**Ayuka v Adongo & another (Environment & Land Case 3 of 2021) [2023] KEELC 16888 (KLR) (19 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16888 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ENVIRONMENT & LAND CASE 3 OF 2021**

**FO NYAGAKA, J**

**APRIL 19, 2023**

**BETWEEN**

**ANDREW AMUNZE AYUKA ..... PLAINTIFF**

**AND**

**BEN MUTENYO ADONGO ..... 1ST DEFENDANT**

**JACKSON ANGAINE ..... 2ND DEFENDANT**

**RULING**

(On an application for striking out pleadings for not disclosing a reasonable cause of action and being an abuse of the process of court)

## The Application

1. The 1st Defendant moved this Court by way of a Notice of Motion dated November 10, 2022. He brought it under Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Order 2 Rules 15(a), (b), (c) and (d) and Order 51 Rule 1 of the *Civil Procedure Rules*. Through it he sought the following orders:

    1. ...spent

    2. That the Plaint herein and all the pleadings filed by the Plaintiff/Respondent be struck out/ dismissed with costs.

    3. Any other relief this Court shall direct.

    4. Costs be provided for.

2. The Application was based on four (4) grounds which were fairly straight forward since they were copied almost verbatim from Rule 15(1) of the *Civil Procedure Rules*. They were that the Plaint did not disclose any reasonable cause of act; the suit was an abuse of the process of this Court; the suit

may prejudice, embarrass and delay the fair trial of the action; and it was flagrant abuse of the process of the Court.

3. It was supported by the Affidavit of the 1st Defendant, sworn on the same date as the Application. In it he deponed that he was the registered owner of all that parcel of land known as Kolongolo/Kolongolo Block 2/Biketi/417 (herein referred to as parcel No. 417) which was as a result of a subdivision of the original Kolongolo/Kolongolo Block 2/Biketi/3 (herein referred to as parcel No 3). Hereinafter, the parcels of land will be designated by only their specific numerical figures, for instance, parcel No 417 for the two parcels referred to above. He annexed to the Affidavit and marked as BMA 1 a copy of the green card. He deponed further that the registered boundaries of plot numbers Kolongolo/Kolongolo Block 2/Biketi/416 (herein referred to as parcel No 416) and 417 were within the measurements of parcel No 3 while those of parcel Kolongolo/Kolongolo Block 2/Biketi/206 (herein referred to as parcel No 206 stood alone.

4. He deposed that parcel No 206 was not associated in any way with other two plots. His evidence on that was the annextures of two green cards of the parcels of land which he marked as BMA 2 'a' and 'b'. Further, he deponed that the survey carried out on the parcels of land on January 30, 2022 confirmed that the beacons were in place and shown on the ground. He argued that the Report by the second surveyor showed that the total acreage of the three parcels of land was more than the registered acreage by approximately 0.34 Ha. He annexed and marked as BMA 3 a copy of the report. He stated that the Report failed to show that the Defendants had trespassed onto the Plaintiff's plot and that it showed that their parcel was less in acreage and ought to be added. He then swore that no cause of action had been disclosed by the Plaintiff. He deponed that the only relief sought was a permanent injunction but no relief for declaration hence it cannot stand alone. He prayed that on that basis the suit be struck out.

5. The Plaintiff opposed the Application through a Replying Affidavit sworn by one Erick Kimokoti Amunze who was said to be one of the Administrators of the estate of the late Andrew Amunze Ayuka who had passed away in the cause of the suit. He deponed that the Application lacked merit. He deponed that the boundaries of the three parcels of land in issue were clear and that from the Registry Index Map (RIM) parcel No 206 was in its rightful place. He then deponed further that the common boundary between parcel Nos 416 and 417 was not straight and to the direction of north the ground was less. He annexed and marked as EKA 1 a copy of the surveyor's report dated October 2, 2022. He then swore further that the County Surveyor's report of 2/10/2022 identified that mischief on the ground. That parcel No 206 was associated with parcel Nos 416 and 417. He stated that the surveyor's report found that the total acreage of parcel No 206 was 4.12 Ha which was less by 0.33 Ha as registered.

6. He deponed that the report marked as EKA1 confirmed that the Applicants had indeed trespassed since the ground acreage of their parcels Nos 416 and 417 were 5.47 Ha and 3.70 Ha respectively while their registered acreage was 5.26 Ha and 3.24 Ha respectively, giving a difference of 0.24 Ha and 0.46 Ha more each. He then deponed that the Application was premature, misconceived an abuse of the process of the Court. He prayed for its dismissal.

7. On February 3, 2023 the Applicant filed a Further Affidavit sworn by him on the same date. The Court is of the opinion that it will not take time to sum the depositions in the Affidavit here or after for reasons that it will give below as it makes the determination of this instant Application.

8. The parties neither submitted orally nor filed any written submissions to the Application although the Court had given them chance to do so.

