



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELC CIVIL CASE NUMBER 373 OF 2016**

**SOGOY ENTERPRISE.....PLAINTIFF/RESPONDENT**

**VERSUS**

**JANE WATHUO.....1<sup>ST</sup> DEFENDANT/APPLICANT**

**RAPHAEL MAINA.....2<sup>ND</sup> DEFENDANT/APPLICANT**

**TERESIAH NJERI.....3<sup>RD</sup> DEFENDANT/APPLICANT**

**MARY KARUGA.....4<sup>TH</sup> DEFENDANT/APPLICANT**

**ESTON MBURU.....5<sup>TH</sup> DEFENDANT/APPLICANT**

**JENIFFER WANGAI.....6<sup>TH</sup> DEFENDANT/APPLICANT**

**PETER MAINA MUGO.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**AND**

**MOHAMED ALI**

**SULEIMANJI HEPTULLABHAI.....INTERESTED PARTY/RESPONDENT**

**RULING**

**INTRODUCTION**

1. This ruling is in respect of the 2<sup>nd</sup> to 6<sup>th</sup> Defendants'/Applicants' Notice of Motion application dated 21<sup>st</sup> March, 2019. The said application expressed to be brought under Order 2 Rule 15, Order 7 Rule 13 of the Civil Procedure Rules and Section 1A, 1B and 3A of the Civil Procedure Act.

2. The application seeks the following Orders:

***1. THAT the suit herein filed be struck out with costs.***

***2. THAT otherwise the counter-claim filed herein proceeds herewith as undefended and summary judgement be entered against the Defendants to the counterclaim in terms prayed in the counter-claim.***

***3. THAT costs of this application be provided for.***

3. The application is based on the grounds on its face and supported by the affidavit sworn by Raphael Maina (the 2<sup>nd</sup> Defendant/applicant) sworn on 8<sup>th</sup> May 2019.

## **FACTUAL BACKGROUND**

4. This suit was commenced by the Plaintiff dated 13<sup>th</sup> September, 2016 and filed on the same date by the firm of Maragia Ogaro & Co. Advocates.
5. The 1<sup>st</sup>-6<sup>th</sup> Defendants filed their statement of defence and counterclaim on 11<sup>th</sup> January, 2017 and amended on 12<sup>th</sup> May, 2021. In their counterclaim, they are seeking a declaration that they are the lawful owners of LR.NO. NAKURU MUNICIPALITY BLOCK 17/401.
6. The 7<sup>th</sup> Defendant filed his statement of defence and counterclaim on 6<sup>th</sup> December, 2016. In his counterclaim, the 7<sup>th</sup> Defendant is seeking a declaration that it is the legal owner of LR.NO. NAKURU MUNICIPALITY BLOCK 17/401 and that they never sold it to Job Kiplangat Birgen (whom it is alleged sold it to the Plaintiff).
7. On representation and filing of pleadings, the court record of 9<sup>th</sup> May, 2019 shows that Mr. Maragia appeared in court and stated that though the documents filed in court are indicated as drawn and filed by him, he is a stranger to the fact of representation by his law firm.
8. On the 19<sup>th</sup> July, 2017, Mr. Maragia appeared in court and confirmed that his firm did not prepare the pleadings and did not file this suit. Counsel for the Defendants informed the court that they had filed a counterclaim and were directed to serve the Plaintiff personally.
9. The court record shows no appearance for the plaintiff until sometime on 15/5/18 when Mr. Ochang' appears for the Plaintiff and seeks time to review the file and file necessary documents.
10. There was no further appearance for the Plaintiff till 12<sup>th</sup> May, 2021. On the said date, the court record shows that Mr. Ochang', again, appeared for the Plaintiff and participated in the proceedings.
11. On 16<sup>th</sup> September, 2021, Mr. Ochang' appeared for the Plaintiff and informs the Court that he had not received proper instructions from his client, the Plaintiff, and that he intended to file an application to cease acting. The court directed him to file and serve the said application within 7 days. In the meantime, the application dated 23<sup>rd</sup> March, 2019 (which is subject of this ruling) was fixed for mention before me on 12<sup>th</sup> October, 2021.
12. On 12<sup>th</sup> October, 2021, Mr. Ochang' for the Plaintiff was absent and counsel for the Defendants asked court to presume that he was still on record.
13. The firm of Ochang' continued to receive mention notices and hearing notices in respect of this matter generally and specifically for the application dated 21<sup>st</sup> March, 2019.
14. Away from issues pertaining to filing of pleadings and representation for the Plaintiff, the Plaintiff in its Complaint describes itself as a registered business entity working for gain in Nakuru County.
15. The Plaintiff avers that it is the registered owner of parcel of land known as Nakuru Municipality Block 17/401 located in Nakuru County.
16. The Plaintiff seeks the following orders against the Defendants:

