



Denooyer & another v Ancilotto (Environment & Land Case 11 of 2022) [2023] KEELC 19317 (KLR) (25 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19317 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 11 OF 2022**

**AK BOR, J
JULY 25, 2023**

BETWEEN

JAMES DENOAYER 1ST PLAINTIFF

LORRIE DENOAYER 2ND PLAINTIFF

AND

LUISA ANCILOTTO DEFENDANT

RULING

1. Through the application dated March 16, 2023, the Defendant sought to have the suit struck out and to be awarded the costs of the suit on the grounds that the Plaintiffs’ Originating Summons did not disclose any reasonable cause of action against her and that the suit was misconceived, incompetent, defective and barred in law because the Plaintiffs are unlawfully claiming or seeking to obtain or assert tenure of, and proprietary interest in a portion of agricultural land that they cannot lawfully acquire as non-citizens of Kenya. The application was brought under Order 2 Rule 15 (1) (a), (2) and (3) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act.
2. The 1st Plaintiff swore the replying affidavit in opposition to the application in which he averred that striking out pleadings was a draconian measure that should only be taken in clear cases which are hopeless and do not require a trial. He averred that from the pleadings, it was clear that his claim was for possessory rights over the suit property despite the fact that it is registered in the Defendant’s name. He gave the value of investments he had made in the suit property as \$1,800,000 which he hastened to add was not a nominal figure that could simply be wished away. He added that the Defendant was being dishonest yet she had expressed the clear intention to sell the suit land and that he and his wife stood to suffer if the question of their rights over the land is not determined. He averred that those facts were outlined in the affidavits supporting his claim and urged that the case should proceed to trial so that the court can evaluate the facts at a proper trial.



3. He implored the court that he was not young anymore and stood to lose everything that he toiled for while he had strength and that the court was his only haven. He expressed surprise that the Defendant who was well aware of the investments he had injected into the suit property could make a move demonstrating that she wanted to unjustly enrich herself.
4. He contended that even one triable issue would make the court not to dismiss a case summarily. He urged that this was not one of those cases that ought to be dismissed summarily because it disclosed a reasonable cause of action and that they as Plaintiffs stood to suffer irreparable loss.
5. The court directed parties to file written submissions on the application. The Defendant submitted that the Plaintiffs filed the Originating Summons dated December 13, 2022 claiming to be entitled to be declared as proprietors of land reference number (LR No) 8035/9 by virtue of adverse possession under the Limitation of Actions Act. That on March 1, 2023, the Plaintiffs filed an Amended Originating Summons in which they averred that they were entitled to be declared as proprietors of a portion of LR No 8035/9, basically abandoning the claim for adverse possession. They submitted that the Plaintiffs admitted that their claim had not accrued and could only accrue under Section 24 of the Land Control Act if the President granted an exemption yet they sought to have the Registrar of Lands directed to effect an instrument of transfer of ownership of a portion of LR No 8035/9 from the Defendant to them under leasehold tenure.
6. The Defendant submitted that the Plaintiffs were conceding that the rights they claim cannot accrue until the President grants an exemption under Section 24 of the Land Control Act. Further, that they also concede that the reason why the Land Control Board would refuse to grant consent was because the Plaintiffs are not citizens of Kenya.
7. The Defendant contended that Section 42 of the Land Registration Act provided that no part of the land comprised in a register should be transferred unless the proprietor had first subdivided the land and duly registered each new subdivision to buttress the fact that the Defendant had not subdivided her land known as LR No 8035/9 and no part of it could therefore be transferred.
8. The Defendant contended that the Plaintiffs sought an injunction to restrain the Defendant from acts in relation to her property unless adequate compensation was made which in the Defendant's view amounted to an admission and acceptance that compensation was an adequate remedy for them. She contended that this contradicted the Plaintiffs' claim to be entitled to be declared as proprietors of a portion of the Defendant's land.
9. The Defendant contended that the suit as filed and as amended was contrived in a misconceived attempt to enable the Plaintiffs gain an unfair advantage over the Defendant by obtaining interlocutory orders when she had not done any wrong. The Defendant contended that it was manifestly clear and obvious that the Plaintiffs' suit discloses no reasonable cause of action against her.
10. The Defendant relied on the overriding objective of the Civil Procedure Act, the Rules and the duty of the court under Sections 1(A) and 1(B) of the Civil Procedure Act, requiring the just, expeditious, efficient, timely, proportionate and affordable resolution of civil disputes.
11. Further, she urged that under Order 2 Rule 15(1) (a) of the Civil Procedure Rules, the court may order to be struck out or amended any pleading at any stage of the proceedings if it discloses no reasonable cause of action or defence in law. She emphasised that Order 2 Rule 15 (2) of the Civil Procedure Rules provided that no evidence was admissible on an application under sub rule 1(a) but the application should concisely state the grounds on which it is made.



