



**Maina (Suing as the Legal Representative of Eliud Wanjohi Maina) v Mungai & 4 others
(Environment & Land Case 101 of 2019) [2023] KEELC 17401 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17401 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 101 OF 2019**

JG KEMEI, J

MAY 11, 2023

BETWEEN

**ERNEST WANJOHI MAINA (SUING AS THE LEGAL REPRESENTATIVE OF
ELIUD WANJOHI MAINA) PLAINTIFF**

AND

DANIEL KINYANJUI MUNGAI 1ST DEFENDANT

DOMINIC KINYANJUI KIARIE 2ND DEFENDANT

JULIUS MUTURI NGANGA 3RD DEFENDANT

DISTRICT LAND REGISTRAR, KIAMBU 4TH DEFENDANT

ATTORNEY GENERAL 5TH DEFENDANT

RULING

1. Before Court is the 3rd Defendant's/Applicant's Notice of Motion dated 16/9/2022 filed pursuant to Order 1 Rule 14 and Order 2 Rule 15 (1) *Civil Procedure Rules* seeking in the main that his name be struck out of the suit for non-disclosure of a reasonable cause of action against him. The 3rd Defendant also prays for costs of both the Application and suit.
2. The Application is premised on grounds that the Plaintiff does not demonstrate the existence of any right to relief against him since paras. 17 and 18 of the Plaintiff accuse the 2nd and 4th Defendants only for fraudulent activities; That under Para 19 of the Plaintiff, the Plaintiff claims that he has not been able to enter the land and there is no averment that it is the 3rd Defendant who has taken possession of the land and that allegations of fraud levelled against him at para 22 of the Plaintiff are insufficient to sustain a charge of fraud against him and thus prayers b and c of the Plaintiff are merely gratuitous and his continued presence in the suit is absolutely unnecessary.



3. The Motion is further supported by the Affidavit of Julius Muturi Ng'ang'a, the 3rd Defendant sworn on even date. The applicant reiterated the above grounds and added that the thrust of the allegations in paras 9-12, 14, 16, and 17 of the Plaint are levelled against the 1st and 4th Defendants and that no culpability has been shown on his part making it unnecessary for him to continue in the suit.
4. Further the deponent admits that he has been mentioned in prayers b, c, d and e of the Plaint.
5. The Application is opposed by the Plaintiff only.
6. The Plaintiff filed Grounds of Opposition dated 4/10/2022 and contended that the cause of action raising triable issues against the 3rd Defendant has been aptly pleaded in paras. 17 – 27 of the Plaint. That the applicant acquired a title to the suit land through fraud; That the averments in the instant Motion can only be determined at the hearing and not at this interlocutory stage; the title deed that the Plaintiff wishes to be revoked is registered in the 3rd Defendant's name making him a necessary party to this suit. The Plaintiff termed the Application as a delaying tactic and a ploy to derail the hearing and urged the Court to dismiss it with costs.
7. On 21/3/2023 directions were taken to canvass the Application by way of written submissions. However, it suffices to observe that by the time of preparing this Ruling none of the parties had complied with the said orders of the Court. That said the Court will determine the Application on its merits based on what is before it.
8. I find the key question for determination is whether the Application is merited.
9. The 3rd Defendant invoked the provisions of Order 1 Rule 14 and Order 2 Rule 15 (1) [Civil Procedure Rules](#) which respectively provide;

“ 14. Practice [Order 1, rule 14.]

Any Application to add or strike out or substitute a Plaintiff or Defendant may be made to the Court at any time before trial by chamber summons or at the trial of the suit in a summary manner.

Order 2, rule 15.] Striking out pleadings.

"15. At any stage of the proceedings the Court may order to be struck out or (1) 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.

(2) No evidence shall be admissible on an Application under subrule (1)-

- (a) but the Application shall state concisely the grounds on which it is made.



(3) So far as applicable this rule shall apply to an Originating Summons and a Petition.”

10. A claimant is entitled to pursue a claim in Court notwithstanding the probability of his success may be. Unless the Defendant can demonstrate that the suit does not raise an iota of a reasonable cause of action, or that the claim is objectionable and or is an abuse of the process of the Court, a claimant must be allowed to pursue his claim to finality.
11. With respect to an Application to strike out a party or Plaintiff on the ground that it does not disclose a reasonable cause of action, at this stage the role of the Court is to test the particulars of each averment to see whether they are sufficient to establish a reasonable cause of action. The Court is not being called upon at this nascent stage to examine the evidence to see whether or not the Plaintiff has proven or assess the prospects of his cause against the Defendant. The Court is therefore restricted to examine the pleadings on record to determine if the Application is merited.
12. It is trite that striking out is a drastic remedy and it has been held that striking out jurisdiction should be invoked in plain and obvious cases. Courts have been cautioned to exercise this jurisdiction with extreme caution and circumspection. See the Court of appeal case of [Nitin properties Vs Jagir Singh Kalsi](#) (1989) unreported.
13. Order 1 Rule 10 (2) [Civil Procedure Rules](#) also provides that: -

“The Court may at any stage of the proceedings, either upon or without the Application of either part, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendants, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”
14. Implicit from the above provision, it is clear that the Court may on its own motion or on Application of any party to the proceedings order the striking out of a party, who the Court finds was improperly joined. In the exercise of that discretion, the Court must undoubtedly have reason(s) to decide fairly and not according to its whims and caprice.
15. The question that falls for determination is whether the 3rd Defendant should be struck out of the suit on grounds that no reasonable cause of action has been disclosed against him in the Plaintiff. Put differently whether the 3rd Defendant is a necessary party in this suit and if so, whether any cause of action is disclosed against him. If the answer to the question is in the negative, then the Court will not hesitate to invoke its discretionary powers and strike out his name.
16. According the [Black's Law Dictionary](#) 10th Edition at page 266 the definition of cause of action is stated thus;

“A group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in Court from another person.”
17. Further the Court of Appeal in the case of [Attorney General & Another Vs Andrew Maina Gitinji & Another](#) [2016] eKLR Waki JA held that,

“A cause of action is an act on the part of the Defendant, which gives the Plaintiff his cause of complaint.”



That definition was given by Pearson J. in the case of Drummond Jackson vs Britain Medical Association (1970) 2 WLR 688 at pg 616. In an earlier case, Read vs Brown (1889), 22 QBD 128, Lord Esher, MR had defined it as: -

“Every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgement of the Court.”

Lord Diplock, for his part in Letang vs Cooper [1964] 2 All ER 929 at 934 rendered the following definition: -

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person.”

18. A perusal of the amended Plaint filed on November 11, 2022 indicates that the Plaintiff is suing the Defendants in his capacity of as legal administrator of the late Eliud Wanjohi Maina, the bona fide proprietor of the land known as Dagoretti/Kinoo/T1187 (the suit land). The Plaintiff inter alia claims that the 2nd and 4th Defendants colluded and fraudulently transferred the suit land to the 3rd Defendant. Particulars of the 3rd Defendant’s fraud were enumerated at para. 22 of the Plaint that failure to conduct due diligence on the suit land; disregarding the restrictions registered on the suit land and conspiring with the 2nd and 4th Defendants to defraud the late Eliud Wanjohi by acquiring title deed issued on 23/2/2018 from the 2nd Defendant.
19. Towards that end the Plaintiff prays for Judgment against the Defendants jointly and severally *inter alia* for a declaration that Eliud Wanjohi Maina is the registered proprietor of the suit land and revocation of the title deed issued to the 3rd Defendant on 23/2/2018
20. Denying the Plaintiff’s claim, the 3rd Defendant filed a memorandum of appearance dated October 27, 2021 through the firm of Amolo & Kibanya Advocates. He also filed his statement of defence dated 4/11/2021 on even date in which he has vehemently denied the particulars of fraud levelled against him and sought to put the Plaintiff to strict proof.
21. The 3rd Defendant in the grounds of his Application conceded that the only reference made to him is traced to paras 17 and 18 of the Plaint wherein the 2nd and 4th Defendants are accused of fraudulently transferring the suit land’s title deed to him.
22. The totality of the above facts leads to but one conclusion that the Plaintiff has disclosed a reasonable cause of action against the 3rd Defendant. It is rather obvious to the Court that the 3rd Defendant is likely to be affected by the orders of the Court, either way, seeing that he is the registered proprietor of the suit land under contest. It is no wonder then that the 3rd Defendant has moved to appoint Counsel to represent and indeed mount a defence against the Plaintiff.
23. The merits or otherwise of the Plaintiff’s case however cannot be determined at this interlocutory stage thus the need to have the matter proceed to full hearing. At that point the parties will be at liberty to ventilate their rival positions and tender evidence before the Court.
24. In the upshot and for the foregoing reasons I find the Application untenable and lacks merit.
25. Final orders for disposal;
 - a. The Application is dismissed
 - b. Costs follow the event but in this case the Application was totally unnecessary and the applicant is condemned to pay costs on a higher scale to the Plaintiff/Respondent.



26. Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 11TH DAY OF MAY, 2023
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;

Kanyi for Plaintiff

Ngugi Kariuki for 1st, 2nd, 3rd and 4th Defendants

5th Defendant – Absent

Court Assistants – Kevin/Lilian

