



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO.5 OF 2021**

**ANTHONY BUNDOTICH CHEBOIYWO.....PLAINTIFF**

**VERSUS**

**REUBEN WAHOME WANJOHI.....1<sup>ST</sup> DEFENDANT**

**ALBERT KIPKOSGEI LESSONET.....2<sup>ND</sup> DEFENDANT**

**NAKURU LAND REGISTRAR.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

1. I have before me for determination the 1<sup>st</sup> defendant/applicant's Notice of Motion application dated 3<sup>rd</sup> June 2021 made under Order 2 Rule 15(1)(a) (b) (c) and (d) of the Civil Procedure Rules. The applicant sought the following orders:

*1. That the suit herein commenced by way of a plaint dated 14<sup>th</sup> December 2020 and filed on 18<sup>th</sup> February 2021 be struck out.*

*2. That the costs of this application and the costs of the entire suit be borne by the plaintiff.*

2. The application was supported on the grounds set out in the body of the application and the supporting affidavit sworn by Reuben Wahome Wanjohi, the 1<sup>st</sup> defendant. He averred that the 2<sup>nd</sup> defendant sold to him land parcel No. **Nakuru Municipality Block 20/116** pursuant to a sale agreement and that the property was transferred to him and he was issued with a certificate of lease.

3. He averred further that he had been paying land rates and that the first allottee of the suit property was Jeremiah Cheruiyot Rotich. The 1<sup>st</sup> defendant averred that the plaintiff's case is founded on a letter of allotment dated 27<sup>th</sup> October 1995 whose terms, it is unclear if the plaintiff complied, with as there was no evidence of acceptance and/or payment of the stand premium by the plaintiff within 30 days of the date as required in the allotment letter. The 1<sup>st</sup> defendant further averred the plaintiff's cause of action having accrued in 1995 when the lotment was made to him the suit was barred by the Limitation of Actions Act, Cap 22 Laws of Kenya.

4. The plaintiff/respondent filed a replying affidavit sworn on 22<sup>nd</sup> June 2021 where he deposed that residential plot number **Plot F Block XX/116-Nakuru** belonged to him after it was allotted to him on 27<sup>th</sup> October 1995. He deposed that he is challenging the manner/process the 2<sup>nd</sup> defendant acquired the suit property before selling it to the 1<sup>st</sup> defendant/applicant. He deposed that payment of land rates by the 1<sup>st</sup> defendant would not validate what was a fraudulent transaction stating that he had also been paying land rates for the suit property.

6. The plaintiff deposed that the letter of allotment issued to him created an interest in the land as he accepted the offer, paid the stand premium of Kshs. 46,910/= and the survey charges on 27<sup>th</sup> November 2002. He stated he had started processing his certificate of Lease when he was informed that the suit property had been registered in the 1<sup>st</sup> defendant/applicant's name. He deposed that the Limitation of Actions Act would not be applicable as he was not seeking to enforce any contract with the defendants.

7. The plaintiff deposed further that his suit raised substantive issues that should be heard and determined on merit and he, therefore sought that the applicant's application dated 3<sup>rd</sup> June 2021 be dismissed.

8. The application was canvassed by way of written submissions. The 1<sup>st</sup> defendant/applicant in his submissions submitted that **Order 2 Rule 15** of the Civil Procedure Rules 2010 empowered the court to strike out a suit that is frivolous, vexatious, scandalous, and an abuse of the court process. The 1<sup>st</sup> defendant relied on the case of **County Council of Nandi vs Ezekiel Kibet Rutto & 6 others [2013] eKLR** where the court defined what constituted frivolous and vexatious as follows:

*“A frivolous pleading in my view is a pleading that completely lacks a legal foundation. It is a pleading that discloses no cause of action and serves no purpose at all. For example, if a litigant founds his cause of action on a law that has been repealed, then such pleading obviously lacks legal foundation and can be said to be frivolous.*

*A vexatious pleading in my view is a pleading whose only purpose is to annoy or irritate the other party to the suit. It may be, though not necessarily, a frivolous pleading or a scandalous pleading. It’s main quality is that it stands out as a pleading only aimed at harassing the other party”*

9. The 1<sup>st</sup> defendant further submitted that the plaintiff’s claim was frivolous based on the following reasons: firstly, that the claim is based on an allotment letter that has no connection with the certificate of lease, secondly that letters of allotment do not create any land rights and thirdly, that the claim in this matter is a claim on land and should have been presented within 12 years.

