



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND CASE NO. 177 OF 2014

MBEYU WA NGOME & ANOTHER.....PLAINTIFFS/APPLICANTS

-VERSUS-

PATANI VIRPAL & 2 OTHERS.....DEFENDANTS/RESPONDENTS

RULING

1. By an application dated 19th November 2014 and filed in Court on 4th December 2014, the respondents who are the applicants sought for orders ;

- i) That this honourable Court be pleased to strike out the suit
- ii) Costs be provided for.

The application is premised on 4 grounds listed on the face of it inter alia that this suit is an abuse of the Court process as it was filed after a decree was issued and executed relating to the same parcel of land.

2. The application is further supported by the affidavit of Ashit Ramiknal Patani. Mr Patani deposes that their application is made to protect the dignity of the Court from abuse. He deposes the respondents in this application have approached the Court with unclean hands and are being used by their families as conduits after lawful orders for vacant possession of land Kwale/Shimba North/Kundutsi 'B'/1148 were made. He deposed further that execution took place on 17th October 2014 and the orders sought in the originating summons cannot be sustained as prayers seeking adverse possession is already defeated because the previous proceedings leading to the decree that was issued are evidence that the occupation has not been continuous and uninterrupted.

3. The application is opposed vide a replying affidavit sworn by Mbeyu wa Ngome. In it, the plaintiffs have denied intent of abusing the Court process or approaching the Court with unclean hands. They have denied being aware of the existence of CMCC No 92 of 2012 and orders made therein. The plaintiffs deposed that the claim for adverse possession could not be determined by a Magistrate's Court in CMCC NO 92 of 2012 and although the subject matter is the same, the cause of action and parties are different.

Mr Mbeyu concluded by deposing that the defendants are only keen at driving them away from the seat of justice. They urged the Court to dismiss this application.

4. The parties then filed written submissions in support and opposition to the the application. The defendants/applicants submitted in answering two questions they posed i.e whether this Court can

entertain a case where a decree has been issued and second whether the defendants have advanced sufficient reasons to warrant the striking out of the suit. In expounding this, the defendants relied on the provisions of Section 7 of the Civil Procedure Act. The defendants submit the plaintiffs/respondents are abusing the Court process by changing their titles in order to circumvent the proper Court process. Further that the plaintiffs are being represented by Kituo Cha Sheria who represented the defendants in the early suit. In support of their submissions, they have cited the case of **Twiga Estate Squatters** suing through **William Chege & 2 Others vs Mboi – Kamiti Farmers Co. Ltd (2015) eKLR** .

5. The plaintiffs on their part submit that striking out pleadings is a draconian measure and should be invoked sparingly as was held in the case of **D.T Dobie & Co. vs Muchina (1982) KLR I**. It is their submission that their pleadings filed cannot be said to be frivolous or vexatious and referred this

Court to the case of **County Council of Nandi vs Ezekiel Rutto & 6 Others (2013) e KLR**. The plaintiff also listed the grounds set out under Section 7 of the Act which must be met before a suit is declared res judicata which they submit does not apply to them. In conclusion, the plaintiffs urged this Court to find this motion has not met the set conditions and should be dismissed with costs.

6. Both parties, from the pleadings and submissions agree that the only issue for determination is whether the plaintiffs' suit is res judicata. The plaintiffs set out the conditions outlined in Section 7 of the Civil Procedure Act. I therefore need not enumerate them here. From the documents annexed, civil suit No 92 of 2012, Kwale Court indeed was heard and decided on merits. The plaintiffs/respondents admit the case referred to the same subject matter except the parties and the cause of action are different. This Court's task is therefore to establish whether or not the parties were the same and/or if the cause of action is different.
7. The pleadings in CMCC 92 of 2012 annexed by the defendants show the parties are:-

Ramaben Patani)
Selina Patani) Plaintiffs
Ashit Patani)

vs
Ngome Tsuma)
Mrinzi Ngome Tsuma) Defendants

In paragraph 5 of the supporting affidavit, the defendants/applicants deposed that ;

“That the applicants have been used as conduits by their family after lawful orders were made against them to give vacant possession of the suit property through a valid decree made after hearing all the parties at Kwale CMCC 92 of 2012 which matter was completed on 18.6.2014 and this suit filed a month later”.

The plaintiff in response said this ;

“That in response to paragraph 5 of the supporting

affidavit, the fact that this suit was instituted after

CMCC No 92 of 2012 was determined cannot be

evidence of non-disclosure of material facts”.

8. The plaintiffs have therefore not denied verbatim the relationship (family) put forth by the applicants. In paragraph 8, the plaintiffs swore that they were never made aware of the existence of CMCC No 92 of 2012 nor were they witnesses or parties. Part of Section 7 as relates to parties provides thus; **“.....between the same parties or between parties under whom they or any one of them claim, litigating under the same title”**. Further in paragraph 4 of the plaint in CMCC No 92 of 2012, it is pleaded thus:-

“The plaintiffs aver that on diverse dates, the defendants

herein jointly with others comprising members of their

families without any lawful authority... purported to

forcefully enter and occupy the suit property and thereby

developing the same with temporary structures”.

Since the suit property is the same and the plaintiffs herein have not denied their relationship to the defendants in CMCC No 92 of 2012, I am satisfied that they fall under the group of people litigating or who would have litigated under the same claim. I find that although the names are different, the family relationship ties them together and they cannot deny not being aware to CMCC No 92 of 2012 or being parties to it as laid out in explanation No 6 of Section 7. They are indeed bound by the findings and decree made in that suit.

9. The second issue is whether the cause of action herein is different and therefore the doctrine of res judicata does not apply. The present claim is for adverse possession while in the previous suit, these applicants sued for trespass. The defendants/applicants averred that the decree from Kwale Court has been executed in totality with the 3rd applicant now in actual possession hence the plaintiffs/respondents have not been in continuous and uninterrupted occupation. Although the magistrate's Court does not have jurisdiction to hear and determine a claim for adverse possession yet the existence of the case before it obviously has a direct bearing on a claim for adverse possession. The plaintiffs/respondents have not denied the averment that the 3rd respondent is in occupation and therefore letting this case proceed to hearing would merely be an academic exercise and a waste of judicial time. I hold that although the cause of action is different the respondents had the liberty before the conclusion of CMCC No 92 of 2012 to bring their claim. Once this suit was determined, it is not open for these plaintiffs to bring a new claim that could have been resolved in the former suit. I do find this line of objection to the application does not have an anchor to stand on and is hereby rejected.

10. This Court is alive to the law and principle that striking out suits is a harsh measure that must be exercised sparingly and in the clearest of cases. I have considered the matters in issue in totality and I am satisfied that on the basis of the decree arising from CMCC No 92 of 2012 which has not been appealed and on the basis of the relationship of parties in this suit and the former suit, the present suit is res judicata. It amounts to abuse of the Court process and it is a clear case for striking out. I do proceed to strike it out with an order that each party bear their respective costs of both the application and the suit.

Ruling Dated and Delivered at Mombasa this **29th** day of **September, 2015**

A. OMOLLO

JUDGE