



**Aboli & another (Suing as administrators of the Estate of Rev Madar Evans Okanga Dondo (Deceased)) v Kiarie & another (Suing as administrators of the Estate of Kiarie Ng'ang'a (Deceased)) (Environment and Land Case Civil Suit 108 of 2012) [2023] KEELC 16716 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16716 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND CASE CIVIL SUIT 108 OF 2012**

**A OMBWAYO, J  
MARCH 23, 2023**

**BETWEEN**

**FOSCA ABOLI ..... 1<sup>ST</sup> PLAINTIFF**

**CALEB OTIENO MADARA DONDO ..... 2<sup>ND</sup> PLAINTIFF**

**SUING AS ADMINISTRATORS OF THE ESTATE OF REV MADAR EVANS  
OKANGA DONDO (DECEASED)**

**AND**

**PATRICK NG'ANG'A KIARIE ..... 1<sup>ST</sup> DEFENDANT**

**JOHN NG'ANG'A KIARIE ..... 2<sup>ND</sup> DEFENDANT**

**SUING AS ADMINISTRATORS OF THE ESTATE OF KIARIE NG'ANG'A  
(DECEASED)**

**RULING**

**Brief Facts**

1. The defendants herein filed the notice of motion application dated March 15, 2016 brought under order 51 rule 1, order 2 rule 15 of the *Civil Procedure Rules* and sections 1A, 1B & 3A of the *Civil Procedure Act* seeking for orders that;
  - a. That the plaintiff (now deceased) having entirely withdrawn his suit against the defendant (now deceased) herein, the plaintiff's defence to the defendant's counterclaim be struck out and judgement be entered in favour of the defendant/applicant granting.
    - a. Immediate vacant possession of the suit land to wit Nakuru/Langalanga Block 1/330.



b. Mesne profits at the rate of Ksh 19,600 per month from December, 2005 to-date.

That the plaintiff's estate be condemned to shoulder the costs of the instant application together with the defendant's costs of this suit.

2. The grounds on the face of the application are that the pleadings ought to be struck out as they are frivolous and vexatious. That the plaintiff's estate has no valid claim against the defendant's estate and that if it has any claim then it is against housing finance for damages and not for the suit property. That the plaintiff (now deceased) withdrew his suit against the defendant (also deceased) and the plaintiff's defence to the counterclaim which still stands after withdrawal of the suit, is thus an abuse of the court process. That the deceased defendant is the absolute owner of the suit property and that the deceased plaintiff's estate has unlawfully refused to grant the defendant's estate vacant possession.
3. That the deceased defendant had bought the suit property at a public auction on December 16, 2005 which was advertised in advance and the deceased plaintiff's attempt to challenge the sale in Nakuru HCC No 262 of 2005 failed. That the deceased defendant had acquired the title deed for the suit property and the occupation of the property by the deceased plaintiff's family is an act of trespass. That in the premises, the court should strike out the plaintiff's defence to counterclaim and enter judgement for the defendant and his estate in terms of the prayers sought.
4. The application is supported by the supporting affidavit sworn by John Ng'ang'a Kiarie on April 6, 2016. He reiterated the grounds on the face of the application and stated that the public auction that took place on December 16, 2005 was conducted by M/s Nguru Enterprises Auctioneers outside National Bank of Kenya Ltd where he was the highest bidder. That immediately he deposited the purchase price with the chargee Housing Finance Company of Kenya Ltd and was given a certificate of public auction. That he was registered as the owner of the suit property and was issued with a certificate of lease. That the plaintiff's estate has declined to vacate the suit property despite demands to do so and that their occupation is unlawful and so they should be ordered to vacate and pay the late defendant's estate mesne profits at Kshs 19,600/= per month since December 2005 which is equivalent to monthly rent from the said premises.
5. The defendants filed a further supporting affidavit sworn on November 4, 2021 by John Ng'ang'a Kiarie. He deposed that he has read the replying affidavit of Fosca Aboli and Caleb Otieno Masara Dondo sworn on October 22, 2021. The said replying affidavit is not on the court record.
6. He deposed that the plaintiffs have confirmed that this suit was withdrawn and reiterated the contents of his supporting affidavit. That Nakuru HCC No 270 of 2007 formerly HCC No 119 of 2006 abated as his father who was the 4<sup>th</sup> defendant died on September 29, 2011. That he seeks that their application be allowed as prayed.