**Issues, Analysis and Determination**

9. The Court considered the Application here, the opposition thereto and the law on it. It is of the view that only three issues lie for determination. They are:

    a. Whether an Application for striking out pleadings for not disclosing a reasonable cause of action can be brought under Rules 15(b), (c) and (d) also.

    b. Whether the application is merited.

    c. Which orders to give and who to bear costs of the application.

10. I now begin to analyze the issues in the sequence they are listed above.

**a. Whether an application for striking out pleadings for not disclosing a reasonable cause of action can be brought under rules 15(b), (c) and (d) also**

11. The issue to determine here is whether it was proper for the Applicant to base the application on a combination of all the grounds listed under Order 2 Rules 15(1) of the *Civil Procedure Rules*. The instant application was brought under Order 2 Rule 15(1) of the *Civil Procedure Rules*. The sub-rule has four sub-heads, being (a)-(d). They are disjunctive: an application can be brought based on any one of the sub-heads. That does not mean that a party may not combine one or two of the subheads in bringing an application. He is permitted to do so but not using all the sub-heads. One of them, being must sub-rule (a) should have the prayer thereunder as a stand-alone one. The rest of the other three can be combined if a party thinks there are good reasons to do so. The sub-heads (b), (c) and (d) only.

12. An application brought under sub-rule (a) should be a stand-alone for two main reasons. First, while it is not the duty of the Court to be on the lookout for errors on the part of the parties, for the Court and parties to conduct the trial fairly, and I mean here that the observing the principle of fair trial which calls for, among others, the speedy and just conclusion of the dispute, the starting point for consideration as to any dispute between parties is whether or not a real dispute exists, or if it does for a Plaintiff/ Claimant, whether or not the Defendant has any reasonable defence to it.

13. Secondly, using the natural principle of like things to be treated alike and unalike ones to be treated unalike, under Order 2 Rule 15(2) any application brought under subhead (a) is not, at all, supposed to be supported by any affidavit evidence. And there is good reason for that: the parties' pleadings only are under consideration in comparison with the law. If a party combines a prayer under the sub-rule with that in the others which require Affidavit evidence, he/she places the Court in a dilemma as to whether the prayer merits on its own not. At the same time, it presupposes that the Plaint or Claim or Defence raises a reasonable cause of action already but does not warrant being in Court for the reasons being advanced under one or a combination of any of the three sub-rules.

14. The point is that it is either a pleading does not raise a reasonable cause of action hence should be struck out without consideration of the other issues provided for under the other sub-rules or it raises a reasonable cause of action but then it meets the other challenges of being scandalous, frivolous or vexatious, or is likely to prejudice or embarrass the fair trial of the matter, or is otherwise an abuse of the process of the Court. Thus, to bring the Application under sub-rule (a) together with any of the other sub-rules (b), (c) or (d) or any combination of them is clearly wrong an incurable for the application. It implies that the Applicant is on a fishing expedition hence casting the net as wide as he/she possibly can to try luck. In my view such an application is the one that is itself an abuse of the process of the Court.

15. To sum up that finding, this Court finds instructive guidance in the case of *Olympic Escort International Co Ltd & 2 Others -vs- Parminder Singh Sandhu & Another* [2009]eKLR. In it the COA held:

> "We think for our part that it was inappropriate to combine the two prayers, one of which requires evidence before a decision is made and one that does not. There was affidavit evidence on record and it was in fact considered by the learned Judge. It matters not therefore that the applicant had stated that the affidavits should not be considered. As the prayer sought under Order 6 r 13 (1) (a) was in contravention of sub-rule (2) of that order, it was not for consideration and we would have similarly struck out the application on that score..."

**b. Whether the application is merited**

16. In beginning with this second issue, and now giving the reason for not summarizing the contents of the Further Affidavit, the Court notes that the Applicant filed it on 03/02/2023. He did so without leave of the Court as provided for under Order 51 Rule 14(3) of the *Civil Procedure Rules*. By contrast with the law on filing of pleadings by parties to the effect that a party wishing to join issue with allegations raised in a Defence may file a Reply to the Defence without leave of the Court, the procedure regarding Applications is different. A party who files an application does not have automatic leave to file any further affidavit subsequent to the Application without leave of the Court. If a Respondent files a replying affidavit and the Applicant is of the opinion that facts are raised in it which require further answers or clarifications by way of deposition, he can only file another affidavit in response with leave of the Court. Short of that any further affidavit filed would be illegally on record and a nullity. That is what the Applicant did herein and the further affidavit is illegally on record hence not worth considering.

17. Striking out a pleading is a rare phenomenon which the Court applies only in the clearest of the cases that the party's pleadings are plainly hopeless or clearly not intended to achieve the ends of justice but put across a certain motive. Danckwerts L.J. of the House of Lords *Wenlock V Moloney*, [1965] 2 All E.R 871 at page 874, when considering a similar issue stated as follows:

> "There is no doubt that the inherent power of the court remains; but this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent power of the court and not a proper exercise of that power. The learned master stated the relevant principles and practice correctly enough, and then, I am afraid, failed to apply them to the case."

