



**Kikuvi v Musilu (Environment & Land Case E006 of 2021)
[2022] KEELC 3069 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3069 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E006 OF 2021**

**A NYUKURI, J
MAY 25, 2022**

BETWEEN

JUSTUS KIOKO KIKUVI APPLICANT

AND

FAITH VATA MUSILU RESPONDENT

RULING

1. Vide an application dated August 2, 2021, the plaintiff/applicant sought for the following orders;
 - a. Spent.
 - b. That the defendant's defence filed herein on April 30, 2021 be struck out and judgment be entered for the plaintiff against the defendant accordingly.
 - c. That the defendant be condemned to pay costs occasioned herein.
2. The application is premised on the plaintiff's supporting affidavit sworn on August 2, 2021. The applicant's case is that it is not disputed by the defendant that the plaintiff and defendant are joint owners of parcel LR No 12715/3772 (I.R No 156593), each party being entitled to an equal share thereof, but that in a bid to delay the matter, the defendant stated further that the suit property is registered in trust for their child who is a minor, which is not the true position. The plaintiff therefore argues that the defence is a sham and an abuse of the court process.
3. The application is opposed. The defendant/respondent filed grounds of opposition and replying affidavit both dated August 25, 2021 in opposition to the application. It is the respondent's case that although the suit property was jointly acquired, the parties have a child aged six years and that his rights to shelter will be violated if the suit property is sold. That the defence raises triable issues which should go on trial.



4. The application was canvassed by way of written submissions and on record are the applicant's submissions filed on October 15, 2021 and the Respondent's submissions filed on November 26, 2021.

Submissions

5. Counsel for the applicant submitted that section 91(6) of the [Land Registration Act](#) provided that where land is owned in common, consent to deal in the land shall not be unreasonably withheld. Counsel argued that while it is clear that each party owns 50% of the suit property, the respondent has withheld permission to have the applicant realize proceeds of his 50% share. The applicant's position was that although they were in a love relationship which led to the birth of their son, there is no evidence to show that the parties intended to have the suit property registered in trust for their minor son. Counsel contended that as proprietor, the plaintiff had a right under section 25 of the [Land Registration Act](#) to use the land. Counsel referred the court to section 96(1) of the [Land Registration Act](#) to contend that the Plaintiff was entitled to have the property sold and the proceeds shared equally.
6. On whether the defence raised triable issues, counsel argued that the same was frivolous and a sham as it did not challenge the Plaintiff's claim on the suit property. Counsel argued that the claim of the child was not a matter that this court had jurisdiction to determine under article 162(2)(b) and section 13 of the [Environment and Land Court Act](#). Reliance was placed on the cases of *NSG v SCG* [2019] eKLR, *NLS v BRP* [2016] eKLR, *Owners of the Motor Vessel Lillian S v Caltex Kenya* [1989] eKLR 1 and *JAM v BOS* [2019] eKLR, all of which the court has considered.
7. Counsel for the respondent submitted that parties ought to be allowed to ventilate their cases and courts ought to be cautious in using their discretion to strike out a suit as they will be driving away parties from the seat of justice without being accorded an opportunity to be heard. Counsel referred to the cases of *David Ondimu Kombo v Belcom Agencies Limited* [2021] eKLR, *Madison Insurance Company Limited v Augustine Kamanda Gitau* [2020] eKLR, *Mercy Nduta Mwangi t/a Mwangi Kengara & Co Advocates v Invesco Assurance Company Limited* [2020] eKLR and *Saudi Arabian Airlines Corporation v Sean Express Services Ltd* [2014] eKLR, for the proposition that the discretion to strike out a pleading must be sparingly exercised.
8. Counsel argued that dissolution of joint ownership of the suit property will violate the right to shelter of the parties' child aged six years old, in contravention of article 53 of the [Constitution](#) of Kenya. It was counsel's view that the Plaintiff owed the child parental responsibility and that the orders sought were not in the child's best interests. Counsel relied on the cases of *MA v ROO* [2013] eKLR and *SAJ v AOG & another* [2019] eKLR for the proposition that a child's best interest shall be of paramount importance in every matter concerning the child and that shelter is every child's basic right.

Analysis and determination

9. I have carefully considered the application, the response and submissions filed by the parties. The issue for determination is whether the applicant has met the threshold for striking out of the defence.
10. Order 2 rule 15 of the [Civil Procedure Rules](#) provides that where a pleading is frivolous, scandalous, vexatious or does not disclose a cause of action or defence or may delay the fair trial of the action, the court has discretion to strike it out. It will however be borne in mind that the right to be heard before an adverse decision is made against a party is sacrosanct. The power to strike out a pleading ought to be exercised with caution and sparingly as the court exists to hear parties on merit unless, it is so clear and obvious that the pleading does not have any merit, neither does it raise any triable issue.



11. In the case of *DT Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1982] eKLR, the court held as follows;

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 the 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”

12. The applicant herein has contended that they jointly purchased the suit property and that there was no intention of a trust in favour of the parties’ child now aged six years. In this matter, the applicant has tried to address the issues raised in the defence by arguing that the rights of joint owners are protected and that the rights of children of such joint owners cannot be a bar to the exercise of the joint owner’s proprietary’s rights.
13. I am of the considered view that the issues raised by the defendant cannot be determined at the interlocutory stage by way of striking out the defence. The defence has raised a triable issue as to whether the rights of a child of joint owners can have enforceable interest in property owned by their parents. That is a matter that can only be determined at trial and not at this stage.
14. In the premises, the application dated August 2, 2021 is unmeritorious and the same is dismissed, with no order as to costs.
15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 25TH DAY OF MAY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Mr. Matemu for the Defendant/Respondent

Ms. Lucheveleli holding brief for Mr. Omondi for the Plaintiff/Applicant

Ms Josephine Misigo – Court Assistant

