



REPUBLIC OF KENYA



**Nyae & 2 others v Ebrahim (Miscellaneous Application 17 of 2021)
[2023] KEELC 20979 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20979 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
MISCELLANEOUS APPLICATION 17 OF 2021
LL NAIKUNI, J
OCTOBER 19, 2023**

BETWEEN

NYONDO NGAO NYAE 1ST APPLICANT

HAMISI MOTO 2ND APPLICANT

SAJADI KAZUNGU KIRUMBI 3RD APPLICANT

AND

ABDULHAMID EBRAHIM RESPONDENT

RULING

I. Introduction

1. What is before this Honourable Court for its determination is the Notice of Motion application dated 8th March 2022 moved by Abdulhamid Ebrahim, the Respondent herein. It was brought under the dint of Order 2 Rule 15 (1) (b) and (c) of the Civil Procedure Rules, 2010, Section 45 of the Laws of Succession Act, CAP 160, Section 13 of the Limitation of Action Act, CAP 22, Section 7 (d) of the Land Act, No. 6 of 2012 and Section 5B of the Public Trustee Act, of Cap. 168.
2. Upon service, while opposing the said application, the Applicant did file replies in form of a Replying Affidavit dated 27th March, 2022 accordingly. I shall be dealing with it at a later stage.

II. The Respondent's case

3. The Respondent sought for the following orders:
 - a. That the suit be struck out for being scandalous, frivolous, vexatious or for being otherwise an abuse of the court process.
 - b. That the costs of the application be provided for.



4. The application is premised on the grounds, the testimonial facts and the averments made out under the 16 Paragraphed Supporting Affidavit sworn by ABDUL HAMID EBRAHIM the Respondent herein and dated even date together with two (2) annexures marked as “AHE – 1 and 2” annexed thereto. The Respondent deponed that:
- a. He was a male adult holding a national identity card bearing numbers 0310115.
 - b. He was aware from the pleading filed here that the Plaintiffs were interested in Plot Sub – division Number 6747/1/MN (Original MN/1/75/4).
 - c. He was further aware of the existence of a similar suit pending before the Chief Magistrate’s Court being Civil Case “Mombasa CMELC No. 147 of 2019 Mustafa Zwai Mzungu and 2 others v Ibrahim Mohamed and 2 others where the subject matter was the suit land herein, Plot No. MN/1/6747 (original No. MN/1/75/4).
 - d. He maintained that the suit land was the subject to proceedings in Mombasa Probate and Administration Cause No. 164 of 1984, where the public trustee is the administrator appointed by the court for the purpose of distribution to the beneficiaries.
 - e. The deponent maintained that the suit land being vested in the name and control the Public Trustee for purposes of distribution to the beneficiaries of the estate of Mishi Binti Mwalimu (Hereinafter referred to as “The Deceased”) and hence it could not be subject to acquisition by way of adverse possession. The Applicants had not established the ingredients of being considered for title under the Land Adverse possession as they had not occupied the land continuously and uninterruptedly for over 12 years as required by law.
 - f. Besides the Public Trustee, a body Corporate with perpetual succession rights capable of suing and being sued, was not a party to this suit even though they were the duly appointed administrators of the Estate having been appointed by Court.
 - g. The property being under the Public Trustees, it was under the Government of Kenya to be distributed to the rightful heirs of the deceased and hence it was not subject to operation of the law on land adverse possession.
 - h. It was deponed that the Respondent was yet to be registered as the beneficiary of the suit land in the said proceedings, which belongs to the Estate of Mishi Binti Mwalimu (deceased).
 - i. The suit amounted to intermeddling with the property of the estate of the deceased contrary to the provision of Section 45 of the Laws of Succession Act Cap. 160.
 - j. All proceedings relating to ownership, acquisition of Title, control and possession of the suit property should be canvassed before the Probate Court in Probate & Administration Cause No. 164 of 194 Mombasa pursuant to the Doctrine of exhaustion.
 - k. The Respondent argues that all issues relating to ownership, acquisition of title and possession of the suit land ought to be canvassed before the probate matter.
 - l. He urged the court to dismiss this suit with costs.

