



No.47/2014

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**ELC CASE NO.396 'A' OF 2012**

**LULUMET KEREYA ..... PLAINTIFF**

**VERSUS**

**EVANS MPOTO OMBUI ..... DEFENDANT**

**R U L I N G**

1. The Plaintiff lodged suit herein via a **Plaint dated 5.10.2012** on 12.10.2012 seeking the following prayers:-

- a. A permanent injunction RESTRAINING the Defendant by himself, his agents, or servants from interfering, encroaching, wasting, evicting and/or trespassing, over the Plaintiff's and the other adjacent parcels of land known as Land Reference Number Olchoro-Onyore/2096, 2097, 2098, 2099 and 2010 thereof.
- b. A declaration that the breach of these orders be deemed as unlawful and illegal.
- c. The compliance of these orders be effected by the Officer-in-charge (OCS) of Kiserian Police Station.
- d. Any other orders that the court may deem fit to grant.

2. Upon service with summons, the Defendant filed Defence dated 15.11.2012 on 16.11.12 prompting the Plaintiff to file a reply to Defence on 11.12.2012. The Defendant thereafter filed Application dated 3.1.2013 on 3.1.2013 seeking the following orders:-

- a. That the Plaintiff suit be struck out with costs as it does not disclose any reasonable cause of action or at all.
- b. That the Plaintiff to bear the costs of this Application.

And the same was based on the grounds on the Application namely:-

- i. The pleadings do not disclose any reasonable cause of action capable of being taken to trial.
- ii. The Plaintiff has failed to file any reply to the Defendant's pleadings and the issues raised in the Statement of Defence and its supporting pleadings are uncontroverted.
- iii. The pleadings have shown that the Plaintiff has no interest registrable or otherwise in the property known as **KAJIADO/OLCHORO-ONYORE/2100**.

- iv. It is also clear that the Plaintiff's claims are in the past and these are issues which have been dealt with by competent authorities or Tribunal and the Plaintiff's claim has been found wanting absolutely.
- v. It is clear now that the aim or purpose of filing this suit was not so much ventilation of any violation of any right but as an attempt to prevent the fixing of boundary and/or erection of beacons as decreed by a competent tribunal and for which no appeal has been preferred or at all and in any event it appears as jumping the gun by failing to pursue the remedies provided in a process in which the Plaintiff has fully participated.
- vi. It is only fair and just in the circumstances of this case the same be struck with costs and the legal process commenced by the Defendant be allowed to complete.
- vii. The issues raised by the Defendant/Applicant remain uncontroverted by the Plaintiff by reply or otherwise.

3. The Respondent filed grounds of opposition to oppose the application on the 4.2.2013. On the 8.10.2014 the parties agreed to canvass the application by way of written submission but the Plaintiff has not filed to date, of fixing the date for the ruling. The Applicant filed submissions on 29.3.2014.

4. The Applicant's case is that the Respondent's Plaint is for striking out in that it does not disclose any reasonable cause of action. The Applicant contends that the Plaint filed alleges that the Plaintiff is the owner of suit property namely Kajiado/Olchoro-Onyore/2100 (hereinafter referred to 2100). Yet the copy of title attached by the Applicant shows that the Defendant/Applicant is the owner. The Respondent has not put any document to show he owns the same. The Applicant in his bundle of documents including the Agreement of Sale and Mutation, he demonstrates how he acquired the same contrary to the averment which are not supported by any documents.

5. The Applicant submits that Section 26(1) of Land Registration is to the effect that the certificate of title is prima facie evidence of the ownership. The Applicant further contends that the principle prayer in the Plaint is an injunction against the Defendant/Applicant from trespassing inter alia on parcels No.2096, 2097, 2097, 2098, 2099 and 2010 which belong to the non-parties and the Defendant (2100). The Applicant cites the authority of **TRANSNATIONAL BANK VS. MOGAKA (1991) KLR 389** which held:

- ***The question whether or not a Plaint or defence discloses a reasonable cause of action must be determined upon perusal of the Plaint of Defence along together with anything attached so as to form part of it and upon the assumption that any express or implied allegations of fact are true***”.

6. He also relied on the case of **MARY NJERI NGONI VS. HOUSING FINANCE CO. LTD & OTHERS HCC NO.1864/2000** which held:

***“As to the third Applicant i.e as to the application dated 11.3.1999, I do agree with the Applicant that according to the Plaint as it is clear on the face of it, he was bonafide purchaser. There is no allegation of fraud against him as far as the Plaint before me is concerned neither is there any allegation of conspiracy between him and the other defendants. The property was bought at a public auction (as the Plaint states) and it already registered in his own name. I do not see any cause of action shown against him in Law and on fact. The Plaint stands struck out against him with costs to him...”***

7. Further he cites the authority of **DT DOBIE & CO. LTD. VS. MUCHINA (1982) KLR 1** where it was held:

- ***The word ‘reasonable cause of action’ in order VI rule 13(1) means an action with some chance of success, when the allegation in the Plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. The***

**words ‘cause of action’ means an act on the part of the Defendant which gives the Plaintiff cause of action”.**

8. He submits that it is difficult to fathom what Plaintiff/Respondent complaint is. He submits that, if it was a boundary dispute issue, same is within the mandate of Chief Registrar vide Section 19(1) of Land Registrar Act. He cites in his bundle of documents or ruling dated 14.9.2012 on report by Land Registrar and submits that the suit is an abuse of the court process. He prays for the dismissal of the suit. In the Respondent reply via the grounds of opposition, the same contends that, the application is incompetent in that it does not cite the law it relies on, fails to comply with order 51 rule 4 of Civil Procedure rules and it fails to comply with order 19 Civil Procedure Rules.

