



**Remtone Holding Company Limited v Mashukur Enterprises Limited & 2 others
(Environment & Land Case 396 of 2017) [2023] KEELC 17526 (KLR) (18 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17526 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 396 OF 2017**

FM NJOROGE, J

MAY 18, 2023

BETWEEN

REMTONE HOLDING COMPANY LIMITED PLAINTIFF

AND

MASHUKUR ENTERPRISES LIMITED 1ST DEFENDANT

NAKURU DISTRICT LAND REGISTRAR 2ND DEFENDANT

RUKIMA ESTATE LIMITED 3RD DEFENDANT

RULING

1. This ruling is in respect of the 3rd defendant's Notice of Motion application dated 7/02/2023 brought under Section 1B and 3A of the *Civil Procedure Act* and Order 50 Rule 1 of the *Civil Procedure Rules* seeking the following orders:
 1. The Honourable Court be pleased to strike out and expunge the statement of the Director Land Administration, R J Simiyu dated December 2, 2021 from the court record.
 2. The Honourable Court be pleased to make an order directing the Ethics and Anti-Corruption Commission and or the Directorate of Criminal Investigations to investigate the circumstances under which the statement of R J Simiyu was drawn, executed and filed in this proceedings and make appropriate recommendations to the Director of Public Prosecutions.
 3. The costs of this application be borne by the Plaintiff.
2. The application is supported by the affidavit of Onesmus Kimani Ngunjiri a director of the 3rd defendant sworn on 7/02/2023. The grounds on the face of the application and the supporting affidavit are that the plaintiff, the 1st and 3rd defendants are laying claim to land parcel No. Nakuru Municipality Block 4/127; that although the District Land Registrar, Nakuru is a party to this proceedings, the plaintiff which is a private company has purported to draw and caused execution of a



witness statement of the Director Land Administration. R J Simiyu dated 2/12/2021 that was filed in Court on 7/4/2022; that he is aware that R J Simiyu is employed by the Public Service Commission as a Director Land Administration, which fact he confirms at paragraph 1 of his statement; that he believes that it is an outright illegality for the Plaintiff to draw and file R J Simiyu's purported statement as this is a mandate that is exclusively vested on his employer or the Hon. Attorney General; that the said action is in contravention of Article 156(4)(a) of the Constitution; that it is in the interest of good governance and rule of law that the statement of R J Simiyu dated 2/12/2021 be expunged from the Court record; that it is also in the interest of good governance and the rule of law that the court orders the Ethics and Anti-Corruption Commission and the Directorate of Criminal Investigation investigate the circumstances under which the statement of R J Simiyu was drawn, executed and filed and make appropriate recommendations to the Director of Public Prosecutions; that R J Simiyu has failed to be impartial and objective in the discharge of his mandate as a Director Land Administration in accepting to execute the impugned statement that has evidently been drawn, prepared and filed by the law firm of Mirugi Kariuki & Company Advocates and sought that his application be allowed as prayed.

3. The plaintiff filed a replying affidavit on March 6, 2023 sworn by Hellena Cheserem a director of the plaintiff company. She deposed that the plaintiff filed a Further Witness Statement by one RJ Simiyu dated 2/12/2021 and filed in court on the 7/2/2021; that RJ Simiyu was brought in by the Plaintiff as an expert witness to shed more light on the dispute and to give his expert testimony on the renewal of the lease; that his witness statement is confined to the issue of renewal of a lease and the procedure a party is expected to follow; that the contested witness statement does not touch on the issues being disputed by the parties but is only meant to shed more light on the question of procedure; that the said witness statement does not bring new evidence; that the contested witness statement is necessary as it will give the court guidance on how to settle the dispute at hand; that his evidence does not bind the court and no party will be prejudiced if he is allowed to give his evidence; that the 3rd defendant's application lacks merit and can be dismissed.

Submissions

4. The 3rd defendant filed its submissions dated March 22, 2023 on the same day while the plaintiff filed its submissions dated 3/03/2023 on March 6, 2023.
5. The 3rd defendant relied on the case of Okuya Omtatah Okoiti & 2 others v Attorney General & 3 others [2014] eKLR and submitted that the plaintiff is in breach of clear constitutional and statutory law by preparing and filing a public officer's witness statement. The 3rd defendant reiterated that the plaintiff, the 1st defendant and itself are claiming ownership of the suit property and submitted that the only issue in contention is whether it is legal for the plaintiff to file a statement of a public officer employed in the office of Director Land Administration where the Chief Land Registrar is a party and is represented by the Attorney General. The 3rd defendant relied on Articles 10 and 232(1) of the Constitution of Kenya, Section 9(a) of the Public Officers Ethics Act, the case of Felix Kiprono Matagei v Attorney General & 3 others (2016) eKLR and submitted that the statement of R J Simiyu violates the national values of transparency, accountability, good governance, objectivity and impartiality.
6. The 3rd defendant also relied on the case of Okuya Omtatah Okoiti & 2 others v Attorney General & 3 others [2014] eKLR and Section 80(1) of the Evidence Act in support of its arguments and sought that its application dated 7/02/2023 be allowed as prayed.
7. The plaintiff filed its submissions dated 3/03/2023 and submitted on whether the statement of the Director of Land Administration RJ Simiyu dated 2/12/2021 should be struck out and expunged from the record and who should bear the costs of the application.