### **Submissions**

7. The plaintiffs filed their submissions dated March 26, 2022 on April 5, 2022. The plaintiffs submitted that the deceased plaintiff filed a suit against the deceased defendant *vide* the plaint dated June 9, 2006. The deceased defendant filed a statement of defence and counterclaim dated June 19, 2006 and the deceased plaintiff filed a reply to defence and defence to counterclaim dated July 11, 2006. That before the hearing of the matter, the plaintiff withdrew the suit with costs to the deceased defendant and filed Nakuru HCC No 270 of 2007 where he challenged the sale of the suit property.
8. The plaintiffs then identified the following issues for determination; whether a counterclaim amounts to a suit, whether the defence to counterclaim should be struck out and whether the prayers sought in the application can be granted in the circumstances.



9. On the first issue, the plaintiffs relied on order 7 rule 3 and 5 of the *Civil Procedure Rules*, the cases of *Sh. Jag Mohan Chawla & another v Dera Radha Swami Satsang & others* (citation not given), *County Government of Kilifi v Mombasa Cement Limited* [2017] eKLR, *CK Patel Limited v Mayharvest Limited & 2 others* [2020] eKLR and submitted that the defendants counterclaim is a suit.
10. On the second issue, the plaintiffs submitted that the defence to counterclaim raises triable issues and should not be struck out at this stage of the proceedings and cited the decision in the case of *D.T Dobia & Company (Kenya) Limited v Joseph Mbaria Muchina & another* civil appeal 37 of 1978 [1980] eKLR in support of their submissions.

On the third issue, the plaintiffs relied on order 36 rules 1 and 2 of the *Civil Procedure Rules*, section 26(1) of the *Land Registration Act* and submitted that the deceased defendant's title is challenged on the ground of fraud. The plaintiffs further relied on the case of *Postal Corporation of Kenya & Anor v Aineah Likumba Asienya & 11 others* CA No 275 of 2014 and sought that the defendants application be dismissed.

### **Analysis and Determination.**

The defendants are seeking that since the plaintiffs had withdrawn their suit against them, the court should strike out the plaintiffs defence to the defendants counterclaim and judgement be entered in favour of their as sought in their counterclaim.

Order 2 rule 15 of the *Civil Procedure Rules* provides that;

15.(1) at any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that;

- a) It discloses no reasonable cause of action or defense in law.
  - b) It is scandalous, frivolous or vexatious.
  - c) It may prejudice, embarrass or delay the fair trial of the action.
  - d) It is otherwise an abuse of the process of the court.
11. The jurisdiction to strike out pleadings is discretionary. The court in the case of *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (civil appeal No 35 of 2000) held as follows;

A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial...It cannot be doubted that the court has inherent jurisdiction to dismiss that, which is an abuse of the process of the court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved”.

12. The grounds upon which the defendants are seeking for the court to strike out the plaintiffs' defence to counterclaim are that the pleadings are frivolous and vexatious and that the suit property belongs to the deceased defendant.

Upon perusal of the defendants' statement of defence and counterclaim dated June 19, 2006 and filed on the same date, the prayers sought in the application are similar to the one's sought in the



application under consideration while the averments in the counterclaim, are the grounds on the face of the application. The plaintiffs in their reply to defence and defence to counterclaim admit that the deceased defendant is the registered owner of the suit property but they deny the other averments in the counterclaim.

The court in the case of *Crescent Construction Limited v Kenya Commercial Bank Limited* [2019] eKLR stated as follows;

However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

13. It is the courts finding that the defendants have not laid a basis for the court to strike out the plaintiffs defence to the counterclaim and it is in the interest of justice and fairness that the counterclaim be defended and heard on merit. Further that the prayers sought by the defendants herein cannot be granted as they require to be subjected to proof as per the required standards in civil cases and the court can only pronounce itself upon consideration of the evidence placed before it.

In conclusion, the application dated March 15, 2016 lacks merit and is dismissed with costs.

**RULING DATED, SIGNED AND DELIVERED VIA EMAIL THIS 23RD MARCH 2023**

**A O OMBWAYO**

**JUDGE**