III. The Responses by the Applicants

5. The applicants responded to the application vide a 16 Paragraphed Replying Affidavit sworn by Nyondo Ngao Nyae the 1st Applicant dated on 27th March 2023. He deponed that:



- a. the application was frivolous, vexatious and an abuse of the court's process and ought to be struck out with costs.
- b. The despositions made in the supporting affidavit were misconceived and contradictory and were an attempt by the Applicant to divert the Court's attention from the main issues in the matter.
- c. The deponent maintained that the suit land was transferred into the name of the respondent on 29th October 1984.
- d. The assertions that the suit land has been vested in the public trustee were misleading and contradictory; as no evidence has been submitted to support this claim.
- e. The desposition and the proceedings referred to by the Applicant of Probate Court in Probate & Administration Cause No. 164 of 194 Mombasa and relied on as a basis for striking out the suit had not been laid - down.
- f. The deponent urged court to find that striking out the suit would be a draconian remedy, which has a claim for adverse possession and ought to be considered by the court on merit.
- g. The averments made out that the suit property was vested and under the control of the Public Trustees was misconceived and red herring as there was no evidence adduced to this effect and connecting them to this matter.
- h. The Respondent filed this suit making a claim of title under the Land Adverse possession and being a serious matter this Court ought to accord them an opportunity to be heard and have the case determined on merit and not to be subjected to peremptory dismissal as requested by the Respondent.
- i. It was urged that there was no enough evidence to warrant a dismissal of the suit and urged the court to proceed with the matter to full hearing.

IV. Submissions

6. On 13th March, 2023 vide a Ruling by this Court, all the parties were directed to have the Notice of Motion application dated 8th March, 2022 be canvassed by way of written submissions. Apparently, by the time of penning down this Ruling, only the Applicant had obliged with he stipulated stringent timelines according. Thereafter, the Court reserved a date for delivering of a Ruling on notice.

A). The Written Submission by the Applicants

7. On 10th May 2023 Learned Counsel for the applicants through the Law firm Obinju Rondo & Company LLP filed their written submissions dated 10th May 2023 in opposition of the application dated 8th March 2022. Mr. Obinju Advocate commenced his submission by stating that from the directions made through a Ruling of this Court on 13th march, 2023 submitted, the Applicant had complied and filed the responses and submission onto the Notice of Motion application dated 8th March, 2022 by the Respondent herein. The Learned Counsel averred that the Respondent was desirous of having the suit struck out for being scandalous, frivolous or being an abuse of the due process of the Court. To the Counsel striking out the suit was not only misconceived, by itself an abuse of the due process of this Court but only intended on delaying the fair hearing of the suit.
8. He asserted that Applicant was the registered owner of the suit land and hence a claim for adverse possession could be sustained against him.



9. The Counsel argued that though the Respondent was claiming the suit land vested in and under the control of the Public Trustee pursuant to a probate suit, there was no evidence that had been adduced to support the existence of the said suit. The Learned Counsel submitted that striking out of suit was discretionary. To buttress on this point he cited the case of “Jones M. Musau & Another – Versus – Kenya Hospital Association & Another (2017) eKLR where the Court held:-

“.....one thing remains clear, and that is that the power to strike out pleadings is a discretionary one. It is to be exercised with greatest care and caution. This comes from the realization that the rules of natural justice require that the Court must not drive away any litigant, however weak his case may be, from the seat of justice. This is a time – honored legal principle.....

10. Thus, he urged the court to exercise its discretion to strike out the suit with the greatest caution and care as was stated in the case of:- “DT Dobie & company (Kenya) Limited – Versus - Joseph Mbaria Muchina and Anor (1980) eKLR where the court held that:-

“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.”

