



REPUBLIC OF KENYA



**Sabriye v Ndolo & 4 others (Environment & Land Case E108 of 2022)
[2023] KEELC 20836 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20836 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E108 OF 2022
OA ANGOTE, J
OCTOBER 19, 2023**

BETWEEN

ABDILLE ABDI AZIZ SABRIYE PLAINTIFF

AND

LUMUMBA MWAU NDOLO 1ST DEFENDANT

ABDULLAHI IBRAHIM NUNI 2ND DEFENDANT

NUNI GENERAL TRADING COMPANY LIMITED 3RD DEFENDANT

HUSSEIN IBRAHIM NUNI 4TH DEFENDANT

JOSEPH NGUI MWAU NDOLO 5TH DEFENDANT

RULING

1. Before the Court for determination is the 1st Defendant's (hereinafter 'Applicant') Notice of Motion dated 25th January 2023 and brought under Sections 1A, 1B, and 3A of the *Civil Procedure Act* and Order 2 Rule 15 and Order 51 Rule 1 of the *Civil Procedure Rules*. The Applicant is seeking for orders that:
 - a. The Plaintiff's amended Plaint be struck out with cost for failing to disclose any reasonable cause of action.
 - b. The costs of the application be borne by the Plaintiff.
2. The application is based on several grounds and supported by an affidavit sworn by the Applicant where he averred that he is the Administrator of the Estate of the late Mwaun Ndolo together with the 5th Defendant and that the Plaintiff instituted the current suit on 21st March 2022 seeking recourse with regards to LR No 36/I/33.



3. The 1st Defendant/Applicant averred that the said land has never been part of the Estate of the Late Mwau Ndolo; that the Plaintiff amended the Plaintiff and substituted LR No 36/1/33 with LR No 36/11/33 and that the documents produced before the Court still related to LR No 36/1/33.
4. The Applicant averred that he has no dealings with LR No 36/1/33 and that the Plaintiff's suit discloses no reasonable cause of action against him and should be struck out.
5. The Plaintiff filed a Replying Affidavit in which he deponed that there were no grounds to strike out the suit as there is a Lease in respect of LR No 36/11/33 and that there was an error in description whereby the suit property was described as LR No 36/1/33 as opposed to LR No 36/11/33.
6. It was deponed by the Plaintiff that the error in the title was allowed by an amendment by the court and that the application should be dismissed for being frivolous and lacking merit.
7. The 2nd, 3rd and 4th Defendants filed a Replying Affidavit sworn by the 4th Defendant; that they were in support of the application as the Plaintiff's suit discloses no reasonable cause of action and that the Plaintiff has no proprietary or beneficial interest in LR No 36/11/33 which belongs to the Estate of the Late Mwau Ndolo.
8. It was deponed by the 4th Defendant that the 3rd Defendant has been in occupation of the suit property pursuant to a lease granted to it by the Estate of the Late Mwau Ndolo on 18th October 2019 and that prior to the signing of the lease in 2019, the 3rd Defendant was in control of the suit property property as an estate agent.
9. According to the 4th Defendant, the Plaintiff filed the suit and obtained various orders relating to LR No 36/1/33; that the Plaintiff stated in his pleadings that he had a stake in the suit property pursuant to a lease executed between himself and one Teresia Kindile in 2007; and that when the Plaintiff filed the amended Plaintiff, there was a turnaround in his claim.
10. It was deponed by the 4th Defendant that the Estate of the late Mwau Ndolo granted him a lease over LR No 36/11/33 on 16th October 2019 and that the Lease dated 16th October 2019 was fraudulent and illegal.

Submissions

11. Relying on the cases of *DT Dobie v Muchina (supra)*, *Susan Rokih v Joyce Kandie & 6 others* [2018] eKLR and *Crescent Construction Co Ltd v Delphis Bank Limited* [2007] eKLR, the Plaintiff submitted that the Court ought to exercise its discretion with utmost care in an application like the present one and it should be guided by well-established authorities on what constitutes a reasonable cause of action.
12. It was submitted that the allegation that the instant suit does not disclose a cause of action was based on a typographical error that was an honest mistake and has since been corrected after the Court allowed the amendment of the Plaintiff. Consequently, it was submitted, the suit discloses a strong cause of action against all the Defendants.
13. The Plaintiff submitted that the application should be dismissed as no sufficient grounds to dismiss the Plaintiff's suit have been given. Further, it was submitted, the Plaintiff raises triable issues which should be determined after evidence is adduced.



Analysis and Determination

14. Based on the foregoing, the following one issue arise:
- a. Whether the Plaintiff's suit should be struck out.
15. Order 2 Rule 15 of the [Civil Procedure Rules](#) provides as follows:
- “(1) 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.
- (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.”
16. The 1st Defendant/Applicant, alongside the 2nd, 3rd and 4th Defendants have called for the Plaintiff's suit to be struck out on the ground that it discloses no reasonable cause of action because it relates to LR No 36/1/33 of which the Defendants have no interest. According to the Defendants, their interest is in LR No 36/11/33.
17. The Plaintiff has disputed this saying that there was a typographical error which was amended with the authority of the Court to reflect the suit property as LR No 36/11/33.
18. It was deponed by the Defendants that the suit is scandalous and vexatious as it is brought by a person who is neither a beneficiary nor administrator of the Estate of Mwau Ndolo, the registered owner of the suit property.
19. In the case of [D.T. Dobie & Company \(Kenya\) Limited v Joseph Mbaria Muchina & another](#) [1980] eKLR the Court stated 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, L.J. (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.”

20. In the case of *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* [2000] eKLR, the Court stated as follows:

A plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the court, it must be allowed to proceed to trial. In *Lawrence v Lord Norreys* (1890) 15 App Cas 210 at 219, Lord Herschell said:-

“It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be sparingly exercised, and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.”

If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini-trial upon the affidavits. As Danckwerts, LJ, said in *Wenlock v Moloney* [1965] 1 WLR 1238 at 1244:-

“.... this summary jurisdiction of the court was never intended to be exercised by a minute and protracted examination of the documents and facts of the case, in order to see whether the plaintiff really has a cause of action. To do that, is to usurp the position of the trial judge, and to produce the trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination in the ordinary way. This seems to me to be an abuse of the inherent powers of the court and not a proper exercise of that power.”.... I would add that the object of the summary procedure of striking out is to ensure that defendants should not be troubled by claims against them which are bound to fail having regard to the uncontested facts.”

21. Based on the foregoing and without going into the merits of the case that forms the substratum of the Plaintiff's and Defendants' affidavits and submissions, I find that the amended Plaintiff discloses a reasonable cause of action. The error in writing LR No 36/1/33 instead of LR No 36/11/33, if at all, is something that could be easily explained as having happened and warranting the amendment.
22. Additionally, the amendment injects real life to the suit because it relates to LR No 36/11/33 which the Plaintiff and Defendants have admitted to having an interest in.
23. The Defendants have not demonstrated that the Plaintiff's claim is bound fail. Although the Defendants have stated that they have no authority to bring a claim relating to land owned by the Estate of the Late Mwau Ndolo as he is neither a beneficiary nor administrator of the Estate, the Plaintiff has contested this allegation.



24. At this point in the proceedings, the Court cannot go into the claim of ownership of the suit property without conducting a mini trial. This would amount to usurping the power of the trial Court. Having considered that, it therefore follows that the Applicant's claim for striking out the suit is unsustainable.
25. In view of the foregoing, I find that the application to strike out the Plaintiff's case is without merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF OCTOBER, 2023.

O. A. ANGOTE

JUDGE

