeal decision in Civil Appeal No. 161 of 2009 dealt with two issues which are whether the 1st Respondent (10th Respondent herein) failed to perform a public duty or acted unreasonable or ultra vires in the performance of his duty and whether the 2nd Respondent (2nd Respondent herein) was deserving of the order of mandamus as granted.

ii) That I am advised by my advocates on record which advise I verily believe to be true that the court of appeal decision did not deal with the issues of the true proprietorship of the titles and the authenticity of the titles held by the various parties however the court made mention of the fact that there are avenues of which the parties can utilize to determine the same.

iii) That I am advised by my advocates on record which advise I verily believe to be true that the issues before this court are in respect of alleged contravention of fundamental rights and freedoms and Mombasa Chief Magistrate Criminal Case 3905 of 2010 (R – V – Brawny Properties Ltd & Pietro Cannobio)

iv) That I am advised by my advocates on record which advise I verily believe to be true that the issues before this court are distinguishable from the issues adjudicated in the decision of the court of appeal which dealt with the issue of judicial review in the H.C Misc. Appl. No JR 2 of 2008.

It is therefore his contention that this application is premature, misleading and lacks merit and should be

struck out with costs.

5. Mr Daniel Kihiko the 3rd Petitioner also filed a replying affidavit on 21.4.2016 in opposition to the application. He deposed to facts similar to the first petitioner and urged the Court to dismiss this application.

6. The parties filed their rival submissions which were highlighted on 13th July 2016. Ms Luta State Counsel appearing for 2nd and 10th, 11th & 12th Respondents did not oppose the motion. Mr Ondego for the 7th Respondent stated that they are supporting the motion. In their opening submission the 1st & 3rd Respondent/Applicant stated that Section 1A & 1B of the Civil Procedure Act provide for efficient use of judicial resources. They submit that using judicial time on cases overtaken by events violates the doctrine of overriding objectives and this is an abuse of the Court process. They quoted Ugandan Court of Appeal case **No 11 of 1999 Uganda Corporation Creamaries Ltd**.

7. The applicant submitted further that the basis of filing the petition was the decision reached in JR No 2 of 2008 between the parties herein. That once that decision was set aside by the Court of Appeal this petition has no legs to stand on. Further that the petitioners have since filed Malindi ELC Case No 51 of 2016 to litigate the issues proprietary between parties confirms that the petition no longer has relevance. They urged the Court to strike out the petition with costs.

8. The 8th and 9th Respondents also submitted in favour of orders to strike out the petition. It is their submission that article 159 of the constitution provides that Courts in exercising judicial authority shall be guided by the principle amongst others that justice shall not be delayed. They also cited the case of **Fredrick Karisa Shungu & 3 Others –vs – Geoffrey Gidyo Dida (2012) eKLR** where the Court held thus, *“from the facts emerging as a common cause the true gravamen of the plaintiff case now lies in the past having been overlaid with a series of subsequent elections establishing new reality. For all practical purposes, the gravamen is spent”*.

9. The 1st & 3rd petitioners on their part submitted in opposition to the orders sought in the motion dated 16th December 2015. The submissions were worded as if deposing to facts without disclosing who the deponent is. The relevant parts are paragraphs 16 – 23. The petitioners herein submit the Court of Appeal decision did not deal with the issues of the true proprietorship of the titles. That the matters before this Court are in respect to alleged contravention of fundamental rights and freedoms and MSA CMCr. Case No 3905 of 2010 (R vs Brawny Properties Ltd & Pietro Cannobio). Further that the decision in Malindi ELC Case No 51 of 2016 will have a bearing to this petition and consequently assist with the disposal of the same. They urged this Court to therefore keep this petition in abeyance awaiting the final determination of Malindi ELC Case No 51 of 2016.

10. The 2nd petitioner also submitted against the granting of orders sought in the motion dated 16.12.16. The 2nd petitioner submits that the petition should only be struck out in the clearest of cases as contained in article 48 and 159 of the constitution. That Rule 3 (5) relied on does not provide striking out of proceedings. That article 48 enjoins the state to ensure access to justice for all persons therefore read together with Rule 3 (5) it creates a system where matters must be conducted in the high court but does not create a substantive ground for striking out a pleading.

