



Dawat – E - Hadiya (Kenya) Registered Trustees v Kaingu & 5 others (All Sued in a Representative Capacity also, on Behalf of other 104 Persons in Occupation of the Petitioners Parcel of Land.) (Constitutional Petition 7 of 2021) [2022] KEELC 3062 (KLR) (18 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3062 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CONSTITUTIONAL PETITION 7 OF 2021
LL NAIKUNI, J
MAY 18, 2022
IN THE MATTER OF: ARTICLE 40 OF THE CONSTITUTION OF
KENYA
AND
IN THE MATTER OF: THE LAND ACT AND LAND ACT AND
LAND REGISTRATION ACTS
AND
IN THE MATTER OF: PETITION

BETWEEN

DAWAT – E - HADIYA (KENYA) REGISTERED TRUSTEES PETITIONER

AND

DANIEL KAINGU 1ST RESPONDENT

NASSARO KAINGU 2ND RESPONDENT

HASSAN KAINGU 3RD RESPONDENT

HASSAN MWINGA THOYA 4TH RESPONDENT

KAHINDI BAYA YAA 5TH RESPONDENT

JONATHAN SAFARI KITHI 6TH RESPONDENT

**ALL SUED IN A REPRESENTATIVE CAPACITY ALSO, ON BEHALF OF
OTHER 104 PERSONS IN OCCUPATION OF THE PETITIONERS PARCEL OF
LAND.**



RULING

Introduction

1. The Notice of Motion application dated November 1, 2021 by the respondents/applicants is what is before this Honorable Court for its determination. It is brought under sections 1A, 1B, 3A & 63 (e) of the [Civil Procedure Act](#), cap. 21, order 2 rule 15 (1) and 51 rule 1 of the [Civil Procedure Rules](#), 2010.

II. The Respondent/Applicant's Application.

2. The application by the Respondents/Applicants seek for the following orders:-
 - a. That this Honourable court be pleased to strike out with costs the petitioner's/respondent's suit commenced by way of a petition dated and filed on February 12, 2020 and February 12, 2021 respectively for being scandalous and/or frivolous and/or vexatious and/or prejudicial and/or embarrassing and/or being an otherwise abuse of the court process.
 - b. That the costs of this application and the entire suit be bore by the Petitioner/Respondent in any event.
3. The application is founded on the grounds, facts, testimony and the averments of the eight (8) Paragraphed Supporting Affidavit of one Hassan Mwinga Thoya sworn and date 1st November, 2021. He deponed that he was the 4th Respondent/Applicant and with the authority of all the other Respondents/Applicants herein to act on their behalf in this matter. He stated that the Petitioners filed this suit against the Respondents/Applicants by way of a Petition seeking orders of eviction in respect suit land being Plot No. MN/1/1392, CR No. 1884 situated at Bombolulu within the County of Mombasa. They claimed that they had occupied that parcel of land for a period of over twelve (12) years and hence acquired title by way of land adverse possession as had been admitted by the Petitioners.
4. He averred that the Petition was basically seeking for enforcement of private ownership rights against them and as such they were completely unable to defend the suit as they could not file a Counter Claim in the matter. As such they were not entitled to the suit premises by way of adversary rights and interest and since a Petition could not be converted into a Complaint. They questioned the method upon which the Petitioner used to institute this suit as being prejudicial to their case and defence.
5. Thus they averred that the suit being a Petition which could not be converted into a Complaint, should then be struck out in its entirety as it was scandalous, frivolous, vexatious, embarrassing, prejudicial and an abuse of the law and court. He argued that the Petition was offensive and had no purpose and ought to be struck out as, failure to which the applicants stand to suffer irreparable loss and damage. He argued that no prejudice would be suffered by any of the Petitioners if the orders sought were granted though to them they would suffer irreparable loss and damages if the orders were denied.