10. The 1<sup>st</sup> defendant placed reliance in support of his submissions on the case of **Franco Nderitu Kanyari & 6 others -vs- County Government of Nyandarua [2018] eKLR** where the court cited with approval the Court of Appeal holding in the case of **Joseph Arap Ng’ok -vs- Justice Moijo Ole Keiwua NAI** Civil Application No.60 of 1997 where the Court of Appeal observed as follows:-

*“It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which property is held.”*

11. The 1<sup>st</sup> defendant also submitted that the plaintiff was allotted plot no. **F block XX/116 Nakuru Municipality** measuring 0.1573 hectares which is different from the parcel of land registered in the name of the first defendant which is **Nakuru Municipality Block 20/116** measuring 0.1734 hectares and there is, therefore no nexus between the two parcels of land which shows a lack of factual foundation on the plaintiff’s case. The 1<sup>st</sup> defendant further submitted that the plaintiff’s claim was stale as it was filed beyond the limitation period.

12. The plaintiff/respondent in his submissions contended that he was in the suit challenging the authenticity of the title held by the 1<sup>st</sup> defendant which he claimed was unlawfully and fraudulently acquired. The plaintiff submitted that the 2<sup>nd</sup> defendant did not have a valid title to the suit property that he could have transferred to the 1<sup>st</sup> defendant. The plaintiff argued it was not enough for the 1<sup>st</sup> defendant to rely on the certificate of title to prove ownership since it was such title that was under challenge and contended that the root of the title was critical in establishing the validity thereof.

13. In conclusion, the plaintiff submitted that the letter of allotment issued to him and which he accepted conferred beneficial and ownership rights over the suit property and that the unlawful title issued to the 2<sup>nd</sup> defendant could not operate to defeat his interest.

14. The 1<sup>st</sup> defendant’s instant application is brought under **Order 2 Rule 15 (1)** of the Civil Procedure Rules which 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.*

15. The striking out of a party’s pleadings before the case is heard and determined on merits is a draconian step that must only be taken as a last step and even then, when it is evident that the suit is so hopeless that it cannot be resuscitated even by an amendment. The court of Appeal in the case of **DT Dobie & Company (Kenya) Ltd -vs- Muchina (1982) KLR 1** at page 9 expressing the powers that a court wields in striking out or dismissing a suit summarily stated thus:-

*“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.”*

16. In considering an application for the striking out a suit, a court of law must bear in mind that the summary process amounts to driving a party away from the seat of justice

without the benefit of being heard on the merits of his/her case. It is a jurisdiction that ought to be exercised sparingly, and only in very exceptional cases. In the Court of Appeal case of **Yaya Towers Ltd -vs- Trade Bank Ltd (In Liquidation) (2000) eKLR** the court stated:-

*“ 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 court, it must be allowed to proceed to trial”.*

17. In the instant case the plaintiff is claiming to be entitled to ownership of the suit property on the basis of the letter of allotment issued to him in 1995. He is challenging the title held by the 1<sup>st</sup> defendant as having been fraudulently acquired and seeks the cancellation of the same. Under section 26(1) of the Land Registration Act, 2012 the title of a registered proprietor may be challenged on grounds of fraud and/or misrepresentation and/or if it is shown the title was unprocedurally and illegally obtained through a corrupt scheme. There are a myriad of cases where the courts have cancelled and/or annulled titles held by registered proprietors where it was proved such titles were fraudulently acquired by the registered proprietors. In the instant suit the plaintiff is questioning the root of the title held by the 1<sup>st</sup> defendant. Such investigation can only be done by the trial court during the trial.

18. Upon evaluation of the plaintiff's suit and the defence put forth by the 1<sup>st</sup> defendant, I am not able to find the suit to be so hopeless and weak as to deserve to be struck out. The suit raises serious issues such as whether the title sold by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant had been fraudulently acquired by him and if so whether the 1<sup>st</sup> defendant had knowledge and/or ought to have known of the fraud by due exercise of diligence. Was the 1<sup>st</sup> defendant a bonafide purchaser for Value without any notice? These are issues that ought to be ventilated at the trial. The plaintiff should be allowed to have his day in court. That is what justice is all about as parties approach the court to have their disputes adjudicated fairly and justly after all the disputants are afforded a fair hearing as envisaged under Article 48 and 50 of the Constitution.

19. The upshot is that it is my determination that the 1<sup>st</sup> defendant's Notice of Motion dated 3<sup>rd</sup> June 2021 lacks merit and the same is dismissed with costs to the plaintiff.

20. Orders accordingly.

**RULING DATED SIGNED AND DELIVERED THIS 17TH DAY OF FEBRUARY 2022.**

**J M MUTUNGI**

**JUDGE**