



REPUBLIC OF KENYA



KENYA LAW
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**Mutua v Mwala & 2 others (Environment & Land Case
48 of 2020) [2022] KEELC 3390 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3390 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 48 OF 2020**

CA OCHIENG, J

MAY 31, 2022

BETWEEN

BEATRICE MUTAVE MUTUA PLAINTIFF

AND

BONIFACE NDAMBUKI MWALA 1ST DEFENDANT

KIMITI FARMERS CO-OPERATIVE SOCIETY 2ND DEFENDANT

PHILIP KISUA KIMAU 3RD DEFENDANT

RULING

1. What is before court for determination is the 3rd defendant's chamber summons application dated the August 31, 2020 brought pursuant to order 2 rule 15(1) (a) (b) & (d) of the *Civil Procedure Rules* as well as sections 1, 1A, 3 & 3A of the *Civil Procedure Act*. The 3rd defendant seeks the following orders;
 - a) That the plaintiff's suit against the 3rd defendant be struck out.
 - b) That the costs of the application herein and the entire suit be borne by the plaintiff.
2. The application is premised on grounds on the face of it and supported by the affidavit of one Philip Kisua Kimau dated the August 31, 2020. The 3rd defendant also filed a further affidavit dated the December 22, 2021 to buttress his case. In response thereto, the plaintiff who is the respondent to the application, filed a replying affidavit dated the October 2, 2020. The application was canvassed by way of written submissions as per the court's directions.
3. The background against which this Application is brought is a suit filed by the plaintiff on June 29, 2020. She brought the suit in her capacity as the legal administrator of the estate of her deceased husband, the late John Musyimi Thyaka. She claimed that the 1st and 2nd defendants had trespassed on the suit property. As against the 3rd defendant, she claimed that the officer had abused his office and colluded with the 1st and 2nd defendants to deny her the rights to the suit property.



The Applicant's Case

4. In his supporting affidavit, he averred to have been wrongly enjoined to the suit. He deposed to have been a mere mediator/arbitrator who was trying to assist the parties resolve their dispute. He stated that he did not have any interest in the suit property and that his role was only limited to bringing the disputing parties to the negotiating table to pursue an amicable settlement. He reiterated that the resolutions were reached by the parties themselves and annexed a copy of the said decision. He contended that he did not author the document which the plaintiff alleges to have been forced to sign. In his Further affidavit, the 3rd defendant reiterated that in his entire career, he had never colluded with anyone as alleged. He stated that it is the plaintiff who had visited his offices on or about the May 26, 2020 and reported an invasion by strangers on her land, who had then proceeded to erect beacons thereon. He confirmed to have called all the disputing parties including the area Assistant Chief to a meeting on June 11, 2020 in a bid to have them reach an amicable solution. He deposed that the parties independently and voluntarily reached a decision on their own free will. He denied that his role amounted to a kangaroo court and that the parties had applied the same approach while meeting the surveyor on site, a clear indication that the plaintiff had vindictively dragged his name into the matter without a justifiable cause.

The Respondent's Case

5. The plaintiff who is the respondent herein vide her replying affidavit deposed that the allegations in the instant application can only be proved after the parties have tendered *viva voce* evidence so that the court can make its decision on the merit of each case. She averred that there was overwhelming evidence to the effect that the 3rd defendant was working in collusion with the 1st and 2nd defendants to deny and therefore grab as well as sell her land. She contended that the 3rd defendant did not have jurisdiction to handle land matters and that his interest in the matter was clear for all to see. She stated that in the suit, she had sought for a permanent injunction against the 3rd defendant and other defendants jointly and severally from interfering with the suit land. She insisted that the 3rd defendant was the convenor of the meeting that is impugned and that his office participated in the deliberations which are sought to be challenged, which amounted to oppression. She deposed that the 3rd defendant held a kangaroo court in his office which rubber-stamped a decision which if implemented will occasion her irreparable loss and damage together with her family. Further, that the 3rd defendant was the author of the document that is being challenged as she was forced to sign it together with her children. She reaffirmed that if the 3rd defendant is struck off the proceedings herein, it will set a bad precedent and he will subject many other unsuspecting innocent public members to this kangaroo court in his office where he acts clandestinely as the judge which is a blatant abuse of office. She claimed she shall produce cell phone communication between the 3rd defendant, her daughter and herself to prove this culpability.

The application was canvassed by way of written submissions.

Analysis and Determination

6. Upon consideration of the chamber summons application dated the August 31, 2020 including the respective affidavits and rivaling submissions, the following are the issues for determination: Whether the plaintiff's suit as against the 3rd defendant should be struck out. Who should bear the costs of the 3rd defendant.
7. The 3rd defendant in his submissions reiterated the contents of his affidavits and insisted the suit against him should be struck out as it did not disclose any reasonable cause of action. He contended that it is the plaintiff who reported the dispute to his office for assistance. Further, that he does not qualify to be joined as a party to these proceedings as envisaged in order 1 rule 3 of the [Civil Procedure Rules](#).



