



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

**HCC NO. 1460 OF 2002 CONSOLIDATED WITH ELC NO. 2088 OF 2007 AND HCCC NO. 922
of 2007**

**KENYATTA UNIVERSITY.....PLAINTIFF/
APPLICANT**

VERSUS

**KIMANI MBUGUA & 78 OTHERS.....DEFENDANTS/
RESPONDENTS**

RULING

Kenyatta University College is the registered proprietor of the parcel of land known as LR.11026/2 which has been subject to litigation over a number of years. The defendants have been sued by the college on the grounds that they are trespassers who have obtained illegal letters of allotment allegedly from the Commissioner of Lands and The City Council of Nairobi allocating them various plots on the suit property.

It is the plaintiff's case that, neither the Commissioner of Lands nor the City Council of Nairobi have legal power to allocate or issue allotment letters concerning the plaintiff's land.

In their defence, the defendant deny the plaintiff's claims and contend that at all material times, they are and continue to be holders of letters of allotment issued to them by the Commissioner of Lands in respect of unsurveyed plots at Kamae Resettlement Scheme Phase II situated within Nairobi area. It is their case that the plaintiff should be subjected to strict proof of any allegation to the contrary.

There is now before me an application by the plaintiff by way of Chamber Summons under Order VI Rule 13 (b) (c) and (d), Order VI Rule 16 of the Civil Procedure Rule and Section 3A of the Civil Procedure Act for orders that;-

1. The defendants'/respondents' amended defence dated 19th June 2009 be struck out.

2. That in consequence of prayer 1 above judgment be entered in favour of the plaintiff/applicant as prayed in its further amended plaint dated 29th May, 2009.

3. That it is hereby declared that no person, save under the law and with the leave of the plaintiff/applicant and specifically those that were allocated 30.2 acres and a further 10 acres totaling 40.82 acres by the plaintiff/ applicant may enter upon or remain on the suit property LR 11026/2.

4. That the Commissioner of Police and Provincial Commissioner Nairobi Province, be and are hereby authorized to supervise the eviction of the defendants/respondents from the plaintiff's/applicant's property land reference No. 11026/2.

The grounds upon which the application is based are set out on the face of the application, which is also supported by a lengthy affidavit running into 137 paragraphs, sworn by Professor Paul Wainaina who is the Deputy Vice Chancellor in charge of Administration at Kenyatta University.

The application is opposed and there is a replying affidavit sworn by John Njuguna, the 8th defendant herein on the authority of the other defendants. The defendants filed a Notice of Preliminary Objection alleging that the entire suit and application are incompetent for want of compliance with court orders which are still on record and have yet to be set aside. Upon directions, both learned counsel have filed submissions and cited some authorities. These I have read.

The record shows that on 28th July, 2008 the parties appeared before Lady Justice Ang'awa on which date the following parts of a consent order was recorded including the following clause:-

“4 That the plaintiffs advocate to comply with the provisions of Order 1 Rule 8 of the Civil Procedure Rules within 14 days”

It is the defendants' case that the said order has neither been varied, set aside or appealed. It remains a valid court order which has to be obeyed. It is also their submission that, no further step can competently be undertaken in the present suit before compliance with provisions of Order 1 Rule 8 aforesaid. The Order provides as follows:-

“8 (1) Where there are numerous persons having the same interest in one suit, one or more of such persons may sue or be sued, or may be authorized by the court to defend in such suit, on behalf of or for the benefit of all persons so interested.

(2) The court shall in such case direct the plaintiff to give notice of the institution of the suit to all such persons either by personal service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the court in each case may direct.

(3) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the court to remain a party to such suit”.

It is the defendant's case that this condition precedent has not been fulfilled by the plaintiff neither has the plaintiff sought to have the time set enlarged. The plaintiff's application that sought to comply with the said order was struck out for being incompetent on 25th January, 2010. On the foregoing reasons the defendants seek to have the plaintiff's present application and the suit struck out.

It is the plaintiff's case that the defendants lack the *locus standi* to move the court and a person who has

no capacity to move the court cannot apply for orders such as the one sought by the defendant. This is because it goes to the issue of jurisdiction.

It will be noted that the issue of jurisdiction or *locus standi* of the defendants was not raised by the plaintiff as at the time the said order was recorded. It would appear therefore that the defendants may as well be right that, unless the plaintiff complies with the said requirement then no further proceedings may be entertained by the court. The language in Order 1 Rule 8 (2) is couched in mandatory terms and non compliance would deny a party audience in further proceedings. That reason alone would deny the plaintiff audience before me in the present application. But that does not necessarily mean the present application or suit must therefore be dismissed because, I believe in any litigation where a pleading and or application may be cured in the interest of justice, the same should be sustained. However, that is not the only issue.

Sticking out a pleading is a very drastic step which should only be exercised in very clear cases. This is because, such a step if allowed drives a party out of judgment seat before a hearing.

I have looked at the amended defence dated 19th June, 2009 and asked myself whether or not the same presents any triable issues that should go for full trial. With respect, there are very serious triable issues that cannot be dealt with summarily in the mode suggested by the plaintiff. The documents purporting to confer right to the defendants are on record. They may not have crystallized into title deeds but they give rise to the question whether or not the defendant's occupation of the suit premises is unlawful or illegal. There is also the contention by the defendants that they are entitled to raise a claim based the doctrine of adverse possession. Those are just some of the issues that can be identified from the pleadings this far. If the amended defence aforesaid were to be struck out as proposed, the defendants would have been denied a platform to canvass those issues.

I appreciate the submissions and the many authorities cited by the learned counsel for the plaintiff. Indeed, I commend him for a well researched material. However, in my view they belong to the province of a main trial, a step yet to be reached. If I were to start analyzing the said submissions and the authorities cited, prejudice may result on the part of both parties. I decline to say more on the issue.

I have come to the conclusion that the preliminary objection must be sustained and it is upon the plaintiff to regularize the proceedings by complying with the said order and in this case, the plaintiff is in good hands of learned counsel. The application is therefore dismissed with costs to the defendants.

Orders accordingly.

Dated, signed and delivered at Nairobi this 13th day of March, 2011.

A. MBOGHOLI MSAGHA

JUDGE