



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

ELC. CASE NO. 493 OF 2008

**KURIA THARAO. ....1<sup>ST</sup> PLAINTIFF**

**JAMES WAIGANJO GITUNGO.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOSEPH KINYANJUI MWAI.....1<sup>ST</sup> DEFENDANT**

**JOSEPH WARARI GATHOGA.....2<sup>ND</sup> DEFENDANT**

**THE LAND REGISTRAR KIAMBU.....3<sup>RD</sup> DEFENDANT**

**THE HON. THE ATTORNEY GENERAL.....4<sup>TH</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Chamber Summons dated 6<sup>th</sup> October 2009 (hereinafter referred to as the “First Chamber Summons”) in which the 1<sup>st</sup> Defendant/Applicant seeks for the following orders:

1. That the Honourable Court be pleased to strike out and/or dismiss the entire suit as it:
  - a. Is scandalous, frivolous or vexatious; or
  - b. Prejudices, embarrasses or delays the fair trial of action; or
  - c. Is otherwise an abuse of the court process.
2. That the Honourable Court be pleased to grant and/or make such further or other orders it may deem just and necessary.
3. That the costs of this Application be provided for.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of the 1<sup>st</sup> Defendant/Applicant, Joseph Kinyanjui Mwai, sworn on 6<sup>th</sup> October 2009 in which he averred that he applied for allotment of a residential plot being the suit property and he was duly issued with the requisite letter of allotment dated 13<sup>th</sup> May 1991. He further averred that he proceeded to pay the applicable stand premium, survey and other charges before being issued with the Certificate of Lease on

24<sup>th</sup> June 1993. He further averred that he subsequently transferred his legal interest in the suit property to the 2<sup>nd</sup> Defendant and that a new Certificate of Lease dated 10<sup>th</sup> September 1997 was issued to the 2<sup>nd</sup> Defendant. He then stated that the allegations of fraud against him are unsubstantiated and without any merit. He further averred that upon reading the judgment in the **Milimani CMCC No. 8038 of 1998**, the issue of ownership of the suit property was considered and the court held that the 2<sup>nd</sup> Defendant's title to the suit property was valid and indefeasible and that the Plaintiff's did not allege that the 2<sup>nd</sup> Defendant had obtained registration using fraud or misrepresentation. He further stated that the Decree issued in that case stated that the 2<sup>nd</sup> Defendant was declared to be the legitimate owner of the suit property and the Plaintiffs were permanently enjoined and restrained from interfering in any way with the 2<sup>nd</sup> Defendant's occupation and or use of the suit property. He further averred that the said judgment had not been appealed from or reviewed or set aside meaning that the same was valid and legally binding. He further intimated that the current suit is meant to circumvent the legal effect of the said judgment and decree.

The First Chamber Summons is contested. The 1<sup>st</sup> Plaintiff filed his Replying Affidavit sworn on 11<sup>th</sup> February 2010 in which he averred that the issue of res judicata raised in the First Chamber Summons had been heard and fully adjudicated upon with the court (Kubo, J.) determining that this suit is not res judicata. He denied that the 1<sup>st</sup> Defendant/Applicant was issued with a letter of allotment as alleged and stated that the suit property was allocated to one Wanja Njuguna by the Kiambu District Plot allocation committee on 4<sup>th</sup> March 1992. He further averred that sometime in 1995 they purchased the suit property from the said Wanja Njuguna. He further confirmed that they were issued with a Certificate of Lease on 15<sup>th</sup> January 1998. He produced a copy of that Certificate of Lease as "KT5". He stated that the Certificates of Lease produced by the Defendants did not emanate from the Kiambu Lands Registry and were fraudulent. He urged the court to dismiss the First Chamber Summons with costs.

Also coming up for determination is the Chamber Summons dated 30<sup>th</sup> October 2009 (hereinafter referred to as the "Second Chamber Summons") in which the 2<sup>nd</sup> Defendant sought for the following orders:

1. That the Plaintiff's suit be struck out.
2. That in the alternative to prayer (1) above, the 2<sup>nd</sup> Plaintiff's claim be struck out.
3. That in the alternative to prayers (1) and (2) above, this suit be stayed pending settlement of the 2<sup>nd</sup> Defendant's costs in **Milimani CMCC No. 8038 of 1998**.
4. That costs of this application and suit be paid by the Plaintiffs

