



REPUBLIC OF KENYA



**Registered Trustees of Telposta Pension Scheme v The Chief Lands Registrar & 3 others
(Environment & Land Case E009 of 2022) [2024] KEELC 680 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 680 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E009 OF 2022
E ASATI, J
FEBRUARY 15, 2024**

BETWEEN

REGISTERED TRUSTEES OF TELPOSTA PENSION SCHEME PLAINTIFF

AND

CHIEF LANDS REGISTRAR 1ST RESPONDENT

ZACHARIA KARANJA KINYAJUI 2ND RESPONDENT

JOSEPH MBUGUA MAIN 3RD RESPONDENT

NISHI PANDIT 4TH RESPONDENT

RULING

1. This ruling is in respect of two applications namely; the Notice of Motion application dated 14th March, 2022 filed by the Plaintiff and the Notice of Motion application dated 26th July, 2022 filed by the 4th Defendant.

The Application dated 26th July, 2022

2. The application dated 26th July, 2022 was stated to be brought pursuant to the provisions of Order 51 Rule 1 *Civil Procedure Rules* and Section 1A, 1B and 3A of the *Civil Procedure Act*. It seeks for orders that the suit be struck out with costs.
3. The grounds upon which the application was brought are that the suit as presented by the Plaintiff and the documents in support thereof does not disclose any cause of action vested in the Plaintiff in relation to the suit property. That the suit as presented is misconceived and constitutes an abuse of the due process of the law. That the Plaintiff's cause of action, if any, is prohibited by the law governing limitation of actions.



4. The application was supported by the averments in the Replying Affidavit of the 4th Defendant sworn on 26th July, 2022 in opposition to the Plaintiff's Notice of Motion application dated 14th March, 2022.
5. The application was opposed vide the averments in the Affidavit of Peter Rotich dated 14th March, 2022 attached to the Plaintiff's Notice of Motion dated 14th March, 2022.
6. The application was canvassed by way of written submissions.
7. It was submitted on behalf of the 4th Defendant/Applicant that the court is invited to examine the Plaintiff's documents as presented to reach a determination that it would be futile to wait for a trial in a case where the Plaintiff's alleged claim to have any interest or right on the suit property is based on legal instruments that cannot vest any property in the suit property in the Plaintiff.

That the case is a clear case of interpretation of the various statutes of law and its legal Notices which either stand or falls on their own without the need for any witness to say anything on them for the court to reach determination of the dispute before it.

That a reading of Legal Notice No.133 of 11th March 1988 demonstrates without doubt that the Plaintiff has never had and does not have any legitimate claim to the ownership of the suit property or any of the properties set out in the subsequent schedules attached to Legal Notice No.154 of 5th November, 1999 and Legal Notice No.131 of 2001.

8. It was submitted further that there is no certificate of any minister produced vesting any of the properties in Kenya Post and Telecommunication Corporation from the alleged previous owners. That the entire claim of transfer of property to Kenya Post and Telecommunication Corporation fails as there is no proof of transfer of the suit property.
9. That subsequent legal Notices could not in law legitimately, transfer or vest in the Plaintiff any property from the Kenya Post and Telecommunication Corporation which the later had never acquired in the first place even if the subsequent legal Notice purported to provide a schedule of the Plaintiff's property.
10. Reliance was placed on the case of *Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Limited & 2 others* [1998] eKLR where the court of Appeal cited *Macfoy v United Africa Co. Ltd* [1961] ALL E.R. 1169 where it had held inter alia that "If an act is void, then it is in law a nullity"
11. That the relevant statutes and legal notices did not vest any property, much less the suit property into the Plaintiff as a basis of any iota of claim to its ownership at all. That the Plaintiff appears to have avoided producing legal Notice No.133 of 11th March, 1968 on account of its unfavourable interpretation to the Plaintiff's claim of ownership.
12. It was further submitted that by reason of the contents of the legal Notice No.133 of 11th March, 1988 and lack of certificate of transfer issued by any minister in favour of the alleged previous original owner, the suit property remained unclaimed public land available for allocation or alienation to anyone else. That this entitled the 1st Defendant to allocate the suit land to the 2nd and 3rd Defendants. That the 4th Defendant/applicant was equally lawfully and legitimately entitled to have purchased the leasehold interest thereon and had it transferred in her favour after following all the legal procedures.
13. It was further submitted on behalf of the 4th Defendant/Applicant that the subsequent legal Notice No.154 of 5th November, 1999 and legal Notice No.131 of 2001 of 14th September, 2001 relied upon by the Plaintiff as vesting the suit property from Kenya Posts and Telecommunication to the Plaintiff does not afford the Plaintiff any help as it could only apply in relation to such public land held by



