



Rajab v Lokoel (Civil Case 14 of 2020) [2022] KEHC 10576 (KLR) (24 May 2022) (Ruling)

Neutral citation: [2022] KEHC 10576 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITALE**

CIVIL CASE 14 OF 2020

LK KIMARU, J

MAY 24, 2022

BETWEEN

FATUMA RAJAB PLAINTIFF

AND

GILCHRIST LOKOEL DEFENDANT

RULING

1. By a Notice of Motion dated 31st May 2021, the Defendant made an application pursuant to Sections 1A, 1B, 3 & 3A of the *Civil Procedure Act* and Order 2 Rule 15 of the *Civil Procedure Act* seeking orders from this court to strike out the Plaintiff's originating summons dated 10th July 2020 on account that it did not disclose any reasonable cause of action and was an abuse of the court process. The Defendant prayed to be awarded costs of the suit. The application is supported by the grounds stated on the face of the application. In summary, the Defendant states that the Plaintiff had not laid any basis for this court to make a finding that she had contributed towards the purchase of the suit property. The defendant averred that the Plaintiff had not presented before court any documents to established her ownership of the suit properties. The Defendant observed that the Plaintiff had not placed any evidence before the court to establish that she had been married to the Defendant under a regime of marriage known in law. The defendant formed the view that the Plaintiff's suit was a non-starter, hopelessly defective and beyond redemption. The defendant urged the court to dismiss the suit in the interest of substantive justice and to protect the Defendant from vexatious harassment by the Plaintiff.
2. In response, the Plaintiff swore a replying affidavit urging the court to dismiss the application. She was of the view that the application was meant to deny her the opportunity of ventilating her case before the court. She reiterated that she had contributed towards the developments in the suit parcel of land during the subsistence of her marriage to the Defendant. She maintained that she could not be expected to put all her documents that she intends to rely on in her case during the preliminary stages of the proceedings. The Plaintiff deponed that what the defendant was seeking was the determination of the suit at a preliminary stage before the parties had been given an opportunity to present their respective



cases before the court. As for proof of marriage, the Plaintiff stated that the court had the jurisdiction to presume the existence of marriage depending on the evidence that will be adduced before court. The Plaintiff further pointed out that the application presented before court was incompetent in that it did not have a supporting affidavit. In the premises therefore, the Plaintiff urged the court to dismiss the application.

3. Prior to the hearing of the application, the parties herein agreed by consent to have the application disposed of by way of written submission. Both parties filed their respective submissions. This court has carefully considered the said submissions. It has also had the benefit of reading the pleadings filed by the parties in support of their respective opposing positions. The Defendant's application is predicated on Order 2 Rule 15 of the *Civil Procedure Rules* which provides that at any stage of the proceedings, the court may strike out a suit of pleading if, inter alia, it does not disclose a reasonable cause of action. The Court of Appeal in *The Co-operative Merchant Bank Ltd Vs George Fredrick Wekesa* Civil Appeal No. 54 of 1999 held thus:

“Striking out a pleading is a draconian act, which may be only be resorted to, in plain cases... whether or not a case is plain is a matter of fact ... since oral evidence will be necessary to disprove what either of the parties says, the Appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the Respondent's action or which is otherwise an abuse of the process of the court.”

4. In *DT Dobbie & Company Kenya Ltd. Vs Joseph Mbaria Muchina* [1980] eKLR 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 the case before it.”

5. In the present application, it was clear to the court that the Defendant is trying to advance his defence in this application. The defendant has raised contentious issues which are obviously disputed by the Plaintiff and which can only be resolved by this court hearing the parties, evaluating the evidence that has been thoroughly proved on cross-examination and after the parties had the opportunity to present their respective cases.
6. It is the considered view of this court that what the Defendant is asking this court to do, at a preliminary stage, without the benefit of hearing the parties, is to render a determination on disputed facts which have not been tested on trial. The Defendant wants this court to evict the Plaintiff from the seat of justice without giving her an opportunity to ventilate her case. The Defendant has not established the threshold expected of him by Order 2 Rule 15 of the *Civil Procedure Rules* to enable this court invoke its draconian jurisdiction to strike out suits or pleadings which do not advance the interest of justice.
7. Having perused the pleadings filed by the Plaintiff, this court formed the view that the same raises prima facie issues for determination which can only be resolved by the court hearing oral evidence from the parties. The disputed facts shall be resolved in a full hearing of the case.
8. In the premises therefore, this court holds that the Defendant's application seeking to strike out the Plaintiff's suit lacks merit and is hereby dismissed with costs to the Plaintiff. It is so ordered.

DATED AT KITALE THIS 24TH DAY OF MAY 2022.



L. KIMARU
JUDGE

