REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Case 101 of 2001

RAPHAEL MUGWANJA WARARI ……..…….. PLAINTIFF

VERSUS

OLKEJUADO COUNTY COUNCIL …….....1ST DEFENDANT

JACOB MWANTO WANGORA ……...……..2ND DEFENDANT

DISTRICT LAND REGISTRAR …….....……3RD DEFENDANT

RULING

1. I have before me the 1st defendant's chamber summons dated 18th August 2003. The application was filed way back on 21st August 2003. I find it indefensible that an interlocutory application has remained undetermined for over 9 years and held the trial at abeyance. I sought explanations from learned counsel but the answers given were not persuasive. On 19th April 2012, the application came up for hearing. Learned counsel for the plaintiff sought an adjournment. I declined further adjournment as this application has become a fetter on the wheels of justice.

2. The application is expressed to be brought under order V1 rule 13 and order L rule 7 of the repealed Civil Procedure Rules. The 1st defendant prays that the plaintiff's suit be struck out. The gist of the matter is captured in the supporting affidavit of Sankale Ole Kantai sworn on 18th August 2003. The claim is attacked for being statute barred; for being frivolous, vexatious and failing to disclose a reasonable cause of action against the 1st defendant; for want of *locus standi;* and for duplicity. The primary facts presented are that the suit was filed on 24th January 2001 pursuing a cause of action dating back to September 1991 and December 1993. As the 1st defendant is a local authority, it was contended that the suit was caught up by limitation of action. It was submitted that the suit land has been registered in the name of a third party. Consequently, the applicant, as a licencee under a letter of allotment has no *locus*. Lastly, the applicant contends that there have been other proceedings in other courts. The present suit is thus incompetent for duplicity and should be struck out.

3. The 2nd defendant associated himself fully with the submissions of the 1st defendant and had nothing to add. The 3rd defendant did not appear.

4. The plaintiff contests the motion. The plaintiff had filed a replying affidavit sworn on 27th October 2003. He had appointed new counsel who had just come onto the record. Learned counsel drew the court's attention to a criminal case No 1202 of 2005 at the Chief magistrate's court, Makadara, in which the plaintiff is a complainant and the 2nd defendant an accused person. It was contended that the plaintiff has been fighting breaches and frauds by the 1st defendant. That is the subject of this suit and those criminal proceedings. The plaintiff contended that it is thus not clear how the 1st defendant could interfere with his ownership considering that the plaintiff was the owner from the very beginning. On duplicity, learned counsel conceded that the plaintiff had filed Nairobi CMCC No 6464 of 1999 and also referred the matter to Kajiado Land Disputes Tribunal in Case Number TC 164 of 2001. The latter cases are no longer pending but they were subsisting at the time the present suit was filed. The plaintiff's position was that since they are no longer pending, the present suit is not offensive to procedure.

5. I have heard the rival arguments. At paragraph 6 of the replying affidavit, the plaintiff depones that he filed an application in this suit to consolidate this suit with RMCC No 6464 of 1995 and that this suit became necessary after a title was issued to the 2nd defendant. He also depones that the matter in Land Tribunal cause TC 164 of 2001 was withdrawn upon advice by his counsel that the tribunal lacked jurisdiction. In all that is a tacit admission that there were pending other suits or proceedings between the same parties over the same subject matter at the commencement of this suit. That was a clear violation of section 6 of the Civil Procedure Act. I am however persuaded to disregard the matter of duplicity in the interests of justice. The letter and spirit of the law at article 159 of the constitution as well as sections 1A and 1B of the Civil Procedure Act point me that way. But I have also noted at paragraph 10 of the plaint that the plaintiff did disclose the existence and pendency of those other proceedings and had moved the court for consolidation in a chamber summons application dated 21st February 2001.

6. That takes me to the matter of the cause of action. Is it time barred? Is it frivolous and vexatious? And does the plaintiff have *locus standi?* Is it an appropriate matter for striking out at this stage? Those are the fundamental questions. The answers are found in law and fact.

7. At any stage of the proceedings, the court may strike out a pleading if it is scandalous, frivolous or vexatious; or it is otherwise an abuse of court process. Striking out a pleading is a draconian measure to be employed sparingly. See *Wambua Vs Wathome* [1968] E.A 40 and *Coast Projects Ltd Vs M.R. Shah Construction* [2004] KLR 119.