9. Further, the Respondent contends that the application is pre-mature. He contends that there is a misrepresentation of facts and same can be canvassed effectively during the trial namely;

- The pleadings disclose reasonable cause of action and in any case a defence has been filed.
- The Plaintiff claims to have indefeasible title over subject matter and that land matter is sensitive and emotive and thus should go to full trial.

10. The Respondent cites the case of **HCC 1275.01 JK MULINGE VS. LAKESTAR INSURANCE LTD.** where a similar application was struck out because of the defects in the affidavit. The court also lamented that the Applicant in that matter mixed all the grounds for striking out pleadings without being specific. The Respondent also cites the authority of **ROTAM AGROCHEMICALS CO. LTD VS. TWIGA CHEMICALS INDUSTRIES LTD. Millimani HCC 553/012** which relied on **DT DOBIE Supra** to hold that power to strike out a pleading is a draconian power, it has to be sparingly and only in a clear and deserving case.

11. The third cited authority of **SHAH VS. MBOGO 1967 EA 116** was not attached on the list supplied to court and thus court did not have benefit to pursue the same.

### **ANALYSIS**

The Plaintiff pleads in Plaintiff that one KURENTA (para.5) sub-divided his parcel No.1649 into 1811, 1812, 1813, 1814 and 1815 whereof he sold 1815 to the Defendant and the rest were disposed to other persons not parties in the suit. He further avers that (para.6) he sub-divided his parcel No.1648 into 2096, 2097, 2098, 2099 and 2100 and disposed all save 2100 which he retained to himself.

12. The Defendant alleges that the Defendant is interfering with 2100, 2099, 2098, 2097 and 2096 and thus should be stopped by the court. He alleges that there was LDT dispute and also before land registrar but all were never successful as Defendant is very adamant. He alleges the trespass on his land was occasioning irreparable damage. The Plaintiff has not put even a single document to show he owns 2100 which he claims to own. When the Defence was filed together with bundle of the documents, the same disclosed the title to 2100 is in Defendant’s name and even discloses the person who sold the land namely Martin Waweru Njoroge to him.

13. The Plaintiff does not claim same parcel but instead he pretends to protect the same together with other non-parties named parcels and lands 2096, 2097, 2098 and 2099 without enjoining them as parties. The Respondent has not sought to amend the pleadings nor intimate that he intends to do so in any future. The way the Plaintiff is, it is apparent that there is no cause of action against the Defendant as the Applicant does not own any of the suit properties.

Section 26 (1) LRA of 2012 states that; **“the certificate of title is prima facie evidence of ownership”.**

The Plaintiff has not pleaded fraud or even impugn the Applicant title to 2100.

**Order 2 rule 15(a) Civil Procedure Rules 2010 “empowers court to strike out pleadings or order an amendment on grounds that, it does not disclose reasonable cause of action...”**

**Sub-rule 2 of the same** order directs that ***“no evidence shall be admissible on application under above cited provisions but only concise grounds shall be stated”***.

The Applicant has religiously complied with the above provisions. The Respondent does not demonstrate where the cause of action will be pegged in absence of claim to impugn the Applicant title to suit Plot No.2100. As it stands now the Plaintiff has no reasonable cause of action to be saved from the draconian order of striking out.

14. In **TRANSNATIONAL CASE *Supra***, the court was very emphatic that the question of ***“whether or not a Plaintiff ... Discloses a reasonable cause of action must be determined upon perusal of the Plaintiff.... together with anything attached so as to form part of it and upon the assumption that any express or implied allegations of fact are true.”***

15. The case applies in all forms in our instant suit. A perusal of the Plaintiff and all the documents forming part of Plaintiff vide Order 11 discloses that nowhere does he demonstrate his ownership as alleged of the suit land. In **DT DOBIE *Supra***, the word reasonable cause of action as defined as: ***“Action with some chance of success...”***

16. The injunction sought is to protect the parcels of land in which the Defendant has no right. The Plaintiff has no locus to seek injunction to protect non-parties and Defendant’s parcels of land. The court thus makes the following orders:

1. The Application dated 3.1.2013 is granted in terms of prayers **(a)** and **(b)**.
2. The Applicant will also get costs of the suit.

**Signed and Delivered at Machakos this 11<sup>th</sup> day of December, 2014.**

**CHARLES KARIUKI**

**JUDGE**