11. The 2nd petitioner also maintained that the matters in issue in this petition had no bearing to the issues in the judicial review application and neither of the courts purported to state who was the true owner of land. He cited the decision of **Commissioner of Lands vs Kunste Hotel Ltd** where it was held that;

“It must be remembered that judicial review is concerned not with private rights or the merits of the decision, being challenged but with the decision making process”.

12. The 2nd petitioner also submitted on principles governing striking out pleadings and quoted the

provisions of order 2 rule 15 of the Civil Procedure Rules. It is their submission that the petition herein raises a reasonable cause of action and cannot fall within the reach of an application to strike out. He also quoted the case of **DT Dobie (K) Ltd vs Muchina (1982) KLR I** where the Court of Appeal held that striking out should be exercised sparingly. Similar position was restated in the case of **Ramji Megji Gudka vs Alfred Morfat Michira & 2 Others (2005) eKLR** and **Blue Sky EPZ Ltd vs Notalia Polyakova & Another (2007) eKLR**. They urged the Court to dismiss the present application to allow the applicants to have their day in Court.

13. I have considered the application and the affidavits filed plus the written submissions by each of the different parties. The only key issue for determination is whether on the basis of the decision reached in High Court Judicial Review Case No 2 of 2008 and the subsequent appeal vide Court of Appeal civil appeal No 161 of 2009 this petition has been overtaken by events and therefore ought to be struck out. The petition sought several prayers (Nineteen in number).

14. I have flipped through the prayers sought vis – a – vi the orders that were sought in the judicial review application. From the judgement in Court of Appeal No 161 of 2009, the application appealed against sought for:

“an order of mandamus to compel the Senior Registrar of Titles Coast Registry to transfer all that piece of land known as L.R No 17835 Kilifi No 35336 from Ramada Limited to Brawny Property Ltd.”.

The High Court granted this order which the court of appeal subsequently set aside.

15. In the descriptive parts of this petition, the 1st petitioner is described as a director of the 2nd petitioner who stated that he is the registered owner of a lease hold interest in plot No 17835 registered as L. R No 35336. That this registration was acquired through an order of Mandamus issued by this Court against the 10th Respondent in Miscellaneous Civil Application No 2 of 2008. In paragraph 14, the 2nd petitioner said the 5th Respondent who was an interested party in the Judicial Review proceedings filed an appeal vide Civil Appeal No 161 of 2009 which was yet to be heard. In paragraphs 16, 18 of the petition, the petitioners accused the 3rd Respondent of purporting to interpret the order and ordering the 10th Respondent to assist the 5th Respondent to do things that would defeat that Court order.

16. From the literal reading of the petition, the 1st & 2nd petitioners acquired their proprietorship in LR No 17835 CR 37185 from orders obtained in JR No 2 of 2008 and which formed their basis in filing this petition to seek the declaratory orders. This order which enabled the 1st & 2nd petitioners acquire ownership in the property was set aside. The effect of the setting aside of that order is that it took away any rights or privileges that existed and took parties back to the position they were in before the orders of mandamus were issued.

17. Both the Applicants and the 3rd Petitioner referred to the case of **D.T Dobie Kenya Ltd vs Muchina** although interpreting it differently. This is a clear case for striking since no amendment of the pleadings can reverse the import of the decision of the Court of Appeal. As proposed by the Court of appeal that the petitioners have other avenues of pursuing their claim and which they have since done as they informed this Court that they have filed Malindi ELC Case No 51 of 2016. Keeping this petition in u n abeyance would serve no purpose. The new suit filed can be heard and determined on its own merit.

18. In conclusion, I find merit in the application dated 16.12.15 and allow it. The petition was filed before the conclusion of the appeal that was pending in the court of appeal for that reason I will order the petitioners to pay ½ costs of the petition to the 3rd, 4th, 5th, 6th, 7th, 8th, and 9th Respondents. The costs of the application is awarded to the applicants.

Dated and delivered at Mombasa this 11th November 2016.

A. OMOLLO

JUDGE