*a) A permanent injunction to restrain the Defendants their agents, servants or employees from occupying, using, entering, building, selling or in any way dealing with parcel of land known as NAKURU MUNICIPALITY BLOCK 17/401.*

*b) Order the Defendants not to interfere with the quiet possession of, break into, trespass, enter, erecting structures, selling, transferring, alienating, disposing, tilling, cultivating, leasing, destroying fences or in any way interfering with parcel of land known as NAKURU MUNICIPALITY BLOCK 17/401 pending the hearing of this suit.*

*c) Compensation of the Plaintiff by way of general damages for the loss and damages caused by the Defendants.*

*d) Costs of this suit and interest at court rates.*

17. This background is set out so as to understand the nature of proceedings and appreciate the orders sought in the current application.
18. The Plaintiff/Respondent was served with this application but it did not file any response to the application.

## **1<sup>ST</sup> TO 6<sup>TH</sup> DEFENDANTS'/APPLICANTS' CONTENTION.**

19. The 1<sup>st</sup> to 6<sup>th</sup> Defendants/Applicants contend that the Plaintiff filed the suit herein against the Defendants claiming ownership of land parcel No. **Nakuru Municipality Block 7/401.**
20. It is their contention that the Plaintiff lacks the legal capacity to institute the present suit, is unrepresented and the advocate said to be acting for the Plaintiff denies being on record.

21. The 1<sup>st</sup> to 6<sup>th</sup> Defendants/Applicants further contend that this suit is a nullity as the pleadings were prepared by unqualified persons as the firm of Maragia Ogaro & Company Advocates has disowned all the documents prepared in this suit and they deny ever being on record and so the suit should be struck out.

22. It is also their contention that the counterclaim filed herein has a reasonable cause of action and triable issues and so in light of this application to strike out the suit, the counterclaim can be dispensed with as undefended and summary judgement be entered.

23. The 1<sup>st</sup> to 6<sup>th</sup> Defendants/Applicants contend that they have been informed by their advocates on record that the present suit is scandalous, frivolous, vexatious and it is only fair that it be struck out.

24. They end their deposition by stating that this suit is tainted with illegality, procedural impropriety and is an abuse of the court process intended to defraud the defendants of land they have legally acquired.

#### **7<sup>TH</sup> DEFENDANT'S RESPONSE**

25. In response to the application, Margaret Njeri Mugo filed a replying affidavit as the administratrix of the estate of Paul Maina Mugo (deceased).

26. She deposes that she associates herself with the contents of paragraphs 3, 4, 5 and 6 of the 1<sup>st</sup> – 6<sup>th</sup> Defendants'/Applicants' application and that their application should only be allowed in terms of prayer 1 and 3 against the Plaintiff/Respondent on the grounds that after the Plaintiff/Respondent filed his plaint dated 13<sup>th</sup> September, 2016, the deceased 7<sup>th</sup> Defendant filed his statement of Defence and counterclaim.

27. She deposes further that the deceased 7<sup>th</sup> Defendant sought judgement against the Plaintiff/Respondent for:

*i. Dismissal of the Plaintiff's suit with costs.*

*ii. Judgement in favour of the 7<sup>th</sup> Defendant (Now Plaintiff) with declaration that he is the Legal Owner of LR NO. NAKURU MUNICIPALITY BLOCK 17/401 and the title deed held by the Plaintiff (Now Defendant) is null and void ab initio with order for cancellation of the same by the Commissioner of Land with issuance of the same to the 7<sup>th</sup> Defendant (Now Plaintiff)*

*iii. Costs of this suit.*

*iv. Any other relief that this honourable court.*

28. She also deposes that the basis of the 7<sup>th</sup> Defendant/ Respondent's counterclaim is that he is the lawful allottee and owner of **LR NO. NAKURU MUNICIPALITY BLOCK 17/401** which the Plaintiff/respondent fraudulently acquired.