12. The Defendant relied on *DT Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR* where the court held that a reasonable cause of action in Order VI Rule 13 (1) meant an action with some chance of success when only the allegations in the plaint were considered. Further, that in *Yaya Towers Limited v Trade Bank Limited (In liquidation) (2000) eKLR* the court held that in an application to strike out the plaint the court's function was limited to a scrutiny of the plaint; and that the court tested the particulars given of each averment to see whether they support it and examines the averments to see whether they were sufficient to establish the cause of action. The court emphasised that it was not the court's function to examine the evidence to see whether the Plaintiff could prove his case or to assess the prospects of success. Further, the court added that the objects of the summary procedure of striking out was to ensure that defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts.
13. The Defendant reiterated that Order 2 Rule 15 (2) provided that no evidence was admissible on an application under sub-rule 1 (a) and argued that the Plaintiff's replying affidavit filed on March 24, 2023 was not admissible and should be expunged from the court record. She pointed out that the Plaintiffs did not file grounds of opposition.
14. The Defendant concluded that it would be unjust to allow the Plaintiffs to continue with the suit that cannot succeed on its own facts, and which in her view would waste the court's precious time and cause a defendant who had done no wrong to incur the injustice of mounting costs and considerable inconvenience. The Defendant urged the court to strike out the suit.
15. The Plaintiffs submitted that the application before the court was tenuous, built upon thin foundations and assumptions and that it was premature. They urged that the application should not be adjudicated upon at this time but that the dispute should be allowed to fully unfold.
16. The Plaintiffs submitted that the main issue for determination in the application before court was whether the Defendant had advanced arguments to warrant the striking out of their suit. They reproduced Order 2 Rule 15 of the Civil Procedure Rule and relied on *Spinners and Spinners Limited v Kimilili Wholesalers (K) Limited (2021) eKLR* on the point that the principles guiding striking out of pleadings were well settled to the effect that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously disclosed no reasonable cause of action and is so weak to be beyond redemption and incurable by amendments. They invited the court to note that amendment of pleadings was a way of averting striking out of pleadings.
17. The Plaintiffs submitted that since the amendment of the Originating Summons was the gravamen of this application, it was an absurdity that deserved no regard because its folly was apparent to all who have the eyes to see and the ears to hear. They pointed out that the power to strike out a pleading would end up driving a party from the judgment seat and should be used very sparingly and only in cases where the pleading is shown to be clearly untenable. They made submissions regarding amendments of pleadings and how the court should freely allow amendments which can be made without injustice to the other side.
18. The Plaintiffs gave the background of the dispute and submitted that the Defendant was the owner of the suit land covering an area of 1796.4 hectares. Further, that the Plaintiffs and the Defendant equally contributed a sum of \$300,000 towards Loisaba Wilderness, with the investment made on the understanding that a residence would be constructed on Loisaba close to the existing lodge. The Plaintiffs claimed that they resided on the land until a bush fire devastated their home on October 30, 2013 following which they relocated to Loisaba Cottage and constructed an additional house for their pilots. They also expanded the premises to include rooms intended for tourist purposes within Loisaba. On March 14, 2014, they built their current residence known as Denooyer House after the



Defendant extended an offer to them to construct a residence on her property and reside there for the rest of their lives on specified conditions. That in order to lease Loisaba, they utilised a company called Oryx Limited where they held majority shares on the insistence of the Defendant. They urged that they were seeking possessory rights over their developed property for their lifetime based on the legitimate expectation created by the Defendant's approval for their developments which are currently valued at USD2,250,000. They urged the court to reject the application and proceed to full hearing to ensure that justice was served.