III. The Petitioner's Replying Affidavit

6. On 12th November, 2021, the Petitioners/Respondents filed a 21 Paragraphed Replying Affidavit in response to the said application. It is affirmed by Quresh Zakir Lukmanji, one of the Petitioner's trustees. It is dated 11th November, 2021. He maintained that the Petitioner remained the beneficial, legal and absolute registered owner of all that parcel of land known as Land reference Numbers MN/1/1392, CR No. 1884 situated at Bombolulu, within the County of Mombasa. He produced and annexed a Provisional certificate of title dated 13th February 2020. He argued that the Petition was



properly before this court which had jurisdiction to hear and determine this case under the dint of articles 22, 23 and 40 of *the Constitution* of Kenya as well as the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 to institute this suit against the Respondents. He held that they sought for the enforcement of the Petitioner's constitutional rights to property which had been unlawfully and illegally denied, threatened and violated by the applicants. He contended that the Petition had fulfilled the principles set down in Anarita Karimi's constitutional case.

7. He stated that by them having illegally, unlawfully and wrongfully inhabiting and occupying a portion of the Petitioner's land was indeed a violation and infringement of the Constitutional rights and interests of the Petitioner and as such the Petitioner had the right to institute a Constitutional Petition seeking for the enforcement of their constitutional right. He argued that although it was true that a Counterclaim was not applicable in cases of Petition as in the cases under the *Civil Procedure Rules*, 2010 but under the Mutunga Rules they had an alternative to a filing of a Counter Claim if they so wished. Since they had an alternative to filing a Counter Claim, their rights ought not be curtailed and they would not suffer any prejudice at all as they alleged. Instead of crying wolf, they ought to have filed responses to the substantive issues raised in the Petition. He urged court to find the application to be defective, bad in law and an abuse of the court process.

IV. Submissions

8. On November 15, 2021 when all the parties were in court, they were directed to file their written submissions. Subsequently all of them having fully complied, a ruling date was reserved for March 30, 2022.

V. A. The Respondent's/Applicant's written submissions

9. On December 15, 2021, the Learned Counsel for the Respondents/Applicants, the Law Firm of Messrs. Kenga and Company filed their written submissions dated December 15, 2021. Mr. Kenga Advocate, the Respondents/Applicants filed the Notice of Motion application dated November 1, 2021 seeking to have the entire Petition struck out with costs on ground the Petition was scandalous, frivolous, vexatious, prejudicial, embarrassing and/or otherwise an abuse of the Court process. He counsel indicated that the Respondent/Applicant attached an authority allowing the 4th Respondent to act on behalf of all the other Respondents.
10. He argued that the main ground of attack against the Petition was the procedure preferred in commencing the suit which was by way of a Petition and not a Plaint yet the relief sought was one that was based on private land ownership rights and/or disputes and not a declaration for the enforcement of rights and fundamental freedoms against the state and hence the best method would have been filing of a normal civil suit.
11. In the given circumstances the Respondents/Applicants are unable to file a Defence not file a counter claim. They held that the Provisions of Article 40(1) was one against parliament and not an individual – whereby it forbids Parliaments from enacting laws which permit arbitrary deprivations of anyone's property.
 - a. He further argued that the Petition sought to enforce realization of private land ownership rights under the existing land statutes which said statutes recognizes the law on land adverse possession. Clearly meaning the dispute before court is one that was of civil in nature and not for the enforcement of any of the right and fundamental freedoms provided for under the Bill of Rights.



For this reason, he held that the Respondents were unable to file a Defence and/or Counterclaim in the matter due to the manner in which they have been sued.

To buttress his point he relied on the decision of “Kenya Agricultural and Livestock Research Organization (KALRO) Petition No. 29 of 2019” Which was a finding in a similar Petition as in the instant case.

Therefore he urged court to allow its application and grant the prayers as sought accordingly.

