



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
CIVIL SUIT NO.15 OF 2013

MARY WANGARI MWANGIPLAINTIFF

-VERSUS-

**PETER NGUGI MWANGI T/A MANGU BUILDERS LTD.....1ST
DEFENDANT**

DANIEL KIPLANGAT KIRUI2ND DEFENDANT

DALICE INVESTMENTS LTD.....3RD DEFENDANT

COMMISSIONER OF LANDS.....4TH DEFENDANT

RULING

1.The Plaintiff commenced this suit by way of a plaint dated 8th October, 2010 and sought,*inter alia*, the following orders:

(i) A declaration that the plaintiff is the legal owner of L.R Naivasha Municipality Block 5/225 (hereinafter referred to as the suit property) and subsequent orders for registration of the same in her name

(ii) Nullification and cancellation of title documents to the suit property in the name of Mangu Builders and Dalice Investments Ltd

(iii) A permanent injunction restraining the defendants jointly and severally by themselves, their servants, employers and or agents from registering any dealings on, dealing in, disposing off, transferring and or interfering with the plaintiff's peaceful use, enjoyment, occupation and or dealing in the suit land or any part of, in any manner detrimental to the plaintiff

(iv) Costs

2. Contemporaneously with the plaint, the Plaintiff filed a chamber summons seeking interim orders that the respondents by themselves, their servants, employees and or authorized agents be restrained from selling, dealing in, disposing off, transferring and or interfering with the plaintiff's peaceful use, enjoyment, occupation and or dealing in the suit land or any part of, in any manner detrimental to the plaintiff applicant pending the hearing and determination of this application.

3. On 12th October, 2010 the plaintiff amended her plaint to include a prayer for interim injunction. It is this amended plaint that is the subject of challenge by the two applications dated 31st May, 2011 and 5th July, 2011.

4. On 31st May, 2011 the 1st defendant filed a motion seeking to have the amended plaintiff dated 12th October, 2010 struck out on the following grounds-

(i) That the amended plaintiff does not disclose any reasonable course of action against the 1st defendant

(ii) That the whole suit is an abuse of the court process.

(iii) That the plaintiff has no merits deserving a full trial.

(iv) That this suit relates to two other claims between the parties herein on the same subject matter being Nakuru HCCC NO. 272 of 2009 and Nakuru HCCC NO. 48 of 2006.

(v) That the substratum of the amended plaintiff as against the 1st defendant is so weak that it cannot be cured.

(vi) That the matters in issue in previous proceedings cannot be reopened in this case and be heard as though this is a fresh matter.

5. The application is supported by the affidavit of Peter Ngugi Mwangi, the 1st defendant herein. He deposes that the plaintiff has never been the proprietor of the suit land: that he had found himself involved in matters relating to the suit land through the actions of the plaintiff who had decided to fraudulently register the suit land under his business name Mangu Builders without his authority or consent: That he has no interest in the suit land and neither is he a proprietor of the same therefore the inclusion of his name in the suit and the reliefs sought in the plaintiff have no bearing on him as none have been sought against him.

6. The 2nd and 3rd respondents filed a similar application on 5th July, 2011 seeking that the amended plaintiff dated 13th October, 2010 (which I will take to be the amended plaintiff dated 12th October 2010) be struck out with costs to the 2nd and 3rd applicants on the grounds that :

(a) That the amended plaintiff and the plaintiff's action is abuse of the process of court

(b) That the plaintiff's suit is vexatious, frivolous and scandalous

(c) That the plaintiff's suit lacks merit and cannot stand trial

(d) That the suit will prejudice, embarrass and delay the fair

trial.

7. The application is supported by the affidavit of Daniel Kiplagat Kirui sworn on 1st June, 2011. He deposes that the 3rd defendant is the owner of the suit land having been allotted the same in 1993: that the 2nd applicant had engaged the plaintiff who had presented herself as an estate agent to obtain a lease over the suit property but she instead obtained a title in her name which title was found to be fraudulent by the Ministry of Lands and subsequently cancelled.

