



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT BUNGOMA
CIVIL SUIT NO.137 OF 2004

LOYCE NANJALA ODHIAMBO.....PLAINTIFF

VS

RICHARD WAFULA MASINDE.....1ST DEFENDANT

ROSY NEKESA WATITWA.....2ND DEFENDANT

RULING

The Defendants seek that the Plaintiff's suit be struck out with costs for not disclosing a reasonable cause of action under Order 6 rule 13 (1) (a) of the Civil Procedure Rules. A "*reasonable cause of action*" means a cause of action with some chance of success when only the allegations in the plaint are considered. (**D. T. Dobie and Company (K) LTD v. Joseph Mbaria Muchina and Another [1982] KLR 1**). I also agree with the advocate for the Plaintiff that a suit that does not have a reasonable cause of action is one which is undefined, a mere wishful claim, a trifling one, or such unquantifiable claim that the court cannot grant or even take evidence on it. It is now trite that no suit can be struck out unless it is obviously weak, unsustainable and cannot be remedied by amendment.

In the present suit the Plaintiff claims that she is the wife of the 1st Defendant who subsequently took a second wife, the 2nd Defendant. She claims that she bought the suit land, E.Bukusu/N.Sang'alo/2350, in 1990 which was registered in the name of the 1st Defendant in 1992. When the Defendant married the 2nd Defendant in 1992 he transferred the suit land to her in 2000. The suit is by way of originating summons and seeks the determination of the issues that she is the absolute owner of the land; the 1st Defendant breached trust when he transferred it to the 2nd Defendant; and that the said transfer was null and void. The suit was stated to be brought under section 17 of the Married Women's Property Act. In response, the 1st Defendant denied that he has ever been married to the Plaintiff. He denied he was the registered proprietor of the suit land and pleaded that the suit was incompetent, misconceived, frivolous and an abuse of the process of the court. The 2nd Defendant claimed she was the only wife of the 1st Defendant and stated that she was the registered proprietor of the suit land.

Whether or not the Plaintiff is the wife of the 1st Defendant is consequently a triable issue. One triable issue would be sufficient to take the suit to trial. There is, however, another issue. The Plaintiff alleged that she bought the suit land which she registered in the name of the 1st Defendant by way of trust and which trust was breached when the parcel was transferred to the 2nd Defendant. The Defendants did not specifically address this issue in their replying affidavits. It is a substantial issue to be dealt with.

The Defendants have taken issue with the fact that the suit was brought under the Married Women's Property Act, 1882 when there was no marriage, that the Act does not cover customary law marriages, the property is in the name of the 2nd Defendant who is not the Plaintiff's spouse, and that the particulars of the alleged breach of trust were not pleaded. The response by the Plaintiff was that whether or not she was married to the 1st Defendant is an issue for trial. On the allegation that the Act does not cover customary law marriages, reference was made to the decision of the Court of Appeal in **Tabitha Wangeci Nderitu v. Simon Nderitu Kariuki, Civil Appeal no.203 of 1997 at Nairobi** in which it was held the Act applies to such marriages. Regarding the fact of registration of the 2nd Defendant in respect of the suit land, the Plaintiff's plea was that this was her property that was held in trust by the 1st Defendant who transferred it. If she was married to the 1st Defendant at the time its acquisition then it becomes matrimonial property.

If the pleading in the summons is defective, or in any way wanting, an appropriate request for amendment can be made to rectify the situation now that the suit has not come for hearing.

In conclusion, the application lacks merit and is dismissed with costs.

Dated, signed and delivered at Bungoma this 8th day of May, 2012.

A. O. MUCHELULE

JUDGE