11. The Learned Counsel urged the court to apply the above principle and find that the suit herein isn't weak beyond redemption and does disclose a cause of action of adverse possession having acquired prescriptive rights over the suit land by virtue of their occupation over a period of 12 years.

V. Analysis and Determination

12. The court has carefully considered the application dated 8th March, 2022, by the Respondent herein, the responses to it as well as the written submissions, cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes. advanced together with the authorities they have cited.

13. From the said application, there are three (3) main issues for determination by this Court. These are:-

- a. Whether the Notice of Motion dated 8th March, 2022 has any merit and hence this suit ought to be struck out for being scandalous, frivolous, vexatious or for being an abuse of the process of the court.
- b. Whether the parties herein are entitled to the relief sought
- c. Who will bear the Costs of the application.

ISSUE No. a). Whether the Notice of Motion dated 8th March, 2022 has any merit and hence this suit ought to be struck out for being scandalous, frivolous, vexatious or for being an abuse of the process of the court.

14. The main substratum of this application is to cause the suit filed by the Applicant herein be struck out as it was frivolous, vexatious and an abuse of the due process of the Court and law. Striking out of



pleadings were governed by the provision of Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010. It provides:

“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

15. In his application, the Respondent herein has relied on (b) and (d) of the rule to urge court to strike out the suit filed by the Applicant through an Originating Summons dated 19th April, 2021 seeking for the title and ownership to the suit land through land Adverse possession for being scandalous and vexitious. The court in case of “Mpaka Road Development Co. Ltd – Versus - Abdul Gafur Kana T/ A Anil Kapuri Pan Coffee House [2001] eKLR, defined what it takes for a pleading to be said to be scandalous, frivolous or vexatious and held:-

“From those submissions I think two issues arise for determination. First; whether the defence and counterclaim as drawn are scandalous, frivolous or vexatious, and secondly, whether the same disclose bona fide triable issues. As regards the first issue, I accept the exposition of the words scandalous, frivolous and vexatious contained in the SUPREME COURT PRACTICE. As the exposition is of an English rule which is in pari materia with our Order VI rule 13 (1) (b), I would hold that a matter would only be scandalous if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned. Such would be the case where an imputation is made on the character of a party when the character is not in issue. And I would say a pleading is frivolous if it lacks seriousness. It if is not serious then it would be unsustainable in court. A pleading would be vexatious if it annoys or tends to annoy. Obviously it would annoy or tend to annoy if it was not serious or it contained scandalous matter which were irrelevant to the action or defence. In short, it is my discernment that a scandalous and/or frivolous pleading is ipso facto vexatious.”

16. While abuse of the court process was defined by the court in the case of:- “Satya Bhamu Gandhi – Versus - Director of Public Prosecutions & 3 others [2018] eKLR as:-

“The black law dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use ”An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use”.

The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.



The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party.”

17. Additionally, the guiding principles on striking out pleadings was set out in Court of Appeal case of “Kivanga Estates Limited – Versus – National Ban of Kenya Limited (2017) eKLR held as follows:-

“Striking out a pleading, though draconian, the Court will, in its discretion resort to it, where, for instance, the Court is satisfied that the pleading has been brought in abuse of its process or where it is found to scandalous, frivolous or vexatious. Where the Court below has properly addressed itself on these principles, is satisfied, upon assessment of the material before it that any of the grounds enumerated under Order 2 Rule 15 exists, as an appellate court, this Court will not interfere with the exercise of the former’s discretionary power to strike out the pleadings”

Based on this principles, the Honourable Court finds nothing to apportion any merit to the application by the Respondent so far. But, nonetheless, for the benefit of doubt, I will still proceed to apply the said principles to the facts of the instant case.