29. It is her contention that the 1<sup>st</sup> -6<sup>th</sup> Defendants/Applicants also filed their statement of Defence and counterclaim and that the estate of the deceased 7<sup>th</sup> Defendant/Respondent would be prejudiced should the court allow the 1<sup>st</sup> to 6<sup>th</sup> Defendants/Applicants' application in terms of prayer (2).

30. It is the 7<sup>th</sup> Defendant/Respondent's contention that this application other than seeking to dismiss the Plaintiff's suit, is meant to steal a match from him and that is therefore in the interest of justice that after the dismissal of the Plaintiff/Respondent's suit, she should be enjoined to the 1<sup>st</sup> - 6<sup>th</sup> Defendants'/Applicants' Counter Claim.

31. She ends her deposition by stating that the 1<sup>st</sup> - 6<sup>th</sup> Defendants/Applicants will suffer no prejudice if she is included in their counterclaim and the two counterclaims be heard and determined on merit.

#### **INTERESTED PARTY'S RESPONSE**

32. In response to the application, the interested party filed a replying affidavit where he deposes that the present application is similar to the application dated 21<sup>st</sup> September, 2017 filed by the applicants herein.

33. He deposes further that on 5<sup>th</sup> October 2018, that application was withdrawn with no orders as to costs and parties directed to comply with Order 11. According to him, it beats logic why the 1<sup>st</sup> to 6<sup>th</sup> Defendants'/Applicants' would file a similar application two years later, adding that it is a waste of the court's time.

34. He also deposes that from the court record, the Plaintiff is represented by the firm of Ochang Ajigo & Co. Advocates and so the assertions in the supporting affidavit are untrue.

35. The Interested Party further contends that he is advised by his advocates on record that the ownership of the suit property is in dispute and that it is in the interest of justice that the matter be resolved once and for all.

36. He contends further that the 1<sup>st</sup> - 6<sup>th</sup> Defendants/Applicants by virtue of purchasing the suit parcel from the 7<sup>th</sup> Defendant/Respondent, have an interest in the suit property.

37. The interested party contends that the 7<sup>th</sup> Defendant/Respondent does not have title to the suit property but claims to have been allocated the land sometime in 1997 by the government while he (the interested party) is the registered owner having been issued with a title deed on 23<sup>rd</sup> June 2016.

38. It is his contention that due to the conflicting claims of ownership, the court can only determine that issue after full hearing as opposed to having the matter dismissed on technicalities.

39. He ended his disposition by stating that dismissing the suit where ownership is in question would be unfair to him as the owner because the applicants are in occupation of the suit property.

### **ISSUES FOR DETERMINATION**

40. The 1<sup>st</sup> to 6<sup>th</sup> Defendants/Applicants, the Interested Party/Respondent and the 7<sup>th</sup> Defendant/Respondent and filed their submissions on 3<sup>rd</sup> December 2021, 10<sup>th</sup> December, 2021 and 15<sup>th</sup> December, 2021 respectively.

41. The 1<sup>st</sup> to 6<sup>th</sup> Defendants/Applicants in their submissions submitted on whether their application to strike out the suit should be allowed.

42. The 7<sup>th</sup> Defendant/ Respondent in his submissions identified the following issues for determination:

*1) Whether the Plaintiff/Respondent's suit ought to be struck out.*

*2) Whether the 1<sup>st</sup> to 6<sup>th</sup> Defendants'/Applicants' and the 7<sup>th</sup> Defendant/Respondent's counterclaims should be set down for hearing and determined on merit.*

*3) Whether the 7<sup>th</sup> Defendant is entitled to costs.*

43. The Interested Party in his submissions identified one issue for determination. That is, whether the application has merit.

44. After perusal of the Application, the affidavit in support, submissions filed in respect of this Application, my considered view is that the issues for determination are:

*a) Whether this suit should be struck out.*

*b) Whether the counterclaim should proceed as undefended and judgement entered against the Defendants in the counterclaim.*

*c) Whether the 1<sup>st</sup> to 6<sup>th</sup> Defendants'/Applicants' and the 7<sup>th</sup> Defendant/Respondent's counterclaims should be set down for hearing and determined on merit.*

*d) Which party bears the cost of the application?*

### **ANALYSIS AND DETERMINATION**

#### **A. Whether this suit should be struck out**

45. I begin by taking note of the fact that this application is similar to an application dated 21<sup>st</sup> September, 2017, as rightly observed by the interested party.