B. The Petitioner’s/Respondent’s Written Submissions

12. On December 15, 2021, the Learned Counsels for the Petitioners/Respondents the law firm of Messrs. Khalid Salim and Company Advocates filed their written submissions Mr. Khalid Advocate submitted that the Petition filed by the Petitioners/Respondents completely meet the fundamental threshold set out in *the Constitution* of Kenya (Protection of Rights and Fundamental Freedom) Practice and Procedure Rules 2013. The *Mutunga Rules*. He argued that a Constitution Petition was a litigation to either challenge breach of Constitution provisions violation and/or infringement of rights and fundamental freedoms granted or recognized by *the constitution*. These must expressly and/or implied recognized and protected rights and fundamental freedom under the Bill of Rights.
13. He argued that the claim raised in both the Petition and the Supporting Affidavit were purely on the violation and/or infringement of the Constitutional rights and interest of the Petitioner and as such had the right to institute a constitutional rights and interest of the Petitioner and as such had the right to institute a constitutional Petition seeking for the enforcement of its rights.
14. He reiterated that the Petitioner was the legal and absolute registered owner of the property known as Land Reference No. MN/I/1329/bearing CR. Title No. 1884 comprising 42.1. acres and situated at Bombolulu within the County of Mombasa. The suit property was registered as he freehold proprietor of the said parcel pursuant to a transfer registered in its name on 10th February, 2010.
15. The Learned Counsel’s contention was that the Respondents/ Applicants had hitherto been mushrooming at an alarming rate with the passage of time and now occupied the suit land. By this action, they were violating, infringing and threatening the fundamental Rights for the Petitioner under the Provisions of article 40 of *the Constitution* of Kenya which caused him to institute this Constitution Petition before the Honorable Court and seeking the prayers as stated thereof, under article 22 and 23 of *the Constitution* of Kenya the counsel held that the Notice of Motion was just a tactic for delaying the hearing of the matter as it fails to raise any triable, arguable, justifiable issues. They had admitted being in occupation onto the suit land yet they had no title deed to it. Although the Defence and Counter Claim is not available to the Respondent under *the Constitution* Petition as it is under the *Civil Procedure Rules* 2010 but under rules 15(3) of the Mutunga Rules spells out thus:-

“The Respondent may file a Cross-Petition which shall disclose the matter set out in rule 10 (2)”

Therefore the Notice of Motion application by the Respondent/Applicant should not be allowed at all. They have misapprehended the provisions of Order 2 Rule 15 of the *Civil Procedure Rules* 2010 as it is not applicable under *the Constitution* Petition.

16. To buttress their argument they relied on the decision of *Reuben Musyoki Muli –Versus- Peter Mutua Kanyi* (2017) eKLR and *DT Dobie & Company (K) Limited –Versus- Joseph Mbatia Muchina and Another* Civil Appeal No. 37 of 1988.

In the long analysis, he urged for the entire application to be dismissed with costs.



IV. Analysis and determination

17. I have considered the pleadings filed in relation to the Notice of Motion application dated November 1, 2021 by the Respondents herein, the Replying Affidavit as well as the written submissions made by both Learned Counsels, the relevant provisions of the law and Constitution of Kenya.

In order to arrive at an informed decision, this court is only concerned on two issues for determination. These are:-

- a) Whether the court should strike out the Petition for being scandalous, frivolous and an abuse of the court process.
- b) Who will meet the costs of the application.

ISSUE a). Whether the court should strike out the Petition for being scandalous, frivolous and an abuse of the court process.

18. The Respondents/Applicants claim that the petitioner seeks to enforce private land ownership rights to Plot No. MN/1/1392 through a Petition as opposed to a normal Plaint. They urged court to find that the Petition is prejudicial to their interest and ought to be struck out with costs for being an abuse of the court process. The Court of Appeal in “[Kivanga Estates Limited – Versus - National Bank of Kenya Limited](#) (2017) eKLR held that:-

“It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, and discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of brining a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a nonstarter. The exercise of the power to strike out pleadings must balance these two rival considerations.”

19. As a result of its far reaching consequences of striking out pleadings, order 2 rule 15 of the [Civil Procedure Rules](#), 2010 sets out mandatory requirements that guide court in exercising the discretionary powers. The Order provides that,

- (1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
 - (a) it discloses no reasonable cause of action or defence in law; or
 - (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 otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
- (2) No evidence shall be admissible on an application under sub - rule (1)(a) but the application shall state concisely the grounds on which it is made.
- (3) So far as applicable this rule shall apply to an originating summons and a Petition.