The Application is based on the grounds appearing on the face of it together with the Supporting Affidavit of the 2<sup>nd</sup> Defendant, Joseph Warari Gathoga, sworn on 30<sup>th</sup> October 2009 in which he averred that the 1<sup>st</sup> Defendant was the first registered proprietor of the property known as Limuru/Township/196 (herein referred to as the "suit property") and that he is the present registered proprietor thereof. He annexed copies of the Certificate of Lease in the name of the 1<sup>st</sup> Defendant and a second one in his name. He further averred that he paid the entire purchase price for the suit property to the 1<sup>st</sup> Defendant as stipulated in the sale agreement. He further stated that sometimes in the year 1998, the Plaintiffs started interfering with his ownership of the suit property and he filed suit in **Milimani CMCC No. 8038 of 1998** which was heard and determined in his favour and a decree subsequently issued. He further stated that the Plaintiffs did not appeal or apply for that decree to be set aside and that the decree is therefore still in force to date. He further stated that this suit is res judicata as the issues herein were determined in the said suit. He further stated that the Plaintiffs have not settled the costs awarded to him in **Milimani CMCC No. 8038 of 1998**. He also stated that the Plaintiffs' claim for fraud as pleaded herein is incompetent in law and cannot succeed against him because no particulars of fraud were pleaded. He further added that the 2<sup>nd</sup> Plaintiff did not swear a verifying affidavit in this suit, that he is an innocent purchaser of title for consideration without notice of any dispute, that the suit is time barred as the Plaintiffs took over 11 years to file it since he assumed ownership of the suit property in 1998 and that the pleadings raise no cause of action as against him. He further stated that the Plaintiffs' remedy, if any, was to appeal against the decree issued in **Milimani CMCC No. 8038 of 1998**.

The Second Chamber Summons is contested. The 1<sup>st</sup> Plaintiff filed his Replying Affidavit sworn on 11<sup>th</sup> February 2010 in which he averred that it is true that the 2<sup>nd</sup> Defendant purchased the suit property from the 1<sup>st</sup> Defendant but that the said 1<sup>st</sup> Defendant had no interest to pass on hence the 2<sup>nd</sup> Defendant's Certificate of Lease is of no legal consequences and is a sham. He stated that the claim of fraud affects the 2<sup>nd</sup> Defendant's title as no interest was passed to him yet he moved into the parcel of land and commenced putting up a permanent building. He further averred that it is true there was a civil suit in **Milimani CMCC No. 8038 of 1998** but denied that this present suit is res judicata. He further denied that this present suit is fatally defective or time barred stating that this suit touches on the validity of the 2<sup>nd</sup> Defendant's title and his trespass to the suit property. He further stated that the issue of costs cannot be used to stay this suit as the 2<sup>nd</sup> Defendant has avenues to execute for his costs. He maintained that this suit was properly before court and this Application is only meant to delay the prosecution thereof and should be dismissed with costs.

The 2<sup>nd</sup> Defendant filed his written submissions dated 17<sup>th</sup> February 2010 in which he made several points:

1. That pursuant to **Section 143(1)** of the **Registered Land Act** (now repealed), a first registration such as the one for the 1<sup>st</sup> Defendant who sold the suit property to the 2<sup>nd</sup> Defendant cannot be challenged on the ground of fraud or mistake which the Plaintiffs are purporting to do in this suit. On that ground, the 2<sup>nd</sup> Defendant contended that this suit must fail.
2. That the Plaintiffs' cause of action herein is founded on fraud which is a tort which action should have been brought within 3 years from the date the cause of action accrued in compliance with **section 4(2) of the Limitations of Actions Act**. He further cited section 26 of the same statute that stipulates that time does not begin to run until the Plaintiff discovered the fraud or mistake or could with reasonable diligence have discovered it. In this case, he contended that the Plaintiffs have been aware of the Defendants' interests and claim over the suit property for a period of over 12 years as time started to run in September 1997. He then concluded that based on that, this suit is time barred. He further submitted that even where there is interlocutory judgment, the court has jurisdiction to strike out a fatal suit.
3. That the verifying affidavit in support of the Plaintiffs in this suit was only signed by the 1<sup>st</sup> Plaintiff and not by the 2<sup>nd</sup> Plaintiff which is contrary to the provisions of **Order VII Rule 13(1)(2) and (3)** which empowers the court to strike out any plaint which does not comply. In support of that submission, they cited the Court of Appeal decision in **Research International East Africa Limited versus Julius Arisi & 213 Others Civil Appeal No. 321 of 2003** and submitted that the 2<sup>nd</sup> Plaintiff's suit is incompetent and fatal for failure to comply with that provision.
4. That the 2<sup>nd</sup> Defendant is an innocent purchaser for value without notice. He submitted that the Plaintiffs did not plead any allegation to demonstrate that he had notice of the dispute of ownership between them and the 1<sup>st</sup> Defendant and as the Plaintiffs are bound by their pleadings, his title to the suit property cannot be impeached.
5. That the Plaintiffs having not imputed any fraud on the part of the 2<sup>nd</sup> Defendant had no cause of action against him. In support of that submission, he cited the case of **Richard Obiero Bwai versus Guerci & Co. & Another HCCC No. 4772 of 1988**.
6. That the 2<sup>nd</sup> Defendant has not been paid his costs awarded to him in **CMCC No. 8083 of 1998** which were to be borne by the Plaintiffs after losing that case. He submitted that in accordance with **Order 24 Rule 4**, any subsequent suit ought to be stayed until costs from the previous suit are settled.