8. The 4th defendant did not enter appearance in this suit.

9. The two applications are opposed. The Respondent through a replying affidavit sworn on 19th September, 2010 deposes that her amended plaintiff disclosed a reasonable cause of action which raises issues of fraud perpetrated by the Defendants, is not an abuse of the court process and deserves a full trial: that the existence of the two suits i.e Nakuru HCC No.272 of 2009 and Nakuru HCC No.48 of 2006 is proof that there are issues that need a full trial, which the defendants wished to avoid: That Nakuru HCC 272 of 2009 was withdrawn by the plaintiff and the 2nd and 3rd Defendants had failed to

prosecute HCC No.48 of 2006 giving her a right to file and proceed with her own suit; That the 1st Defendant in his affidavit admits that the plaintiff is the registered owner of the suit property as the title had initially been registered in her name but the same was subsequently transferred back to the name of Mangu Builders: That the 1st Defendant is colluding with the 2nd and 3rd Defendant to defraud the plaintiff of her property even after the 1st Defendant agreed with the plaintiff to convert Mangu Builders into a Limited Liability company where they hold equal shares: that the 2nd and 3rd Defendants have never been owners of the suit land and they obtained the title document through fraudulent means: That the 2nd and 3rd Defendant did not apply for the suit property and their allotment letters are for different Land parcels and perusal of the Municipal Council of Naivasha records will reveal that the plaintiff is the registered owner of the suit property. She urged the court to dismiss the two application with costs.

10. An earlier application by chamber summons dated 8th October, 2010 seeking orders of injunction, was heard and determined by Ouko J. He did not grant the orders sought but instead dismissed the application with costs on the grounds that the applicant (plaintiff) had failed to establish a prima facie case. He made the following observations: The 1st defendant had disowned the lease registered in his business name stating that it was acquired fraudulently which title had also been declared a forgery by the Ministry of Lands: Nakuru HCCC No. 272/ 2009 raised similar issues to those in the instant suit: The documents presented in support of the instant application were the same used in an application dated 1st October, 2009 and that although the present applicant was not a party in the other suit and investigations carried out by the police did not find her culpable, he was of the view that the allegation of collusion and fraud against the respondents met the threshold of a prima facie case.

11. Directions were taken that the two applications be disposed of together by way of written submissions. The 1st, 2nd and 3rd defendants filed their written submissions within the stipulated period but the plaintiff/respondent filed her written submissions four days after the expiry of the 30 days granted by this court. I shall not consider her submissions alongside the other submissions.

12. In his submissions the 1st defendant rehearsed what was stated in his grounds and supporting affidavit of his application dated 31st May, 2011. He relied on the following authorities which I have taken into consideration

1. **Samuel Karuga Koinange v. Bellion Bank Ltd Nairobi (Millimani) High Court, Civil Case No.9511 of 2000 Hewett J, on 1 November, 2000** Cited by G.V Odunga in his book Ondung's Digest on Civil Case Law and procedure Volume 1, 2nd Edition at page 3.

2. **United Insurance Company Ltd v. Kerano Marwa Musembi Ndolo & Company Advocates, Kisumu High Court Civil Case No.409 of 2000: LLR(Birech CA on 4th September, 2001)** as cited at page 4 in Ondung's Digest (*supra*)

3. **Kenya Re-Insurance Co-operation v. Adda Okello Owuor Kisumu High court Civil Appeal No.17 of 2005 Warsame, J.**

13. The 2nd and 3rd defendants also rehearsed their grounds and replying affidavit and relied on the following authorities which I have equally read and considered.

1. **Mpaka Road Development Co Ltd v. Abdul Gatur Kawa T/A An Kapuri Paw Coffee House HCCC No. 318 of 2000** cited in **Kenya Power & Lighting Company Ltd v American Life Insurance Company (K) Ltd (2005) eKLR**

2. **Trust Bank Limited Vs Amin & Company Ltd & Another (2000) KLR 164**

3. **Margaret Mumbi Kagiri v. Kagiri Wamairwe & 3 others Civil Appeal No.181 of 2002 Nyeri**

4. **Solomon Kutundu Munywoki & 2 others Vs Par Towers Limited & 2 others**(2006) eKLR

5. **Japhet Ogendo Owuar v. Akuom O Leonard & Co Auctioneers & 4 others** (2006) eKLR

14. After reading the pleadings and submissions by counsels for both parties, I find that the following are the issues for determination:

(i) Is the suit vexatious, frivolous and scandalous?

(ii) Is the suit an abuse of the court process?

