



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL APPEAL NO 262 OF 2009**

STANLEY MWANGI WAMAE ..... APPELLANT

VERSUS

CHARLES NGATIA KAMAU ..... 1<sup>ST</sup> RESPONDENT

JOHN MUCHANGI NJOROGE ..... 2<sup>ND</sup> RESPONDENT

CHARLES KAMAU NYAGA ..... 3<sup>RD</sup> RESPONDENT

**JUDGMENT**

1. The Appeal herein arises out of a Ruling on an Interlocutory Application in which the learned trial magistrate not only dismissed the Applicant's application for injunctive orders, but also struck out the Appellant's entire suit. Aggrieved with that decision the Appellant came to this court and pleaded nine (9) grounds of appeal in the Memorandum of Appeal dated 16<sup>th</sup> June 2010 and filed on 1<sup>st</sup> July 2010. The grounds are -

- (1) the learned Magistrate erred in law and fact in holding that the Appellant's suit which was essentially on alienation of land by creation of a road of access could only be determined under Section 3(1) of the Land Disputes Act,***
- (2) the learned Magistrate erred in law and fact in holding that the Appellant's claim was an action for trespass.***
- (3) the learned Magistrate erred in law and fact by considering extraneous issues that were not the subject matter of the application,***
- (4) the learned Magistrate erred in law and fact in holding that the Court lacked jurisdiction to hear and determine the suit.***
- (5) the learned Magistrate erred in law and fact in holding that the Court lacked jurisdiction to hear and determine the application dated 5<sup>th</sup> October 2009,***
- (6) the learned Magistrate rightly appreciated that part of the Applicant's claim was on trespass, but erred in law and fact in holding that the entire suit revolved around trespass.***
- (7) the learned Magistrate erred in law and fact by failing to appreciate that the pleadings filed therein raised issues that could only be determined by the court.***

**(8) the learned Magistrate erred in law and fact by dismissing the application dated 5th October 2009 with costs.**

**(9) the learned Magistrate erred in law and fact by dismissing the Appellant's suit with costs.**

and for those reasons, Counsel for the Appellant asked the court to allow the appeal with costs against the Respondents.

2. Prior to the hearing of the Appeal respective counsel for the Appellant and Respondent filed submissions dated 14th September 2012, and filed on 17th September 2012 (for the Appellant) and dated 16th November 2013 (for the Respondent).

3. Although there were nine grounds of appeal, the Appeal herein raises basically one issue, whether the learned trial magistrate erred in dismissing the Appellant's Interlocutory Application dated 5/10/2009 for injunctive orders as well as striking out the Appellant's entire suit.

4. On the first leg of that issue, it is within the discretion of the trial court for reasons given even if wrong and mistaken, to grant or deny any order sought by any party to the action. It was therefore perfectly legal for the trial court to deny the orders for injunction and to dismiss the Application for injunction dated 5th October 2009, in its Ruling delivered on 9th December 2009.

5. The question raised by the **second** leg of that issue is whether the learned trial magistrate erred in striking out the Applicant's entire suit on the ground that the issue was merely one of trespass and was subject to the jurisdiction of the Land Disputes Tribunal under the Land Disputes Act 1980 (No. 19 of 1980), and therefore the court had no jurisdiction.

6. To answer that question, this court needs to consider **firstly** the claim of the Appellant as set out in the Plaint. **Secondly**, the court will need to consider the law governing striking out of pleadings.

7. On the first consideration, that is, the Appellant in their Plaint prayed for the following orders -

**(a) an order of a permanent injunction against any form of interference with the plaintiff's suit land, Title No. LAIKIPIA/NYANDURUA/401**

**(b) special damages of Ksh 12,000/=**

**c. general damages**

**d. costs and interest at court rates,**

**(e) any other relief the court may deem fit to grant.**

8. It is clear that the Appellant's claim was not merely for "trespass". The Appellant was the registered owner of the suit land. He was asserting ownership of his land against the interference by the Respondent. He had spent money, resisting the Respondent's actions, he claimed general and special damages. The Land Disputes Tribunal jurisdiction is indeed limited by Section 3(1) thereof to matters relating to -

**(i) the division of, or the determination of boundaries to land, including land held in common.**

**(ii) a claim to occupy and work land or**

**iii. trespass to land**

9. It is clear from the Appellant's prayers in the Plaint that the Appellant's claim was for an injunction, not trespass to land, it was also a claim for general and special damages. A Land Disputes

Tribunal had no jurisdiction to determine such claim. The learned trial magistrate erred in holding that he had no jurisdiction to determine the application for injunction.

10. On the second consideration relating to striking out of pleadings, Order 2, rule 15 of the Civil Procedure Rules 2010 lays out grounds for striking out pleadings

- (a) disclosure of 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 in such case the court may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be,

11. None of the above grounds were canvassed by the Respondents or the trial magistrate. The learned trial magistrate consequently erred in striking out the Appellant's suit without any proper or legal basis. Judicial precedent has established that the jurisdiction to strike out any pleadings or suit is one to be exercised with utmost caution and sparingly.

12. In one of the leading cases on the subject, **D. T. DOBIE & COMPANY LTD (KENYA LTD), Vs. MUCHINA [1982] KLR** the Court of Appeal held *inter alia* -

***as the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.***

In Obiter dicta, Madan J A (as he then was) said -

- (1) The power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge (court). On an application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and restrict the freedom of the trial judge in disposing the case.***
- 2. The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment. As long as a suit can be injected with life by amendment it should not be struck out.***

13. There was of course no need for amendment in this case. None had been called for. The Appellant's case was clear. It was for a permanent injunction and for special and general damages. Those are remedies which a Land Disputes Tribunal had no jurisdiction to grant. The learned trial magistrate consequently erred in law and in fact in striking out the Appellant's suit; and I so hold.

14. I therefore set aside the learned magistrate's Ruling delivered on 9/12/2009, and all consequential orders arising therefrom.

15. I direct that the Appellant's suit in Nyahururu Senior Principal Magistrate's Court Civil Suit No. 297 of 2009 be heard and determined before another trial magistrate.

16. The Appellant shall also have the costs of this Appeal as well as in the lower court.

17. There shall be orders accordingly.

**Dated, signed and delivered at Nakuru this 21st day of February, 2014**

**M. J. ANYARA EMUKULE**

**JUDGE**