20. Sub - rule 2, dictates that the application to strike out pleadings must not be accompanied by evidence in cases where the applicant is relying on Sub - rule 1 (a), in this case a supporting affidavit. Since striking out a pleadings is such a draconian act, it's only resulted to in plain cases which can be adduced from the pleadings only. However, the Sub - rule 1 (b) (c) and (d) require evidence in form of a supporting affidavit. In this application, the applicant has made the fatal mistake of combining all the grounds provided in Sub - rule 1, into one omnibus application, which could not be the case.
21. The case of “Court of Appeal in *Olympic Escort International Co. Limited & 2 others – Versus - Perminder Singh Sandru & another* (2009)eKLR, considered an application made under the former order vi rule 13 (i)(a) held that:-

“We think for our part that it was inappropriate to combine the two prayers, one which requires evidence before a decision is made and one that does not... I will here add that, since our legislature in its wisdom decided that the grounds in rule 15(1) of Order 2 are in the alternative and that three (3) out of four (4) of them, that is Rule 15 (1) (b) (c) and (d) may be based on evidence whilst the one under Rule 15 (1) (a) should not, I do hold that whilst a party can bring an application combining the grounds in Rule 15 (1) (b) (c) and (d) – such an application cannot and should not be brought with a ground under Rule 15 (1) (a). This is so because, if those grounds are combined, there would definitely be prejudice in that the court would have to look at the evidence produced in support of the grounds under sub rule (1) (b) (c) and (d) yet sub rule (2) has specifically barred the Court from considering any evidence once an application under Rule 15(1) (a) is up for consideration. Applying the rule of interpretation that a latter provision amends or varies an earlier provision, I hold that the intention of the legislature in enacting Rule 15(2) was that if an application is brought to strike out a pleading for disclosing no reasonable cause of action or defence, no evidence at all shall be adduced in support of such an application. That is so even if any of the grounds thereon are under Order 15 Rule (1) (b) (c) and (d). In my view, prejudice must be guarded against and it will be very difficult for the court to consider the other grounds based on the evidence produced then disabuse itself of that evidence when considering the ground of disclosing no reasonable cause of action under Rule 15 (1) (a).”

22. In the case of “*Millennium Chuma Limited – Versus - Platinum Steel Limited* (2017)eKLR, it was held:-

“As the provisions of Order 2 Rule 15 (2) are capped in mandatory form, an application that cites all grounds thereunder, some that require evidence and others which do not require evidence, it fatally defective and susceptible to striking out. Although provisions of Article 159 of *the Constitution* of Kenya, 2010 requires that, the court decide matters without undue regard to technicalities, the issue herein, is not a technical issue. It is a serious issue of procedural requirement of the law.”

As provided for under the provisions of rules 10 (2) and 15 (3) *the Constitution* of *Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013, and the Respondents may file a Cross Petition and raise the same issues they may wish as though it was a Counter Claim.

IV. Conclusion & Disposition

23. Based on the detailed analysis of the framed issues herein, I reiterate the findings of the Court of Appeal case of “Kivanga Estate (supra)” and find that striking out a pleading is only one is the clearest of



scenarios where the applicant has followed the procedure laid down in Order 2 Rule 15. I am therefore not persuaded that the petition is scandalous, frivolous, vexatious or has been brought in abuse of the court process. I am not satisfied that the material placed before me has enumerated to its satisfaction the grounds set out in order 2 rule 15.

24. Consequently, I make the following findings:-

- a) That the Notice of Motion application dated 1st November 2021 be and is hereby dismissed for lack of merit.
- b) That for expediency sake, the Petition to be heard and determined by both affidavit and Viva Voce evidence on 26th October, 2022.
- c) That the Respondents are granted 21 days from this date of the ruling to file their Replies to the Petition and Cross Petition accordingly.
- d) That the Petitioner be granted 21 days leave to file both a Supplementary affidavit to the Replies made on the Petition and Replies to the Counter Petitions.
- e) That the Respondents be granted 7 days leave to file Supplementary affidavit from the issues raised in the replies of the Cross Petition filed by the Petitioners.
- f) That the an award of costs to the Petitioners for the application to be in the cause.

25. IT IS ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 18TH DAY OF MAY 2022.

HON. JUSTICE L. L. NAIKUNI - JUDGE

ENVIRONMENT AND LAND COURT

MOMBASA

In the presence of:-

- a. M/s. Yumna Court Assistant
- b. M/s. Nafula Advocate holding brief for the Petitioners/Respondents.
- c. Non Appearance for the Respondents/Applicants

