



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUNGOMA**

**ENVIRONMENT LAND CASE NO. 85 OF 2012**

JUSTINE NEKESA NACHAMI .....PLAINTIFF

VERSUS

FRANCIS K. KHAEMBA.....1ST DEFENDANT

KERESENJA NASIKE NYONGESA ..... 2ND DEFENDANT

ELIZABETH NASAMBU NYONGESA .....3RD DEFENDANT

LYDIA NAMUSIA NYONGESA ..... 4TH DEFENDANT

DISTRICT LAND REGISTRAR ..... 5TH DEFENDANT

**RULING**

This application brought under Order 2 Rule 15 of the Civil Procedure Rules seeks to strike out the written statement of the 2nd, 3rd & 4th defendants and subsequently list the plaintiff's case for formal proof. The application is supported by the grounds on the face of it and the affidavit sworn by the applicant. Basically, the plaintiff claims the defence filed is general and contains mere demands.

The application is opposed by all the defendants. The 5th defendant represented by the Attorney General submitted they have filed their defence and hence the suit should proceed to full hearing. Ms. Mumu for the 2nd, 3rd & 4th defence submits their defence raises triable issues. She referred the court to paragraph 4 & 5 of the statement of defence.

She also submitted this being a land matter should be heard and determined on its merit. They urged the court to dismiss the application.

I have perused the defence of 2nd, 3rd, & 4th defendants as filed. I have also perused the plaintiff. In the plaintiff, the applicant seeks to cancel title of 1st – 4th defendants as registered owners to the suit parcels of land. This is a serious matter that it would be unfair to close out the defendants from participating in the hearing however flimsy their defences appear.

In the defence, at paragraph 3 it raises the issue that suit is ***“incompetent and bad in law”***. The defendant s have further raised a defence of ***“trust.”*** as it seems there exists a relationship between the plaintiff and part of the defendants as brought out in paragraph 4 and 5. This are issues which can only be determined during a full trial.

It is now a well settled principle of law that striking out should be exercised cautiously and in the clearest of cases. This position is embraced in the case of **Kensan Insurance Brokers Ltd. Vs. Kenindia Ass. Co. Ltd, Civil Ap. No. 94 of 1997**. In **Mugambi Vs. Gatururu [1967] EA 196**, it was held ***“where a defence has been filed, the court cannot ignore it in an application for summary judgment”***. I therefore find there is no proper case made for the defences to be struck out. Accordingly I dismiss the application with costs to the defendants.

**RULING DATED, SIGNED, DELIVERED AND READ** in open court this 25th Day of September 2013.

**A. OMOLLO**

**JUDGE.**