



**REPUBLIC OF KENYA.**

**IN THE HIGH COURT OF KENYA AT BUSIA.**

**ELC. NO. 6 OF 2015.**

**NEW SPRING OF LIFE GOSPEL MINISTRIES.....PLAINTIFF**

**=VERSUS=**

**HOLY REDEEMED APOSTOLIC MINISTRIES**

**INTERNATIONAL.....DEFENDANT.**

**R U L I N G.**

The Applicant, **NEW SPRING OF LIFE GOSPEL MINISTRIES** filed the notice of motion dated 17<sup>th</sup> February, 2015 against the Respondent, **HOLY REDEEMED APOSTOLIC MINISTRIES INTERNATIONAL**, seeking the striking out of the defence and counter claim filed by the Respondent. The Applicant set out eight (8) grounds on the application. The application is supported by the affidavit of Jonathan A.O. Wabala sworn on 17<sup>th</sup> February, 2015 in which he describes himself as a member and administrator of the Applicant's church.

The application is opposed through the replying affidavit of Japheth Barua Kirori who described himself as the Mission Secretary to the Respondent's church.

M/S. Omondi and company advocates and M/S. Olel, Onyango, Ingutiah and company advocates represented the Applicant and Respondent respectively and filed written submissions.

The court has carefully considered the grounds on the application, written submissions, supporting and replying affidavits and find as follows;

1. That the Applicant commenced this suit through the plaint dated 14<sup>th</sup> January, 2015 praying for eviction, permanent injunction orders and costs against the Respondent in relation to land parcel South Teso/Angoromo/912. Prior to this suit, the Respondent had filed Busia H.C.C.C. NO. 41 of 2011, through originating summons claiming the same suit land under adverse possession but lost as shown in this court's judgment of 16<sup>th</sup> October, 2013.
2. That the Respondent filed their statement of defence and counter claim dated 3<sup>rd</sup> February, 2015. The Applicant filed a reply to the defence and also a defence to the counterclaim dated 12<sup>th</sup> February, 2015.
3. That the court is alive to the various judicial decisions on the main legal principles which should guide it in determining applications to strike out pleadings. The principles were recently summarized in *Arabian Airlines corporation services Ltd* [2014] eKLR by Gikonyo J, at paragraph 17 as follows;

**“ 17 I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent but from the principles of justice enshrined in the Constitution especially in article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in the judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT Dobie case that the Court should aim at sustaining rather than terminating suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, is that courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party of a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the ‘Sword of the Damocles.’ Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is ‘demurer or something worse than a demurer’ beyond redemption and not curable by even an amendment. Thirdly, in case of a defence, the court must be convinced upon looking at the defence, that is a sham; it raises no bona fide triable issue worth a trial by the court. And a triable issue need not be one which will succeed but one that passes the SHERIDAN J. Test in PATEL –V- E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75 at P. 76 (Duffus P.) that ‘...a triable issue ... is an issue which raises a prima facie defence and which should go to trial for adjudication.’”**

4. That the Respondent’s defence to the Applicant’s claim can be summarized to two grounds as follows:

- a) That the Applicant is not the registered proprietor of the suit land South Teso/Angoromo/912.
- b) Alternatively, that the Applicant obtained registration of the suit land fraudulently.

The court has taken note of the copy of the suit lands register and judgment in Busia H.C.C.C. No. 41 of 2011 which were filed with the plaint herein. The copy of the register shows that the Applicant became the registered proprietor of the suit land on 1<sup>st</sup> March, 2011 and under section 26 of the Land Registration Act, 2012 the court is obligated to take its content as prima facie evidence that the Applicant, as the person named as proprietor of the land is the absolute and indefeasible owner. The Respondent had when filing the originating summons in Busia H.C.C.C. NO. 41 of 2011 pleaded that the Applicant was the registered owner of the suit land and it is not clear why they have changed that position. The court had pronounced itself in the judgment of 16<sup>th</sup> October, 2013 in Busia HCCC. NO. 41 of 2011 as follows;

**“ As possession is a matter of fact, the court finds the Applicants have not adduced any evidence to show that the Respondents were dispossessed of the land or that their possession of the land was discontinued for a continuous period of 12 years before the filing of this case. From the foregoing, therefore, the court finds that the Applicants have failed to prove their case on adverse possession against the Respondents to the standard required. The applicants case is therefore dismissed with costs.”**

This court’s finding in the foregoing case has not been reviewed and or successfully appealed against by the parties. The defence filed by the Respondent denying that the Applicant is the registered proprietor of the suit land do not therefore raise or disclose any new triable issue on ownership of the suit land in view of the contents of the register and judgment in Busia H.C.C.C No. 41 of 2011.

5. That the counterclaim by the Respondent alleges fraud on the part of the Applicant. The Respondent prays for a declaration that the Applicant acquired the land fraudulently. The Respondent further prays that the Applicant’s title to the suit land should be cancelled and the land reverts back .C.C.Hto the

name of Matayo Were. The Applicant has disputed the allegations of fraud in their defence to the counterclaim, insisting that the due process was followed in their registration with the suit land. The Respondent has not disclosed what interest they have over the suit land or the relationship they have with Matayo Were, whom they pray the title to the land should revert back to. The Respondent would not have commenced their claim based on adverse possession against the Applicant in Busia H.C.C.C. No. 41 of 2011 if they had not been convinced that the Applicant was the registered proprietor of the suit land. The court therefore find that so long as the decision of the court in Busia H.C.C.C. No. 41 of 2011 remain and in the absence of the Respondent showing that they have any beneficial or legal interest on the suit land, the counterclaim does not disclose any issues that could go for trial, in view of the defence filed by the Applicant.

6. That for reasons set out above, the court finds that the defence and counterclaim filed by the Respondent herein do not disclose triable issues to the Applicant's claim. The application dated 17<sup>th</sup> February, 2015 is therefore allowed and the following orders issued;

- a) The statement of defence and counterclaim filed by the Defendant, Holy Redeemed Apostolic Ministries International, dated 3<sup>rd</sup> February, 2015 are hereby struck out.
- b) The Defendant's suit vide the counterclaim dated 3<sup>rd</sup> February, 2015 is hereby dismissed with costs.
- c) The court enters judgment in favour of the Plaintiff against the Defendant in terms of prayers (a) and (b) of the plaint dated 14<sup>th</sup> January, 2015 with costs.

It is so ordered.

**S. M KIBUNJA,**

**JUDGE.**

**DATED AND DELIVERED ON 28<sup>th</sup> DAY OF MAY, 2015**

**IN THE PRESENCE OF;**

**PLAINTIFF/APPLICANT.....ABSENT.....**

**DEFENDANT/RESPONDENT.....ABSENT.....**

**COUNSEL...MR. JUMBA FOR WAFULA FOR PLAINTIFF/APPLICANT.....**

**JUDGE.**