The 1<sup>st</sup> Defendant also filed his written submissions dated 25<sup>th</sup> February 2010 in which he made the following points:

1. That the present suit was filed in the year 2008 which is over 8 years over the limitation period as provided under the Limitation of Actions Act.
2. That this suit is res judicata because the Plaintiffs ought to have raised the issue of alleged fraud as

against the Defendants especially in light of the Plaintiffs' knowledge of the material facts in respect of which they allege fraud as against the 1<sup>st</sup> Defendant. To support that submission he cited section 7 of the **Civil Procedure Act** which provides as follows:

“Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in such suit”

3. He reiterated the sanctity of his title in respect of the suit property and also that acquired by the 2<sup>nd</sup> Defendant.

The Plaintiff also filed their submissions dated 10<sup>th</sup> March 2010 in which they made the following points:

1. That the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' applications are both res judicata as the issues raised had been heard and adjudicated upon. He submitted that Kubo J as he then was had already dealt with the issues in a ruling delivered on 19<sup>th</sup> March 2009 in which the judge made a finding that the suit was not res judicata as the issues raised in the previous suit were dissimilar to those of the present suit. He added that the ruling was not appealed against. He also added that the issue in this case was that there was fraud and misrepresentation during the procurement of the 1<sup>st</sup> defendant's certificate of lease.
2. On the issue of limitation of time, the plaintiff submitted that the causes of actions raised are not statute barred in any way. On the issue of fraud he relied on **section 4(2) of the Limitation of Actions Act** which states that “*An action founded on tort may not be brought after the end of three years from the date of which the cause of action is accrued*” and **section 26** of the same Act stating that “*The period of limitation does not begin to run until the plaintiff has discovered the fraud or misstate or could with reasonable diligence have discovered it*” The plaintiff therefore submitted that the cause of action arose on 25<sup>th</sup> September 2006 when the 3<sup>rd</sup> defendant furnished the police with the status of the 1<sup>st</sup> defendants lease. On the issue of trespass, the plaintiff submitted that it was a continuing tort and that the plaintiff filed this suit the same year the act commenced. On the action to recover land the plaintiff submitted that section 7 of the Limitation of Actions Act state that one cannot bring an action for the recovery of land after the end of 12 years. That this suit was commenced in 1998 and that the 2<sup>nd</sup> defendant obtained his lease in 1997 making it a period of 10 and 11 years respectively.
3. On the sanctity of the 1<sup>st</sup> defendants title, the plaintiff submitted that while it is true that the 1<sup>st</sup> defendant got his lease in 1993 and the plaintiffs in 1998 the court will be tasked with looking at what is first registration as both leases show that the 1<sup>st</sup> defendant and plaintiffs as registered first in the green cards.
4. On the issue on purchase for value without notice claimed by the 2<sup>nd</sup> defendant, the plaintiffs submitted that he cannot lay claim on a property which did not belong to the 1<sup>st</sup> defendant and cannot hold the plaintiffs interest at ransom and that the 2<sup>nd</sup> defendant's remedy is to claim a refund of what he may have paid to the 1<sup>st</sup> defendant.
5. On the defendants claim that the suit should be struck out the plaintiffs relied on the case of **D.T. Dobie & Company(Kenya) Limited –vs Muchina [1982]KLR** that held that the court should aim at sustaining a trial rather than terminating it and should be struck out if it is so weak that it cannot be resuscitated by an amendment

The 3<sup>rd</sup> and 4<sup>th</sup> defendants filed their submissions on 15<sup>th</sup> March 2010 and submitted that the 3<sup>rd</sup> defendant occupies a peculiar position in this suit being the custodian of the documents that are being contested and added that its evidence was crucial in determining whose document was the valid title upon which this court should issue a judgment in rem. He submitted that both the plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants should be have an interest on the opinion of the 3<sup>rd</sup> defendant. He added that it beats logic as to why the 1<sup>st</sup> and 2<sup>nd</sup> defendant would want to deny themselves the opportunity to challenge the evidence which may be adduced by the 3<sup>rd</sup> defendant.

