

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT BUNGOMA
HIGH COURT CIVIL APPLICATION NO. 93 OF 2010

WILMINA A. SHITSILI.....PLAINTIFF

VERSUS

1. BUNGOMA MUNICIPAL COUNCIL
2. M. BIG LIMITED.....DEFENDANTS

RULING

1. The 2nd defendant has moved the court under sec. 3, 3A of the Civil Procedure Act and Order 2 rule 15 (a), (b), (c) (d) of the Rules seeking orders to have his name struck out in the suit as the amended plaint discloses no cause of action. The motion is premised on the grounds on the face of it and contents of an affidavit sworn by Kenneth Munene Chuaga.

2. The application is opposed and the plaintiff/respondent has deposed in a 16 paragraph affidavit that there is a cause of action raised in her plaint against both defendants. In paragraph 4 and 5, she deposes her plot no. 573 neighbours 2nd defendant's plot no. 574 and the 2nd defendant has encroached on her plot.

3. I have perused the amended plaint filed in court on 21st February 2014. In which paragraph 12 and 13 is pleaded thus;

12 "That the defendants, their servants and authorized agents are interfering with the said plot and have subleased portion of it who has annexed and or encroached on it and is building and or constructing on it."

13. "That the plaintiff as a result of the defendants' actions has suffered great loss and damage for not using the said plot which she lawfully owns..."

4. It is clear from the plaint that the plaintiff has raised the issue of encroachment in her pleadings. It is not disputed that the 2nd defendants' plot no. 574 is neighbouring the plaintiffs plot no. 573. Although in paragraph 12 of the plaint it is not specifically pleaded to refer to the 2nd defendant, there is averment of encroachment by both defendants which forms a triable issue. The 2nd defendant/applicant is asking this court to strike out a suit which is a very drastic measure that will amount to cutting short the respondent's journey in her route to secure justice. Under order 2 r 15(1)(a) evidence is not admissible and each of the subrule are disjunctive therefore it was not proper for counsel to file affidavit evidence since the core of their application is rule 15(1)(a). In *Ramji Megji Gudka Ltd vs Alfred Morfat Omondi & 2 Others* (2005) eKLR the Court of Appeal held "in our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised sparingly in the clearest of cases. The issue of summary procedure and striking out pleadings was given very careful consideration by this court in *D.T Dobie & Co (K) ltd vs Muchina* (1982) KLR 1. It is in the interest of justice that parties are given an opportunity to present their case. It follows therefore that this court finds the 2nd defendants application without merit and proceed to dismiss it with costs to the plaintiff.

Dated, Signed and Delivered in Bungoma this 30th day of JUNE 2014

A. OMOLLO

JUDGE