To support his arguments, he relied on the following decision: *Alumark Investments Limited v Tom Otieno Onyang'o & 4 others* [2018] eKLR.

8. The plaintiff in her submissions contended that the matters being raised are a matters of fact that can only be determined upon hearing the main suit. She insisted that the 3rd defendant is the author of the document dated the June 10, 2020, which gave the suit land to the 1st defendant, and is the basis of this case. Further, that the controversy before the court is yet to be resolved and the 3rd defendant will have an opportunity to defend himself. She concluded by stating that the suit was provoked by the actions of the 3rd defendant and that the application is premature, unmerited and ought to be dismissed with costs. To buttress her averments, she relied on the following decision: *DT Dobbie Kenya Co Ltd v Joseph Mbona Muchina & Leah Wanjiku Mbugua* [1982] KLR 1.
9. On striking out of pleadings, the legal provisions governing the same are contained in order 2 rule 15(1) of the *Civil Procedure Rules, 2010* which provides *inter alia*:-

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

- (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 an abuse of the process of the court.”

10. In the case of *Civicon Limited v Kivumatt Limited & 2 others* [2015] eKLR, the Court of Appeal observed as follows:

“Under order 1 of the *Civil Procedure Rules*, the trial court has wide discretionary powers to make necessary amendments as to the parties to a suit by adding, substituting or striking them out and to make all such changes in respect of parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute between them. The court has a separate, independent duty from the parties themselves to ensure that all necessary and proper parties, and no others, are before it so that it may effectually and completely determine and adjudicate upon all matters in dispute. For this reason, at any stage of the proceedings, the court may on such terms as it thinks just and either on its own motion or on application, order for the joinder of a party where the party is a person who ought to have been joined as a party or; whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. the party is any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed which in the court’s opinion it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.”

11. While the Court of Appeal in *Ramji Megji Gudka Ltd v Alfred Morfat Omundi Michira & 2 others* [2005] eKLR provided parameters on striking out of pleadings and stated thus:

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings



was given very careful consideration by this court in *DT Dobie & Company (Kenya) Ltd v Muchina* [1982] KLR 1 in which Madan, JA at p 9 said:-

“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 itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers 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.”

12. In this instance, I note the fulcrum of the dispute herein revolves around proprietary interest in land. The plaintiff who is suing in a representative capacity claims the 1st and 2nd defendants have trespassed on their land. she further claims the 3rd defendant abused his office and colluded with the other defendants to interfere with the suit land. The 3rd defendant contends that it is not a necessary party to this suit as he only convened a meeting to resolve the dispute between the plaintiff and the 1st and 2nd defendants. Further, that it is the plaintiff who reported the dispute to his office around May 26, 2020 and insists it is not a necessary party to the dispute herein as he has no interest over the suit land. He reiterates that the plaintiff has not established a reasonable cause of action against him.
13. On perusal of all the pleadings including the respective documents, I note the plaintiff has mainly sought for a declaration that she is the owner of the suit land known as 127B and 129 B in its entirety as well as a portion of adjacent plot No 33B within the 2nd defendant’s land reference number 2709/7447. She has further sought for a permanent injunction restraining the defendants from interfering with the suit land. Insofar as she claims the 3rd defendant colluded with the 1st and 2nd defendants to take away the suit land from her, she has not provided evidence to that effect. She claims she has evidence from her cell phone to prove her allegations but this is not before the court. It is my considered view that since the plaintiff is the one who reported the dispute to the 3rd defendant that is a government official, after which an informal mediation was convened to resolve the dispute herein, she cannot claim it was a kangaroo court. Further, if she indeed had a dispute with the 3rd defendant over the manner he handled the dispute, she has other avenues to lodge complaints against him and not in this forum. Based on the legal provisions I have cited above while relying on the two Court of Appeal decisions, and applying them to the circumstances at hand, I find that the plaintiff has failed to disclose a reasonable cause of action as against the 3rd defendant. I do not find the 3rd defendant as a necessary and proper party to the dispute herein to enable the court effectually and completely determine as well as adjudicate upon all matters in dispute. I however opine that he can be called as a witness in court to confirm what transpired at the meeting in his office culminating in the plaintiff including her children signing the impugned document.
14. In the circumstance, I find the instant chambers summons application merited and will allow it. I proceed to strike out the 3rd defendant from this suit and grant him costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 31ST DAY OF MAY, 2022

CHRISTINE OCHIENG



JUDGE