8. On the first issue, the plaintiff submitted that the Plaintiff herein instituted this suit against the defendants seeking a declaration that it is the lawful and the registered proprietor of the parcel of land known as Nakuru Municipality Block 4/127 and that both the 1st and 3rd defendants hold competing titles to the same property. The plaintiff also submitted that it included two witnesses who were Hellena Cheserem and R J Simiyu a District Land Administrator. The plaintiff reiterated that the said Land Administrator is only intended to give his expert evidence on the renewal of a lease process and will not touch on any contested issues in this matter. The plaintiff further reiterated the contents of its replying affidavit and relied on the cases of *Apex Security Services Limited vs Joel Atuti Nyaruri* [2018] eKLR and *Shah & Another vs Shah Others* [2003] I EA 290 in support of its arguments. The plaintiff concluded its submissions by relying on the case of *Orix Oil Limited vs Paul Kabeu* [2014] eKLR and sought that the 3rd defendant's application be dismissed with costs.

Analysis and Determination

9. After considering the application, replying affidavit and the submissions, the issues that arise for determination are whether the court should strike out the statement of R J Simiyu dated 2/12/2021 and whether the court should order the Ethics and Anti-corruption Commission and/or the Directorate of Criminal Investigations to investigate the circumstances under which R J Simiyu wrote the statement dated 2/12/2021.
10. The 3rd defendant is seeking that the witness statement of R J Simiyu dated 2/12/2021 be expunged from the court record on the grounds that he is employed by the Public Service Commission as a Director Land Administration and it is therefore illegal for the plaintiff to file his witness statement. The 3rd defendant alleges that R J Simiyu as an employee of the Public Service Commission cannot sign a statement drawn by a law firm in support of a litigant in a private land ownership matter where the District Land Registrar is a party as it ought to have been filed by the Attorney General. The plaintiff on the other hand argues that the said witness statement does not touch on the issues in controversy between the parties and is only on the process of the renewal of a lease.
11. Order 2 Rule 15 (1) of the *Civil Procedure Rules* provides as follows:
- "15. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- (a) it discloses no reasonable cause of action or defence in law; 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 the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be."

12. The Court of Appeal in the case of *DT Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR held as follows:

“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the



merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, LJ (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

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."

13. The court in the case of *Parker House Radio Limited v Sony Corporation Japan & 2 others* [2016] eKLR held as follows:

"7, Bearing the above in mind it is essential to note that in striking out of a pleading the Court is only mandated to make a decision based on the pleadings filed. However, it is of note that the matter at hand regards a witness statement filed by Ahmed Mukhtar Parkar dated 4th April, 2014. The primary purpose of a witness statement is to provide written evidence in support a party's case that will, if necessary, be used as evidence in court. The objective of witness statements has been expressed as "to improve the efficiency of trials". In an adversarial system there are carefully formulated rules for pleading and discovery to ensure that by the time of trial each party is fully prepared and no party is taken by surprise. There is an obligation upon each party to come to trial with cards upon the table. In modern parlance, there is a duty of disclosure that requires each party to articulate its case clearly and precisely and to provide access to the materials in its possession that are relevant to the case of each party (even if they do not assist the party giving access). That is in essence, the main objective of Order 11 of the Civil Procedures Rules 2010.

8. Furthermore, in addition to the above it is my opinion that contents of a witness statement flow directly from the claims as pleaded. Put differently, a witness statement provides details and particulars of the pleaded claim. Thus, it is my finding that where a witness statement fails meet this particular function, the tenets of striking out a pleading should be applied." (Emphasis mine)"

14. As indicated before, the 3rd defendant is seeking that the witness statement of R J Simiyu be struck out on the ground that he is a government employee and he should therefore not file a witness statement in support of a party's case in a private matter, that witness statements such as his should be filed by the Attorney General. The plaintiff on the other hand argues that the witness statement of R J Simiyu is majorly on the process of renewal of a lease and does not touch on the issues in dispute. A perusal of the said witness statement (of R J Simiyu) filed on 7/12/2021 indicates that he works in the Lands office as a Director Land Administration and is conversant with the facts and issues of land parcel No Nakuru Municipality Block 4/127 as he had processed the relevant documents and records touching



on the land. The rest of his witness statement is on the process of renewal of a lease as pointed out by the plaintiff. It is necessary to state here that in any litigation before a court of law is normally only interested in establishing the truth regarding allegations made by parties. Some of the truthful statements may emanate from the opposing side. In the present case the proposed witness who has made the impugned statement is from the defence side. His evidence may have rattled the 3rd defendant but there is nothing this court can do to alleviate its concerns in the circumstances outlined above.

15. It is this court's view that the grounds upon which the 3rd defendant is seeking that the said statement be struck out do not fall within the parameters of Order 2 Rule 15 (1) of the *Civil Procedure Rules*. It is also my view that the 3rd defendant's arguments are farfetched and have no legal basis. Each party has a right to call evidence in support of their case and it is possible that the impugned witness statement of R J Simiyu will assist the court in its quest to effectually and completely adjudicate on all the issues in this matter.
16. Consequently, the 3rd defendant's application dated 7/02/2023 lacks merit and it is hereby dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 18TH DAY OF MAY 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

