



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN BUSIA
LAND & ENVIRONMENTAL DIVISION

ELC NO. 24 OF 2017

ANTHONE KWENA ANYIMU.....PLAINTIFF

VERSUS

GABRIEL MUKELE.....1ST DEFENDANT

WALLANCE WESONGA.....2ND DEFENDANT

R U L I N G

1. The application before me is a Notice of Motion dated 31/3/2017 and filed on 3/4/2017. It is brought under Order 2 rule 15(a), (b) and (d) and Order 51 rule I of Civil Procedure Rules. The Defendants – **GABRIELLE MUKELE** and **WALLANCE WESONGA** – are the Applicants while the Plaintiff – **ANTHONE KWENA ANYIMU** – is the Respondent. In the main, the Applicants want the Respondent's suit struck out or dismissed. They argue that the suit discloses no cause of action; is frivolous, scandalous, vexatious and an abuse of the court process; and that it is time-barred. The Applicants also want the court to provide for costs of this application and the suit.

2. According to the Applicants, the Respondent claim is not serious and is a waste of court's time. According to 1st Applicant, the Respondent is out to embarrass him, given his position in society. The Respondent is said to have been holding meetings to encourage younger persons from families that he bought land from to file claims. He has also been promising other parties that he would sell the land to them once recovered through court process.

3. The parcels of land in dispute are **MARACHI/ESIKOMA/1150**, **MARACHI/ESIKOMA/468** and **MARACHI/ESIKOMA/1194** which the Respondent says were owned by the late ANYIMA KWENA but which the Applicants fraudulently appropriated and sub-divided ultimately owning resultant parcels Nos. **MARACHI/ESIKOMA/1151**, **MARACHI/ESIKOMA/1195** and **MARACHI/ESIKOMA/1233**.

According to the Respondent, the land registry was misled into effecting the changes.

4. The Respondent replied to the application vide a replying affidavit filed on 28/8/2017. According to him, his suit is founded on fraud and he has itemised the particulars of the alleged fraud. His aim, he said, is to get justice and not to embarrass the Applicants. He wants to get a chance to be heard.

5. On 28/9/2017 it was agreed that the application be canvassed by way of written submissions. The Applicants' submissions were filed on 3/11/2017. It was submitted that the Respondent failed to state when the cause of action arose; that the alleged fraud has its time of discovery unknown; and that as there

is no reply to the defence, the issues raised in the defence were uncontroverted. According to the applicants, no reasonable cause of action is disclosed. The suit was said to be time-barred. In addition, the suit is also scandalous, vexatious and an abuse of the court process. The decided cases of **TRACEND MEDIA GROUP LIMITED vs INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION (IEBC): HCCC No. 304/2014, MILIMANI, NAIROBI** and **DT DOBIE & COMPANY (KENYA) LTD vs MUCHINA [1982] KLRI** were offered to guide the court.

6. The Respondent's submissions were filed on 6/11/2017. According to the Respondent, his suit discloses a cause of action. It is based on fraud and the Respondent is ready to prove it during hearing. The suit was also said to be good. It is not, as alleged, frivolous, vexatious or an abuse of the court process. The Respondent further submitted that his suit is not time-barred as he only recently discovered the fraud.

7. I have considered the application, the response made, rival submissions, the pleadings on record, and the decided authorities availed. It is good first to appreciate the applicable law. It is trite law that the power to strike out pleadings is not mandatory but permissive. It confers only a discretionary jurisdiction to be exercised cautiously and sparingly and only after due regard to overall quality of the pleadings.

8. Two fundamental principles are always at play in the exercise of discretion to strike out. The first one is that parties will not easily be driven from the seat of justice and, for this reason, great care is urged in the exercise of discretion. In this regard, striking out or dismissal is only done in the clearest cases. The D.T Dobies case (Supra) availed by the Applicants themselves has this as one of its holdings. In this same case, Madan JA observed, *orbiter*, that the court should aim at sustaining rather than terminating a suit. The need for abundant caution is also to be found in the case of **NITIN PROPERTIES vs JAGIR SINGH KALSI, CA No. 132/1989 (Unreported)** where the court of appeal held, *inter alia*, that striking out is a drastic remedy which should be invoked only in plain and obvious cases. It observed that even then, this has to be done with extreme caution. The second principle freely admits that striking out or dismissal can in fact be done if the justice of the case so demands. And this is meant to prevent or stop harassment of parties through hopeless litigation. This is done where the case is so weak as to be beyond redemption and this is the position that emerges in the case of **Abubakar Zein Ahmed vs Premier Savings and Finance Company Ltd & 4 Others: [007] eKLR**.

9. It can then be said that a Plaintiff is entitled to pursue a claim however implausible it might appear to be and a defendant who wants such a claim struck out or dismissed must show very well that the claim is bound to fail or is incontestably bad.

10. In this particular matter itself, I expected the Applicants to show that the case herein is without substance or unarguable or that it lacks bonafides and is hopeless. I have looked at the suit. It is based on fraud and the particulars of the alleged fraud are given. I have looked at the defence filed, it merely denies the fraud. In fact the defence is brief and does not contain sufficient detail to inform the court on the need to strike out. It is necessary to bear in mind that at this stage, the court is not supposed to look at evidence. It is the pleadings alone that should provide a basis for striking out.

11. I think the Applicants fail to appreciate the law properly when they try to introduce evidence in the supporting affidavit purporting to show that the Respondent is inducing other people to file claims against them or alleging that the Respondent is making promises to other people to sell them the land. With respect, this could be evidence for use during hearing. Given the law applicable, it counts for nothing at this stage.

12. When the Plaintiffs' case is considered against the defence filed, and when all that was availed considered, any court of law would be accused of being rash in rushing to dismiss or strike out the case. *Prima facie*, the case looks arguable and reasonably well founded. The defence filed does not displace this position. It could well be that the Applicants are very sure of demolishing the Respondent's case. That needs to wait until all evidence is in. It is in light of the foregoing that the application herein is found unmeritorious. The application is hereby dismissed with costs.

Dated, signed and delivered at Busia this 14th day of December, 2017.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiffs:

Defendant:

Counsel of Plaintiffs:

Counsel of Defendant: