



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**

**ELC. CASE NO. 232 OF 2006**

**DUNCAN NDIRANGU.....1<sup>ST</sup> PLAINTIFF**

**GLADYS WANJIKU NDIRANGU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MAGADI SODA COMPANY LTD..... DEFENDANT**

**THE TOWN COUNCIL OF KAJIADO.....1<sup>ST</sup> INTERESTED PARTY**

**PATRICK KORES.....2<sup>ND</sup> INTERESTED PARTY**

**ALEX CHAU KAMAU.....3<sup>RD</sup> INTERESTED PARTY**

**DANIEL TIMAYIO NKARU.....4<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**FRANCIS MUTUA KIMEU.....5<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**JUDITH WAMBUA.....6<sup>TH</sup> INTERESTED PARTY/APPLICANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 11<sup>th</sup> December 2013 in which the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> Interested Parties/Applicants seek for orders striking out the Amended Originating Summons dated 15<sup>th</sup> March 2012 and dismissing this suit. The Applicants also pray for the costs of this Application.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 5<sup>th</sup> Interested Party, Francis Mutua Kimeu, sworn on 11<sup>th</sup> December 2013 in which he

averred that the Plaintiffs filed this case claiming adverse possession despite the fact that they hold a Letter of Allotment over L.R. No. 2836 (hereinafter referred to as the “suit property”). He further averred that the Plaintiffs have filed this case despite having filed another case being **HCCC No. 1054 of 2004** against the Applicants based on the same claim which case was dismissed. He added that the Plaintiffs tried to appeal against the decision in **HCCC No. 1054 of 2004** but were unsuccessful. He further averred that the Plaintiffs failed to disclose to the court the existence of another case being **HCCC No. 326 of 2011** between the same parties which was withdrawn. He then asserted that the 4<sup>th</sup> Interested Party was granted a Letter of Allotment by the 1<sup>st</sup> Interested Party in the year 2000, that he was granted a Letter of Allotment by the 1<sup>st</sup> Interested Party in the year 2010 and that the 6<sup>th</sup> Interested Party was granted a Letter of Allotment by the 1<sup>st</sup> Interested Party in the year 2001 therefore the period of limitation does not apply to them. He then stated that the Applicants were not properly joined into this suit as the same does not disclose a reasonable cause of action against them.

The Application is contested. The 2<sup>nd</sup> Plaintiff/Respondent, Gladys Wanjiku Ndirangu, filed her Replying Affidavit sworn on 19<sup>th</sup> March 2014 in which she averred that this Application is an attempt by the Applicants to delay justice for the Plaintiffs as they included the Applicants in this suit because they were claiming the suit property and trespassing thereon. She further averred that the letters of allotment purportedly issued to the Applicants are of no legal effect and are incapable of conferring any interest over registered land and only the holders of the legal title over the suit property being the Defendant could have rights of a proprietor.

The Application is further contested by the Defendant/Respondent which filed the Replying Affidavit of its Managing Director, Jackson Mbui, sworn on 30<sup>th</sup> July 2014 in which he averred that the orders sought by the Applicants are final orders that can only be granted in clear and obvious cases and further that this dispute is not clear or obvious as it involves multiple interests and/or claims over the suit property. He further averred that the Defendant is the registered owner of the suit property and any claims alleging allotment thereof by the Applicants is false, unlawful and unfounded. He further averred that one of the issues that will be arising in this suit for determination by the court is the basis of the Applicants’ claims over the suit property and that the Defendant will be seeking protection of the court as regards the sanctity of its title. He added that it is only after a full hearing that the respective claims and/or interests can be determined. He further indicated that pleadings filed raise triable issues relating to the ownership of the suit property and the interests if any of the Plaintiffs and the Interested Parties against the Defendant’s registered interest which issues can only be determined after evidence has been adduced at the full hearing of this matter on merit.

Parties canvassed this Application by way of written submissions. I have considered the affidavits and the written submissions made by the parties herein. The issue emerging for my determination is whether to strike out the Amended Originating Summons dated 15<sup>th</sup> March 2012. The applicable law is to be found in **Order 2 Rule 15(1)** of the **Civil Procedure Rules, 2010** which states as follows:

***“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;***
- 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.”***

In this particular case, the Applicants assert that the Plaintiffs are claiming the suit property under the doctrine of adverse possession yet they are the holders of a Letter of Allotment. They also additionally stated that they too are holders of Letters of Allotment over the suit property and are not affected by the law on limitation of actions. On those points alone, I say that the legal effect of the letters of allotment

held by the Applicants and the Plaintiffs can only be determined after the full hearing of this suit including the production of evidence and is not an issue that can be determined at this interlocutory stage.

The other point the Applicants raised is that the Plaintiffs have filed this case despite having filed another case being **HCCC No. 1054 of 2004** against the Applicants based on the same claim which case was dismissed and whose appeal was unsuccessful. From the pleadings annexed by the Applicants, I can see that none of the 3 Applicants were a party to that suit. Further, the Defendant was not a party to that suit. Clearly, this point fails on that account. Further, the suit having been dismissed by the court for want of prosecution falls in the category contemplated by **Order 12 Rule 6** of the **Civil Procedure Rules, 2010** and cannot be deemed to be *res judicata* as the suit was not heard and decided on its merits. A fresh suit could be filed and this is what the Plaintiffs did.

The Applicants further contend that the Plaintiffs failed to disclose to the court the existence of another case being **HCCC No. 326 of 2011** between the same parties which was withdrawn. To this I would say that no law or court decision has been given to show that the withdrawal of that suit constitutes a bar to filing the present suit.

The other ground upon which the Applicants seek for the Amended Originating Summons to be dismissed is that it does not disclose any reasonable cause of action. In the case of **DT Dobie & Co (Kenya) Ltd vs. Muchina [1982] KLR 1** Madan J held that,

***“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... 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.”***

In the present suit, I agree with the Defendant’s submissions that this suit involves a multiplicity of competing interests and allegations over the suit property registered in the Defendant’s name which raise clear triable issues of fact and law which can only be determined after hearing the matter on merit. I find that the pleadings filed herein, including the Amended Originating Summons, raise a reasonable cause of action and should not be struck out.

In light of the foregoing, the Application is hereby dismissed. Costs shall be in the cause.

**DELIVERED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup> DAY OF MAY 2015.**

**MARY M. GITUMBI**

**JUDGE**