19. The issue for determination is whether the Plaintiffs' suit should be struck out. Put differently, it is whether the suit appears so hopeless and plainly does not disclose any reasonable cause of action and is beyond redemption. Looking at the Amended Originating Summons, the Plaintiffs seek the court's determination of whether they are entitled to be declared as proprietors of a portion of the suit land and whether they are entitled to possessory rights over the Defendant's land. In the affidavit in support of the summons, the 1st Plaintiff deponed to facts on the contributions they made towards the purchase of the suit land and that they had lived on the land for many years. Further, that they built various structures on the land based on the Defendant's offer for them to live there for the rest of their lives. He added that the Defendant had intimated that she wished to sell her land and that they attempted to get a lease or licence over the land but that did not materialise. He gave the schedule of the developments within the two camps, one of which he referred to as the Luisa House and the other the Denooyer house and a valuation report.
20. In her affidavit opposing the original suit, the Defendant denied that she had threatened to dispossess or evict the Plaintiffs from her property. She denied that the Plaintiffs had been on the suit land since 2009 and admitted that they had been on 4 acres of her land on her invitation and with her consent. She disclosed that there had been correspondence between her advocates and the Plaintiffs' advocates on the Plaintiffs' request to have a formal arrangement regarding their occupation of her property. She maintained that the Plaintiffs who are not Kenyan citizens wished to get a lease of her land which is agricultural and which she contended that they could not lawfully acquire.
21. Order 2 Rule 15 provides that no evidence shall be admissible on an application for striking out a pleading premised on the ground that it discloses no reasonable cause of action. The rule goes further to elaborate that what is required of the applicant is to state the grounds on which the application is made. In this court's view, that rule deals with the application itself but is silent on whether the respondent should or should not file an affidavit in response to that application for striking out. Order 51 Rule 14 stipulates that any respondent who wishes to oppose any application may file grounds of opposition or replying affidavit and where the respondent fails to file the response and list of authorities the matter may be heard ex parte.
22. From the decision in *Yaya Towers Limited v Trade Bank Limited*, it is clear that the court dealing with an application to strike out a plaint only has to scrutinise the plaint and the particulars given in it.
23. Looking at the facts of this case set out in the Amended Originating Summons, one cannot say that the claim has no chance of success as to warrant the striking out of the claim. The Plaintiffs' cause of action gives the facts to support the prayers they seek. One of the uncontested facts is that the Plaintiffs have been in possession of a portion of the Defendant's land and that they developed the portion of the land with the Defendant's consent. The Plaintiffs seek possessory rights over the portion of the property that they developed for their lifetime based on the legitimate expectation which they claim was created by the Defendant's approval for their developments on her land. The determination of the rights, if any, that the Plaintiffs have to part of the suit property certainly raises a reasonable cause of action.



24. The Defendant relied on the Plaintiffs' reference to Section 24 of the *Land Control Act* regarding exemption by the President of the application of that Act to the transaction and emphasised the fact that being non-citizens the Plaintiffs cannot hold agricultural land.
25. Section 9 of the *Land Control Act* which gives the Land Control Board power to refuse to grant consent where the land or share to be disposed of by way of sale, transfer, lease or partition is to a non-citizen and Section 24 which gives the President the discretion to exempt any land or share or person in respect of a controlled transactions from the provisions of the Act, has to be construed in the context of Article 65 of the *Constitution* which allows non-citizens to hold land on leasehold tenure for a period not exceeding 99 years.
26. The court declines to struck out the suit. Parties are directed to comply with Order 11 so that the case can be set down for hearing expeditiously.

Each party will bear its costs.

DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JULY 2023.

K. BOR

JUDGE

In the presence of:

Mr. Hillary Wamunyolo for the Plaintiffs

Mr. Omar Amin and Mr. Leroy Misaro for the Defendant