the Government of Kenya in the hands of the then Government agency known as Kenya Post and Telecommunication Corporation as at 30th June, 1999.

That the undisputed facts of the case cannot sustain the Plaintiff's claim to any claim to ownership of the suit property.

14. That though the principle of law has always been that courts would not ordinarily strike out a suit unless it is so hopeless that no life can be injected into it by amendment, this case is different. That the facts of the case are not in dispute on the relevant issues for determination sought for striking out and that it is based entirely on interpretation of various legal Notices and statutes. That it would defeat the overriding objectives of the court of expeditious, proportionate and affordable resolution of disputes if the matter would be allowed to proceed to trial.

Counsel urged the court to strike out the suit for not disclosing a reasonable cause of action.

15. Counsel submitted further through the Supplementary written submissions dated 2nd October, 2023 that legal Notice No.154 of 5th November, 1999 and Legal Notice No.131 of 14th September 2001 can only be of any use to the Plaintiff's case if the Plaintiff can demonstrate that the suit property was one of the properties belonging to its predecessor the Kenya Post and Telecommunication Corporation.

16. It was submitted on behalf of the Plaintiff that the 4th Defendant's application dated 26th July, 2022 is bad in law for being accompanied by Affidavit contrary to Order 2 rule 15(1)(a) and (2) of the Civil Procedure Rules 2010. Relying on the case of Lavington Security Limited v National Social Security Fund [2017]eKLR Counsel submitted that in making an application under Order 2 Rule 15(a), a party must look at the pleadings only and not go beyond them by analysing the evidence produced in the matter or otherwise produce evidence to support such an application. Reliance was also placed on the case of Taj villas Management Limited v Taj Mall Limited [2018] eKLR where the court of Appeal commented on an application made under Order 2 rule 15(a)(a) of the Civil Procedure Rules 2010 that;

“where a party opts to make an application for striking out of a pleading solely under order 2 Rule 15(1)(a), Order 2 Rule 15(1)(a) denies him the right to rely on any evidence. All that such a party is required to do is to state concisely the grounds on which the application is founded.....”

17. It was submitted further for the Plaintiff that the Plaintiff has a reasonable cause of action that is plainly obvious from the plaint. Counsel relied on the case of DT Dobie & Co. (K) Ltd. v Muchina (1982)KLR where reasonable cause of action was defined as;

an action with some chance of success when allegation in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim/prayer.....

Further counsel relied on the case of Crescent Construction Co. Ltd. v Dolphin Bank Limited [2007]eKLR where the court emphasized the need for a court to exercise its discretion with utmost care when faced with an application to strike out a pleading. The court held inter alia that the court must not drive away any litigant however weak his case may be from the seat of justice.

18. I have considered the application and the grounds raised in opposition thereto. The applicant invites the court to examine, analyse and make findings on the evidence intended to be produced by the



plaintiff before production of the evidence. In the case of *D.T. Dobie & Company (Kenya) Ltd. v Muchina* (1982) KLR 1 at p. 9 the Court of Appeal held that:

“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.”

19. Similarly, in *Nitin Properties Ltd v Jagjit S. Kalsi & another* [1995] eKLR where it was held that “Striking out is a drastic remedy and it has been held time and again that striking out procedure can be invoked only in plain and obvious cases and that such jurisdiction must be exercised with extreme caution. See *Republic of Peru v Peruvian Guano Company* 36 Ch Div 489 at pages 495 and 496.”
20. Guided by the cited decisions and in view of the facts of the case, this court finds it to be proper and in the interest of justice that the case goes for trial so as to give the parties a chance to adduce evidence and thereby interrogate the documents relied upon and for the real issues in controversy to be determined. The application to strike out the suit is therefore declined.