46. The said application came up for hearing on 5<sup>th</sup> October, 2018 and counsel appearing for the 1<sup>st</sup> – 6<sup>th</sup> Defendants prayed that the said application be withdrawn with no order as to costs. The court granted this prayer and asked parties to comply with Order 11 of the Civil Procedure Rules in readiness for hearing of the main suit.

47. It is my considered view that nothing prevents a party who has withdrawn a suit or application, for whatever reason, from instituting a fresh one.

48. For this reason, the fact of withdrawal of the previous application is not an impediment to the institution and hearing of the present application and I shall proceed to determine it on its merits.

49. The 1<sup>st</sup> -6<sup>th</sup> Defendants/ Applicants reason for seeking orders that the suit be struck out is hinged on the fact that the Firm of Maragia stated that they did not draft and file the pleadings. They refer to the pleadings filed by the Plaintiff as being fraudulent. According to them, therefore, the Plaintiff was filed by a person who is not qualified as an advocate. It is their submission that the suit should therefore be struck out and any documents filed by the Plaintiff/Respondent be expunged from the record.

50. The 1<sup>st</sup> -6<sup>th</sup> Defendants/Applicants urge this Honourable court to rely on the provisions of section 9, 31, 34 of the Advocates Act in support of their submissions

51. In support of their application, the 1<sup>st</sup> -6<sup>th</sup> Defendants/ Applicants have cited the following judicial decisions:

- a. **National Bank of Kenya Ltd Vs Anjal warehousing Ltd [2015] eKLR.** This decision is on suits instituted by unqualified persons.
- b. **Chairman of Co-operative Tribunal & 8 others ex-parte Management Committee , Konza Ranching and Farming Co-operative Society Limited [2014] eKLR .** This speaks to abuse of court process.
- c. **Trust Bank Limited Vs Amin Company Ltd& Another [2000]KLR 164.** This speaks to frivolous and vexatious pleadings.

52. On the question of striking out the suit, the 7<sup>th</sup> Defendant/Respondent associates himself with the submissions of the 1<sup>st</sup>-6<sup>th</sup> Defendants/Applicants.

53. The interested party/Respondent is of a contrary opinion on the question of striking out. It his submission that the firm of Ochang' Ajigo & Co. Advocates are on record for the Plaintiff, that the competence or qualification of Mr. Ochang are not in question.

54. The interested party makes reference to Order 2 Rule 15 and cites the decision in **Kagwa & 16 others Vs Kiwanuka & 2 others Kampala HCCS No. 175 of 1993 [1994] VI KALR 128.** This decision speaks to the fact that whenever there are allegations, accusations and counter accusations, it is only fair that there be a full hearing.

55. The interested party has also cited the decision in **D.T Dobie & Company (Kenya) Ltd Vs Muchina [1982] (1)KLR 89** wherein it was stated that no suit ought to be summarily dismissed unless it is so hopeless that it plainly and obviously discloses no reasonable cause of action.

56. The interested part has also made reference to Article 159 (2) of the Constitution of Kenya 2010, that the court should proceed to determine the suit without undue regard to procedural technicalities.

57. I am of the view that the reasons for striking out this suit, as advanced by the 1<sup>st</sup> - 6<sup>th</sup> Defendants/Applicants are in misapprehension of the facts and the law.

58. The law relating to striking out of suits is found in Order Rule 15 of the Civil Procedure Rules and it 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.**

59. It is important to note that the power to strike out pleadings is discretionary and there are several judicial decisions that speak to the circumstances under which this power may be exercised, if at all.

60. In **Yaya Towers Limited Vs Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000)** the court expressed itself thus:

*A Plaintiff (Defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant (Plaintiff) 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...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved. (Emphasis is mine).*

61. Similarly, in **D.T. Dobie & Company Kenya Limited Vs Joseph Mbaria Muchina & Another [1980] eKLR, Madan JA, stated:**

***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.***

62. I am not persuaded by the 1<sup>st</sup> – 6<sup>th</sup> Defendants/Applicants contention that this suit is scandalous or illegal. The Plaintiff is seeking protection of his proprietary rights as owner of the suit parcel. This cannot be wished away as frivolous or scandalous.