Issue No. b). Whether the parties are entitled to the reliefs sought

18. Now looking at the pleadings sought to be struck out herein, the Originating Summons dated 19th April 2021 where the applicants are seeking to be declared entitled to Plot No. 6747/1/MN by virtue of adverse possession, I must say that I detect no paragraph in the supporting affidavit sworn by Nyondo Ngao Nyae which can be said to be scandalous, frivolous, vexatious or otherwise abuse of the court process as expounded above. The originating summons raises triable issues which raise reasonable cause of action, in my view there is nothing scandalous, frivolous or vexatious about it. More so, I find nothing irrelevant or unusual in the originating summons, which has even annexed a title document for the court to consider on merit. Perhaps had the Respondent moved this Court and ably demonstrated that the suit offended the doctrine of “Res Judicata” as founded under the Provision of Section 7 of the Civil Procedure Rules, 2010, the Court may have given it a slight different consideration. However, it is quite clear that the Respondent realized that that angle and/or legal dimension would not fathom at all legally speaking and hence the reason he opted for the strategy of seeking the orders from the application herein.
19. The Court of Appeal in “Jones M. Musau & another v Kenya Hospital Association & another [2017] eKLR held:-

“In D. T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina and another [1980] eKLR, this Court, when discussing the principles upon which the court acts when dealing with an application to strike out pleadings on grounds of non disclosure of reasonable cause of action or defence held that a “court ought to act very cautiously and carefully and consider all the 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.” The Court cautioned that:

“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.”

20. Striking out a pleading is a drastic remedy to be exercised only in plain and obvious cases, this court is not persuaded to exercise its discretion and strike out the applicant’s suit. For these reason, I hold that the application by the Respondent must fail.

Issue No. b). Who will bear the costs of the application

21. It is trite law that the issue of Costs is at the discretion of the Court. Costs mean the award that a party is granted at the conclusion of any legal action or proceedings on a litigation process. The Proviso of Section 27 (1) holds that costs follow the events. By events it means the outcome or result of the said legal action. See the cases of “Jasbir Rai Singh - Versus – Tarchalan Rai Singh, 2014 eKLR and Rosemary Wambui Mnene – Versus – Ihururu Dairy Co – operatives Societies Limited, (2014) eKLR”
22. In the instant case, the Respondent has failed in prosecuting his application. It follows therefore, that the Applicant will be entitled to costs for having successfully participated and defended to the hilt.

IV. Conclusion & finding

23. Consequently, having caused an analysis of the issues herein, the Honourable Court on the principles of preponderance of probabilities and the balance of convenience makes the following orders:-
- a. That the Notice of Motion application dated 8th March, 2022 by the Respondent herein is devoid of merit and hence be and is hereby dismissed with costs.
 - b. That in order to expedite the matter, direction on the Originating Summons dated 19th April, 2021 by the Applicants herein and filed on 20th April, 2021 be and is hereby taken under the provisions of Order 37 Rules, 11, 16 and 18 of the Civil Procedure Rules, 2010 as follows:
 - i. The Originating Summons to be converted to a Plaint;
 - ii. The Applicants to Plaintiffs and the annextures in the Supporting affidavit to be documents to be relied on by the Plaintiffs;
 - iii. The Respondent to Defendant and the Replying Affidavit to a Defence and/or Counter Claim under Order 7 of the Civil Procedure Rules, 2010 and the annextures to documents to be relied on by the Defendant.
 - iv. All parties granted 21 days leave to file and serve any further Replies, affidavits and/or relevant documents they wish to rely on in support of their case.
 - v. The evidence to be adduced by way of “Viva Voce” on 15th May, 2024. There be a mention on 20th February, 2024 for Pre – Trial Conference under Order 11 of the Civil Procedure Rules, 2010 and further direction.
 - c. That costs of the application to be awarded to the Applicant and be borne by the Respondent.

It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 19TH DAY OF OCTOBER 2023

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HON. JUSTICE L.L. NAIKUNI (MR.),



**ENVIRONMENT & LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Yumnah, the Court Assistant.
- b. Mr. Oweya Advocate holding brief for Mr. Obinju Advocate for the Applicants.
- c. Mr. Mkomba Advocate holding brief for M/s. Umara Advocate for the Respondent