15. To get a clearer picture of the history of this matter I took the liberty to call for the following files; Nakuru HCCC

NO. 272 of 2009, Nakuru HCCC NO. 48 of 2006 and Nakuru HCCC 50 of 2006.

16. In Nakuru HCCC NO. 272 of 2009, an application dated 1st October, 2009 to restrain the defendants from selling, alienating, disposing of or interfering with the applicants title to the suit land was dismissed with costs. According to the court record, the court later ordered that investigations be carried out after the plaintiff (1st Defendant in the current suit) denied having filed the suit or having an interest in the suit property. Investigations revealed that the plaintiff did not file the suit himself as his signature was found to have been forged and the court left it to the defendants to decide how they wished to proceed with the suit. No further action was taken. This matter is still pending for hearing and determination.

17. Nakuru HCCC 48 of 2006 was withdrawn by the plaintiff and is therefore spent.

18. In Nakuru HCCC NO. 50 of 2006, the plaintiff in the current suit has been sued by James Kiarie Kimemia who is seeking a refund of money paid by him to the plaintiff for the purchase of the suit property. This suit is still pending for hearing and determination.

19. Order 15(1) of the Civil Procedure Rules provides:-

“At any stage of the proceedings a court may order to be struck out or amended any pleading on the ground that-

(a) it discloses no reasonable cause of action; or

(b) it is scandalous, frivolous, or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial

of the action; or

(d) it is otherwise an abuse of the process of court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

20. What was frivolous and vexatious was defined by Ringera J in the case of **Trust Bank Limited v Amin Company Ltd & Another** (2000) KLR 164 as:

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial

of the action”

21. It is common ground that the suit property has been the subject of a long protracted dispute between the plaintiff, 1st, 2nd and 3rd defendants and other persons not parties in this suit. The plaintiff, 1st Defendant and another were jointly charged in a criminal case with the offence of making a document without authority. It is also common ground that the suit property is not registered in the name of the plaintiff. In Nakuru HCCC 272 Of 2009 and in the current suit, the 1st Defendant, (plaintiff in 272) in whose business name the title was registered denied instituting that suit, being a proprietor or having any interest in the suit property stating that the plaintiff fraudulently registered the suit property in his name. In my view, I do not see what reasonable cause of action the plaintiff has against the 1st Defendant who has disowned the very title the plaintiff lays a claim upon.

22. As regards the 2nd and 3rd defendants, the 3rd defendant's title has been recognized by the Lands Office and the earlier title issued to the 1st defendant discredited by the very authority that issued it. The same authority went ahead to confirm that the Documents used to process the title in the name of Mangu builders did not emanate from the Lands office, that they were a forgery. Although the applicant was not a party in Nakuru HCCC 272 Of 2009, the issues raised in the instant suit are the same and the documents used to support the pleadings similar.

23. The main issue for determination in all the suits, is who is holding the genuine lease to the suit property. The holder of the lease in the name of Mangu builders has disowned that lease and admits that the title was fraudulently processed and subsequently registered in his business name. The lands office have also discredited that lease. This is the same lease that the plaintiff now wants declared legal and registered in her name. I find that these issues have already been addressed. In my view continuing to entertain the plaintiff's claim against the 2nd and 3rd Defendants will not only be vexatious, frivolous and scandalous but also an abuse of the court process. See the case of **Japhet Ogendo Owuor v Akuom O Leonard & Co Auctioneers & 4 others** (2006) EKLK and Section 7 of the Civil Procedure Act 2010 which states as follows:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

24. I have looked at this suit from all angles to see if life can be injected into it but is so weak that it is beyond redemption and is incurable. It cannot be redeemed even with amendments.

See the case of **DT Dobie & Company (Kenya) Ltd v. Muchina**, the Court of Appeal observed:-

..... “The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment, it should not be struck out.”

25. For the foregoing reasons I find the applications dated 31st May 2011 and 5th July 2011 have merit and allow both applications with costs.

Dated signed and delivered at Nakuru in open court this 20th day of December 2013 .

L N WAITHAKA

JUDGE

PRESENT

Mr Otieno holding brief for MrGai for Plaintiff/Applicant

Mr Kipkoech holding brief for Mr Kurgat for 1st defendant

Mr Murithi holding brief for 2nd& 3rd defendants

Emmanuel Maelo: Court Assistant

L N WAITHAKA

JUDGE