



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L NO. 531 OF 2012

Formerly HCC 107 of 2009

JULIUS K. ATUNGA.....PLANTIFF

VS

NAUMY JEBYEGON KEMBOI.....DEFENDANT

RULING

(Application to strike out plaint; plaintiff having filed suit to claim land; land having been obtained pursuant to a grant that was nullified; succession court having redistributed the land and plaintiff now no longer proprietor; whether substratum of case destroyed; court of view that cause of action as pleaded no longer exists; plaint struck out).

The application before me has been filed by the defendant pursuant to the provisions of Order 2 Rule 15 (i) (b) (c) and (d) , and Section 3A of the Civil Procedure Act. The applicant is seeking orders that the plaintiff's suit be struck out with costs to the defendant. The grounds upon which the application is based are that the plaintiff's suit is a sham, is scandalous, frivolous and vexatious. It is further stated that the suit does not disclose any cause of action and that it is an abuse of the process of court. It is stated that the defendant is the registered owner of the suit land. The application is opposed by the plaintiff who filed grounds of opposition. It is inter alia averred that the suit raises pertinent and triable issues which can only be resolved through a full hearing.

Probably a little background will shed light as to why the defendant thinks that the plaintiff's suit is frivolous.

The plaintiff instituted this suit through plaint filed on 18 June 2009. In it, he pleaded that he is the owner of the land parcel Nandi/Kapsengere/1289 measuring 0.72 hectares. It was averred that the defendant without any colour of right trespassed into the said land. He sought for orders that the defendant be declared trespasser and for an order that the defendant do demolish any structure on the suit land. He also sought a permanent injunction to bar the defendant from the suit land. The defendant filed a Statement of Defence and Counterclaim. In the defence, it was stated that the plaintiff obtained title to the land through a succession matter being Kisumu Succession Cause No. 502 of 2006 but that the grant has since been annulled. In her counterclaim, the defendant averred that the land parcel Nandi/Kapsengere/1289 was originally part of the land parcel Nandi/Kapsengere/49 registered in the name of Sellah Jebiegon Murere. The defendant contended that she purchased 1/4 of an acre from Sellah on 7 July 2002 but that the vendor died before effecting transfer into the defendant's name. It is averred that after the sale, the defendant took immediate possession of the land. Later, the plaintiff came and bought 1 1/2 acres from the original land which was immediately adjacent to the 1/4 acre purchased by the defendant. It is stated that a certificate of confirmation of grant in the succession cause issued on 18 July 2008 was later revoked and a new one

issued on 27 May 2010. It is stated that the rightful share of the plaintiff in the land is 1 1/2 acres which is 0.6 hectares and not 0.72 hectares. The defendant sought an order to have the transactions that gave rise to the sub-division of the land parcel Nandi/Kapsengere/49 to bring forth the land parcel Nandi/Kapsengere/1289 nullified. There was also sought an order that the defendant is entitled to 1/4 acre of the land parcel Nandi/Kapsengere/49.

In the supporting affidavit to this application, the defendant has deponed that the plaintiff got title to the land parcel Nandi/Kapsengere/1289 by dint of the confirmed grant issued in Kisumu P& A Cause No. 506 which was nullified. She has further deponed that the estate was re-distributed in the succession cause and that she was confirmed as purchaser of 1/4 acre of the land parcel Nandi/Kapsengere/49 and a title for the 1/4 acre has already been issued to her being land parcel No. Nandi/Kapsengere/1338. She also deponed that the plaintiff was found guilty of forgery in Kapsabet Criminal Case No. 2071 of 2010. She annexed the rulings in the succession matter and in the criminal matter.

I have considered the application, the supporting affidavit, the grounds of opposition filed by the plaintiff and the submissions of Mr. Kitiwa for the applicant and Mr. Mukabane for the respondent.

It is apparent from the documents adduced, that the original parcel number was Nandi/Kapsengere/49 which was registered in the name of Sellah Jebiegon Murere (deceased). After the demise of Sellah, two succession causes were filed, being Kisumu High Court Succession Cause No. 506 of 2006 and Eldoret High Court Succession Cause No. 16 of 2008. The petitioners in the two cases were different sons of the deceased and each raised objection in the other's cause. The two suits were later consolidated into the Kisumu matter on 27 May 2010. Before the two suits were consolidated, the petitioners in Kisumu Succession Cause No. 506 of 2006 had already obtained a grant of letters of administration which was confirmed on 29 June 2007. This confirmed grant alongside the grant obtained in the Eldoret matter were annulled in a ruling made on 27 May 2010. Pursuant to the confirmed grant, the plaintiff had sub-divided the land into two parcels, Nandi/Kapsengere/1288 and Nandi/Kapsengere/1289. But even this sub-division was declared to have been made through forgeries as in the criminal matter, the plaintiff and two others were charged and convicted of forging consents from the Aldai Land Control Board purporting to be consents to sub-divide the original land parcel No. 49. The decision of the criminal court aside, I have seen the ruling dated 2 November 2011 made in Kisumu High Court Succession Cause No. 506 of 2006. That ruling was in respect of an application made by the objector in that cause, seeking to nullify the titles Nandi/Kapsengere/1288 and 1289. The objector sought the nullification so that the estate of the deceased as comprised in the land parcel No. 49 should be distributed afresh. The court (Aroni J), allowed the application. The court stated that it had nullified the grant that had been confirmed on 29 June 2007 and that the effect of that nullification was to revoke any distribution of the estate of the deceased. It held that the titles Nandi/Kapsengere/1288 and 1289 had been obtained pursuant to grants that had been revoked and they cannot therefore exist. The court re-instated the original land parcel No.49 and revoked the two titles comprised in Nos. 1288 and 1289. It is apparent therefore, that the land parcel Nandi/Kapsengere/1289, which is the subject matter of this suit does not exist.

I have also seen that the original land parcel Nandi/Kapsengere/49 was distributed in the succession cause. The court held that the plaintiff ought to get 1 1/2 acres out of that land and the defendant to get 1/4 acre of the land. It is also apparent that new titles for these portions have now been issued. The applicant has displayed her title now Nandi/Kapsengere/1338 for 1/4 acre.

It seems to me, given the above scenario that there is nothing to go for trial. The suit land Nandi/Kapsengere/1289 no longer exists and since it does not exist, one cannot continue a case on non-existent land. The issues between the parties herein appear to me to have been determined with finality in the succession cause and in the criminal matter. The defendant had counterclaimed for 1/4 acre, but it can be seen that through the succession cause, she has obtained title to what she wanted. It is in my view unnecessary to have this matter proceed for hearing as the subject matter has been destroyed.

That leaves me with the issue of costs. A reading of the rulings and judgment in the criminal matter brings one to the conclusion that the plaintiff obtained title to the land parcel Nandi/Kapsengere/1289 fraudulently and by forgery. He opted to litigate and protect his fraudulently acquired title. The defendant

was forced into this litigation and asserted her right to her 1/4 acre. That right was affirmed in the succession cause. I do not see how the plaintiff can escape paying costs of his suit and of the defendant's counterclaim.

The final order is therefore that the plaintiff's suit and the counterclaim are struck out. The plaintiff will however bear the costs thereof.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 19TH DAY OF MARCH 2014

JUSTICE MUNYAO SILA

ENVIRONMENT AND LAND COURT AT ELDORET

Delivered in open court in the presence of:

Parties – Absent

N/A for M/s Gicheru & Co for plaintiff/respondent

N/A for M/s Kitiwa & Co for defendant/applicant