The Application dated 14th March, 2022

21. The application dated 14th March, 2022 was stated to be brought pursuant to the provisions of Sections 1A, 1B, 3A, 63(e) of the *Civil Procedure Act*, Order 40 rules 1, 2 and 10 of the *Civil Procedure Rules* 2010. It seeks for an order restraining the Defendants and their agents from dealing, disposing, transferring, digging, advertising, entering or otherwise interfering with the Plaintiff’s interest over title number Kisumu Municipality Block 12/153 pending hearing and determination of the suit.
22. The grounds upon which the application was brought are that the Plaintiff is the owner of the suit land by legal Notice No.133 of 11th March, 1988, legal Notice No.154 of 5th November, 1999 and legal Notice No.131 of 14th September, 2001 vesting the suit property in the Plaintiff absolutely and unaware that there are attempts to convey its interests in the property to third parties.

That the Plaintiff discovered that the 1st Defendant illegally issued a title deed in respect of the suit property to the 4th Defendant. That the Plaintiff is apprehensive that if the court does not intervene, the 4th Defendant will jeopardise the Plaintiff’s interests over its property and adversely affect innocent third parties.
23. That the Plaintiff is a pension scheme that caters for pensioners and it is imperative that it safeguards the proprietary interest from which it can meet its obligations to pensioners. That the Plaintiff is keen to preserve its proprietary interest and execute its mandate as a pension scheme and for this it requires access to its properties including the suit land.
24. It was the plaintiff’s case further that due to illegal acquisition of its various properties including the suit property herein, it stands to suffer losses estimated at Kshs.1 billion which losses will occasion the plaintiff irreparable reputational damage as it will be unable to discharge its liabilities to the pensioners.
25. The application was supported by the averments in the Supporting Affidavit of Peter Rotich and the annexures thereto.
26. The application was opposed by the 4th Defendant vide the contents of the Replying Affidavit sworn by 4th Defendant on 26th July, 2022. The 4th Defendant’s case is that she is the absolute proprietor of the



leasehold interest in the suit property having been so registered on 6th February, 2003 for an ongoing period of 99 years from 1st March 1999.

27. That on the basis of the documents relied upon by the Plaintiff, the Plaintiff's claim to ownership of the suit property is untenable, illogical, unreasonable, no rights or interest were conferred or vested in the Plaintiff in the suit property.
28. That if the application is allowed, the 4th Defendant stands to suffer gross injustice and prejudice as the registered legal owner of the suit property whose authenticity of the document of title has not been challenged by the incoherent state of allegations by the Plaintiff whose legal basis from the documents produced do not appear to substantiate its claim of ownership.
29. The grounds for grant of interlocutory injunction were set out in the case of *Giella v Cassman Brown Co. Ltd* (1973) 358 that the Applicant must establish a prima facie case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of probabilities.
30. In this case both the Plaintiff and the 4th Defendant claim ownership of the suit property. It is through the full hearing that ownership will be determined. In the meantime, it is important to maintain the status quo of and preserve the suit land pending hearing and determination of the suit.
31. For these reasons the court finds that it is in the interest of justice to allow the application. The application dated 14th March 2022 is hereby allowed and a temporary order of injunction issued restraining the Respondents from disposing of, transferring, charging and or advertising the suit land parcel No. Kisumu Municipality Block12/153 pending hearing and determination of the suit.

Costs to the 4th Defendant.

Orders accordingly.

RULING DATED AND SIGNED AT KISUMU AND DELIVERED THIS 15TH DAY OF FEBRUARY, 2024 VIRTUALLY THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI,

JUDGE.

In the presence of:

Maureen: Court Assistant.

Munyiva for the Plaintiff/Applicant.

Moraa h/b for Essendi for the 1st Respondent

No appearance for the 2nd Respondent

No appearance for the 3rd Respondent

Ragot for the 4th Respondent.