8. A frivolous pleading must be plainly so on its face. It is one that is so baseless as to have no legs to stand on and to that extent it can be said to vex the plaintiff. For example in *Silvanus Tubei Vs Kenya Commercial Bank* [2006] e KLR, Justice Ransley found that where a party, against clear evidence of a registered charge, continued to insist there was no such charge was then frivolous in its pleadings. So that a matter is frivolous if it carries no weight or importance or when on its face it does not answer the claim of the other party. See *Brite Print (K) Ltd Vs Attorney General* Nairobi HCCC No 1096 of 2000 (unreported). Justice A. Visram, as he then was, held in the *Brite Print* decision, and citing with approval the case of *Fischer Vs Owen* (1878) 8 C.D 645 that a matter can only be said to be scandalous if it is irrelevant. Cotton L.J. in the *Fischer* case at page 653 said "nothing can be scandalous which is relevant". A pleading is only said to be vexatious when it is baseless and its only intention is to vex or harass the other party. Again a pleading is embarrassing "if it is so drawn that it is not clear what case the opposite party has to meet at trial". See *Brite Print (K) Ltd Vs Attorney General* (Supra). See also *British Land Association Vs Foster* (1888) 4 TLR 574.

9. An application to strike out a pleading must be brought with expedition. Where there has been inordinate delay in bringing it, the court will frown upon it and will not exercise its discretion in favour of the applicant. See *Meru Farmers Co-operative Union Vs Abdul Aziz Suleman* (No 1) [1966] E.A. 436 for the proposition that an application to strike out a plaint on ground it discloses no cause of action should be made promptly.

10. The bottom line cannot be better set than in the words of Sir Udo Udoma C.J. *in Musa Misango Vs Eria Musigire* (Supra) at 395 when he delivered himself thus;

"*To my mind, it is evident that our judicial system would never permit a plaintiff to be driven from the judgment seat in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad"*

11. The dictum of Madan J.A. (as he then was) in *D T Dobie & Company (Kenya) Limited Vs Muchina* [1982] KLR 1 is an all time classic. He said at page 9;

"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 a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it".

The reason is that at this stage, the court is not fully seized of tested evidence or facts to form a complete opinion of the merits of the case. That is why the power should be exercised sparingly. This principle of restraint was restated recently by the Court of Appeal in *Kisii Farmers Co-operative Union Limited Vs Sanjay Natwarlal Chauhan* Kisumu, Civil Appeal 32 of 2003 (unreported). See also the *The Cooperative Bank Limited Vs George Wekesa* Civil Appeal 54 of 1999 (Court of Appeal, Nairobi, unreported). In addition, regard must be had to article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act. The court is now enjoined to do substantial justice to the parties. The overriding objective of the court is clearly laid out in those statutory provisions.

12. Facts can be very stubborn. The plaintiff pleads at paragraphs 5,6 and 7 of the plaint dated 11th January 2001 as follows;

"5. On or about 2nd September, 1991 the Plaintiff was alloted with Plot No.14573 (Formerly Plot No. 305/279) Ngong by the commissioner of Lands upon authority given by the First Defendant. Thereafter the Plaintiff paid for the premium and other charges required to be paid upon allotment.

6. On or about 19th August, 1991 the first defendant confirmed the said allotment. Thereafter and relying on the said allotment and the fact that the said plot now belonged to him, the plaintiff carried out extensive permanent developments on the said plot.

7. On or about 8th December, 1993 the first defendant fraudulently gave authority to the Commissioner of Lands to allocate the said plot to the second defendant who fraudulently paid for the survey, conveyancing and registration fees of the said plot on 17th June, 1994 using the plaintiff's name".

That plaint has not been amended. Those facts are deponed to by the plaintiff or verified in his verifying affidavit to the plaint sworn on 11th January 2001. In the year 2001 when the suit was filed, a solid 10 years had passed since the cause of action pleaded at paragraph 5 and 6 of the plaint. It was again 8 years since the cause of action pleaded at paragraph 7 of the plaint. Those facts were the basis of the prayers in the plaint for cancellation of the title and a declaration that the plaintiff was the lawful owner. Under the Public Authorities Limitation Act (Cap 39) an action of this nature against a local authority must be presented to court within three years. I have not seen any evidence of leave granted to the plaintiff to bring the suit out of time. The wording of the statute is not permissive. Regrettably, I find that as against the 1st defendant local authority the plaintiff's suit is statute barred. That finding is sufficient to dispose of the present application.

13. Having found as such, the question whether the plaintiff had *locus standi to* sustain the suit is water under the bridge. It would also require the court to delve into matters of evidence over the validity or otherwise of the letter of allotment that would be inappropriate at this stage. I thus find that the plaintiff's cause of action as pleaded, and on the facts on the face of the pleadings is frivolous and cannot lie against

the 1st defendant.

14. In the result, I order that the plaintiff's suit against the 1st defendant be and is hereby struck out. Costs would ordinarily follow the event. The plaintiff is still seeking justice over land against the remaining defendants. It would not be just to visit costs of the 1st defendant against him. I thus order that each party shall bear its own costs.

It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 15th day of May 2012.

G.K. KIMONDO
JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff.

No appearance for the 1st Defendant.

No appearance for the 2nd Defendant.

Mr. Kuria for the 3rd Defendant.