After giving due consideration to the two applications above, the issues that this court has been called upon to determine are:-

1. Whether this suit is res judicata.
2. Whether this suit is time barred.
3. Whether this suit should be struck out.

### **Whether this suit is Res- judicata**

Justice Kubo made a finding in his ruling dated 19th March 2009 that the issue of res judicata does not apply in this case. This ruling has not been set aside, appealed against or reviewed by the parties herein. Giving the defendants an audience in their application on the issue of res judicata would in essence be making this court sit on an appeal against its own decision. If the defendants were not satisfied with the decision rendered by Justice Kubo they had the right to appeal rather than making another application before a court of concurrent jurisdiction as that of Justice Kubo.

### **Whether this suit is time barred.**

The 2<sup>nd</sup> defendant submitted that this suit is time barred for the reason that the Plaintiffs' cause of action being founded on fraud is a tort and period within which a party should make his claim is within 3 years from the date the cause of action accrued. He relied on section 4(2) and section 26 of the Limitations of Actions Act, which stipulates that time does not begin to run until the Plaintiff discovered the fraud or mistake or could with reasonable diligence have discovered it. He added that the Plaintiffs were aware of the Defendants' interests and claim over the suit property for a period of over 12 years as time started to run in **September 1997**. The Plaintiff on his part submitted that this suit is not time barred in any way. He too relied on **section 4(2) of the Limitation of Actions Act and section 26 of the same Act** that state, "*The period of limitation does not begin to run until the plaintiff has discovered the fraud or misstate or could with reasonable diligence have discovered it*". He added that to him the cause of action arose on **25th September 2006** when the 3rd defendant furnished the police with the status of the 1st defendant's lease.

**Section 7 of the Limitation of Actions Act, CAP 22** provides as follows,

***"An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person"***.

This Act therefore provides that suits for the recovery of land must be instituted within 12 years from the date when the cause of action arose. However, there is reprieve granted under **Section 26 (c) of the Act** in cases of fraud. It provides that

***"Where, in the case of an action for which a period of limitation is prescribed, either the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it"***

The significant words are that "the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it". In such an event the limitation period starts running from the discovery of the fraud or the period when the plaintiff could have discovered the fraud by exercise of reasonable diligence.

The plaintiff in his replying affidavit sworn on 8th July 2009 at paragraph 12 stated on oath that it was after criminal investigations were commenced and the findings of the investigations made that showed that the 2nd defendant's Certificate of lease was not genuine. I have had the chance to read the **KT3** that shows that investigations were commenced on 25th September 2006. The plaintiff defended himself by stating that without the letter dated 25th September 2006, they would not have known the status of the 1st

defendant's title. This suit was filed in court on 13th October 2008 which was two years after the discovery of the status of the 1st defendant's title therefore the filing of the suit was within the time frame given for filling this suit based on the allegation of fraud.

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

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 struck out or amend 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.”**

From the foregoing legal provisions, there is no doubt that this court has the power at any stage of the proceedings to strike out a pleading including a plaint. However the courts have been asked to be slow in using their inherent and discretionary powers in striking out pleadings as it is a harsh and drastic move that can drive a litigant from the seat of justice. It is only granted in cases where it is clear that the pleadings objected to really disclose no arguable case and can only be granted where the case is plain, obvious, and weak and one that cannot be redeemed by amendment. Madan, J.A in **D.T. Dobie & Company (Kenya) Ltd Vs Muchina [1982] KLR** stressed as follows,

*“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.”*

He further added 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. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by way of cross-examination in the ordinary way (Seller LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right”***

After considerable thought on this suit, I consider that the same raises triable issues bearing in mind that both the Plaintiffs and the Defendants hold title documents to the suit property. The determination on which title document is valid and hence which party is the duly registered proprietor of the suit property is a triable issue which cannot be determined at this juncture by striking out the suit. This issue remains to be determined after a full hearing has been conducted and evidence tendered and tested in the normal way. I am therefore of the considered opinion that this suit should proceed for full hearing and I so hold.

Accordingly, I hereby dismiss the First Chamber Summons and the Second Chamber Summons. Costs shall be in the cause. The Plaintiffs are directed to hasten in the process of fixing the main suit for hearing bearing in mind the long delay taken in concluding interlocutory applications herein.

**DATED AND DELIVERED IN NAIROBI THIS 30<sup>th</sup>**

**DAY OF MAY 2014**

**MARY M. GITUMBI**

**JUDGE**