18. The Court of Appeal in *Blue Shield Insurance Company Ltd vs. Joseph MboyaOguttu* [2009] eKLR restated these principles thus:

> "The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of *D.T. Dobie and Company (Kenya) Ltd vs Muchina* (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect

covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case *inter alia* as follows:-

> "The power to strike out should be exercised after the Court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case."

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of *Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others* (No.3) (1970) ChpD 506, where the Lord Justice said:-

> "The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and all the circumstances relating to the offending pleading."

We may add that like Madan J.A, said, the power to strike out a pleading which ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable."

19. In *Brite Prints (K) Ltd v Attorney General* HCCC No 1096 of 2000 was which was cited by Havelock J in *Strategic Industries Ltd v Solpia Kenya Limited* [2014] eKLR, the judge held:

> " According to Black's Law Dictionary (5th ed.), West Publishing Co., St Paul Minn., U. S. A., 1979) a matter is frivolous if it is of little weight or importance: a pleading is 'frivolous' when it is clearly insufficient on its face, and does not controvert the material points of the opposite pleadings, and is presumably interposed for mere purposes of delay and to embarrass the opponent. A vexatious pleading is one without a reasonable or probable base and only intended to harass, disquiet or annoy the other party. A pleading is embarrassing if it is so drawn that it is not clear what case the opposite party has to meet at the trial (see British Land Asso v Foster (1888) 4 Times Rep. 574). However, a pleading is not embarrassing only because it contains allegations that are inconsistent or slated in the alternative (see Re Morgan, Owen v. Morgan (1887) 35 C. D. 492).

20. The Court now examines the merits of the Application under the sub-rules it was brought. First it was bought under the sub-rule that it did not disclose a reasonable cause of action. The phrase has been defined in a number of court decisions. In *D.T Dobie & Company (kenya) Ltd v Muchina* 1982 KLR 1, the late Madan JA stated as follows:

> " 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."

21. In considering whether the pleading sought to be struck out discloses a reasonable cause of action or not, the content thereof is what is to be considered. I have carefully considered the Plaint dated 18/01/2021 and filed the same date. The Plaintiff states that he is the son of the late Hebron Amunze who was the original owner of land parcel LR. No. Kolongolo/Kolongolo Block2/Biketi/206 which

is now registered in the Plaintiff's name. He averred further that the Defendants were beneficiaries of the estate off the late Hebron Amunze and subsequently became registered as owners of land parcel numbers LR. No. Kolongolo/Kolongolo Block2/Biketi/416 and 417 respectively. After disturbance of the boundary between the parcels owned by the defendants and the plaintiff, the Plaintiff reported the dispute to the Land Registrar who caused a survey to be conducted and boundaries established, showing that the defendants had indeed interfered with the boundary. Then they ignored the findings of the Registrar and have continued to occupy the areas they did before. He sought an injunction against them and their servants and agents from interfering with the use of the land parcel he owns.

22. This summary clearly shows that there is indeed an issue to be tried by the Court. The issue is whether or not the defendants are in occupation of or interfering with the quiet use and enjoyment of land parcel LR. No. Kolongolo/Kolongolo Block2/Biketi/206. Because of that this Court finds that the pleadings disclose a cause of action. The first limb of the application fails.

23. With regard to the rest of the other limbs, on the one hand, the applicant argued that the survey conducted on 01/03/2022 which he annexed as BMA 3 showed that land parcel No. 206 was not adjacent to the two other parcels of land, namely 416 and 417. He deponed that the report failed to confirm that there was trespass by the defendants onto the suit land hence the suit disclosed no cause of action. On the other hand, the Plaintiff repeated the contents of the survey report and how it showed that there were variations of the sizes of the three parcels of land in issue. He stated that the report dated 05/10/2022 indeed identified the mischiefs on the ground.

24. I have carefully considered the issues raised. They relate to the differing survey reports purported to be over the same parcels of land. The Report dated 06/04/2022 was as a result of the order of this Court that the County Surveyor does visit the disputed parcels of land and establish the position on the ground. It raises a number of questions that need to be clarified by the evidence of both the parties and the surveyor. It cannot be wished away. In any event the law cannot permit the suit to be struck out on the basis of a survey report that is not only disputed but strongly contested without the officer who prepared the same being questioned on his findings, for clarification. In my view the Applicant seems to be subtly trying to escape from the reality of testing the evidence that has come forth from the survey that was conducted pursuant to an order of the Court. He is keen to run away from the truth.

25. In my view the above facts do not show how the suit herein is an abuse of the process of this Court or is likely to prejudice, embarrass and delay the fair trial herein or is a flagrant abuse of the process of the Court. Therefore, I find that the application herein is absolutely unmeritorious and is the one that is an abuse of the process of this Court. I dismiss it with costs to the Plaintiff. And to prevent the filing of frivolous applications as the instant one, in case the applicant shall in times to come intend to file another application, he shall have to seek first and obtain the leave of the Court. This suit shall be mentioned on 03/05/2023 to fix a hearing date.

26. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 19TH DAY OF APRIL, 2023.**

**HON. DR. *IUR* FRED NYAGAKA**

**JUDGE, ELC KITALE**