



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 38 of 2011

HAMIDA ALI..... PLAINTIFF

VERSUS

- 1. PATRICK KIGONDU**
- 2. LIVINGSTONE OOKO**
- 3. JOHN KYALO**
- 4. STEPHEN MBITHI**
- 5. PETER KARANI**
- 6. BENARD MWANGI**

7. CHARLES WAWERU.....DEFENDANTS

RULING

1. The Plaintiff has applied by **notice of motion dated 9th August 2011** (expressed to be brought under **Order 2, rule 15(1) (b), (c) and (d)** of the **Civil Procedure Rules** (the **Rules**)) for orders that the statement of defence filed by the Defendants be struck out and that judgment be entered against them as prayed in the plaint.

2. The grounds for the application appearing on the face thereof are –

- i. That the Plaintiff is the owner of the suit premises.
- ii. That the Defendants have admitted to have been duly served with notice to vacate.
- iii. That the Defendants have no reasonable defence to the Plaintiff's claim.

The application is supported by the Plaintiff's affidavit sworn on 9th August 2011.

3. The Plaintiff's case is that she is the registered proprietor as lessee of those properties known as **L R Nos 209/4401/408 and 209/4401/409** and that the Defendants have admitted being in the property aforesaid. She states that the Defendants have further admitted to being duly served with the notice to vacate, and that they have refused to vacate without any reasonable cause or excuse. She thus believes that the defences are frivolous, do not disclose a reasonable cause of defence, are meant to delay a fair trial of the action and should be struck out.

4. The application is opposed by the Defendants through **grounds of opposition filed on 2nd September 2011**. The Defendant's contention is that the defences raise triable issues of ownership and tenancy as well as statutory conditions imposed on the suit property. Further, the Defendants contend

that the notices to quit have not only been challenged but their legitimacy and service have been put to question. The Defendants further contend that the Court lacks jurisdiction under the Rules to grant the reliefs sought.

5. I have carefully evaluated the application on the basis of the material placed before the court and the rival submissions by counsel for the parties.

6. Order 2, rule 15 of the Rules under which this application has been brought allows this court to order to be struck out any pleading on grounds that it discloses no reasonable cause of action or defence; or that it is scandalous, frivolous and vexatious; or that it may prejudice, embarrass or delay the fair trial of the action; or that it is otherwise an abuse of the court process.

7. The parameters that the court should consider were laid out in the case of **DT Dobie & Company (Kenya Limited) vs. Muchina [1982] K.L.R 1** in the following terms:

“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 some semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward”.

8. In the matter before the court, the Plaintiff claims that the defences filed by the Defendants disclose no reasonable defence. The Defendants on their part claim that an order for striking out of pleadings is draconian in nature and offends the principles of substantive justice, and that they should be allowed to defend the suit as there are triable issues arising.

9. The role of the court within the purview of the application before me is not to test whether the defences filed by the Defendants would eventually successfully traverse the Plaintiff's suit. Rather, this court needs only evaluate if the defences raise plausible or triable issues as would require the suit to be submitted to full trial, or whether the defences are so hopeless that there would be no question to determine if the matter were to go to full hearing.

10. I have read the plaint and the defences filed. I find a number of issues arising that in my view are triable. These include -

- **Whether the Defendants are trespassers in the properties LR. No. 209/4401/408 and LR. No. 209/4401/409.**
- **Whether their tenancies were lawfully terminated.**
- **Whether allocation of the suit properties to the Plaintiff was fraudulent.**

11. in the event, the Plaintiff's notice of motion dated 9th August 2011 fails and is hereby dismissed with costs. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF FEBRUARY 2013

H.P.G. WAWERU

JUDGE

DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY 2013