63. All parties to this suit parcel are laying claim and/or asserting their rights over the suit parcel. On the face of it, each party seems to have an explanation as to how they might be the legal owner of the suit parcel. These allegations and assertions need to be probed and determined on merits

64. The second issue canvassed by the 1<sup>st</sup> – 6<sup>th</sup> Defendants/Applicants in support of striking out the suit is that the pleadings have been prepared by a person who is not an advocate. Nothing can be further from the truth. I have set out the factual background as pertains to filing of pleadings and representation in this matter.

65. The fact that Maragia & Co Advocates exists and is run by an advocates is not in dispute. It also not disputed that there are pleadings in the court record filed by the said firm. I am not convinced that the disowning of pleadings by the said advocate qualifies the pleadings as being prepared by a person who is not an advocate and therefore in contravention of the Advocates Act. It may calls for an inquiry but does not out rightly cause the pleadings to be illegal. In any event, subsequently, the firm of Ochang' & Ajigo took over the conduct of the matter and Mr. Ochang' appeared in court for the Plaintiff on more than one occasion and is still on record as appearing for the Plaintiff; he is yet to file the application to cease acting.

66. In view of the foregoing, I decline to grant the prayers for striking out of this suit.

**A. Whether the counterclaim should proceed as undefended and judgement entered against the Defendants in the counterclaim as prayed.**

67. This prayer is essentially seeking summary judgement against the Plaintiff (the Defendant in the counterclaim).

68. The key consideration in determining an application to strike out a defence is the consideration as to whether the said defence raises triable issues. In the case of **JOB KWACH Vs NATION MEDIA GROUP LTD** it was held as follows:-

***“Before the grant of summary judgment the court must satisfy itself that there are no triable issues raised by the Defendant, either in his statement of defence or in the affidavit in opposition to the application for summary judgment or in any other manner. What then is a defence that raised no bonafide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as “subject or liable to judicial examination and trial.” It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the court.”(Emphasis is mine)***

69. I am not convinced that the averments by the Plaintiff- that it is the owner of the suit parcel- should be wished away. I reiterate that the issues raised in the Plaintiff, written statements of defence and counterclaims filed by all the parties require further interrogation, which can only happen during trial.

70. The 7<sup>th</sup> Defendant/ Respondent is particularly opposed to the grant of this prayer for the reason that a grant of it would be tantamount to throwing out its defence and counter claim in which he, too, seeks a declaration that he is the rightful owner of the suit parcel. The 7<sup>th</sup> Defendant describes the grant of the prayer No. 2 as stealing a match on him and I agree.

71. Consequently, this prayer is also declined.

**B. Whether the 1<sup>st</sup> to 6<sup>th</sup> Defendants'/Applicants' and the 7<sup>th</sup> Defendant/Respondent's counterclaims should be set down for hearing and determination on merit.**

72. This question is supported by the interested party/Respondent.

73. In view of my determination on the first and second question. I find that this suit should be set down for hearing and a determination made on merits. This will be able to finally resolve the competing claims of the parties herein.

74. Article 159(2) of the Constitution of Kenya 2010 reminds me that justice should be done without undue regard to procedural technicalities. I note that there are things yet to be done by the Plaintiff before this suit is ready for hearing. These things range from resolving its representation to filing necessary responses. It is in the interest of justice that the Plaintiff is granted an opportunity to do so.

75. Striking out this suit or making an order for summary judgment, without hearing the parties herein would be a dereliction of duty by me.

**C. Which party bears the cost of the application?**

76. On the question of costs of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the Civil Procedure Act (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

77. The interested party wholly opposed the application, the 7<sup>th</sup> Defendant/Respondent opposed the application partially while the Plaintiff /Respondent did not file their response to this application.

**78. The Upshot of the foregoing is that the Notice of Motion Application dated 21<sup>st</sup> March, 2019 is dismissed with costs to the 7<sup>th</sup> Defendant/Respondent and the Interested Party.**

79. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 17<sup>TH</sup> DAY OF FEBRUARY 2022**

**L. A. OMOLLO**

**JUDGE.**

**In the presence of: -**

**Mr. Murimi for the 1<sup>st</sup> – 6<sup>th</sup> Defendants/Applicants.**

**No appearance for the Plaintiff/Respondent.**

**Mrs. Mukira for the 7<sup>th</sup> Defendant/Respondent.**

**Miss Cherono for the Interested Party/Respondent.**

**Court Assistant; Jeniffer.**