



**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT BUNGOMA**

**HCCC NO. 12 OF 2005**

**MAURICE M. MAKHANU.....PLAINTIFF**

**~VRS~**

**THE MUNICIPAL COUNCIL OF BUNGOMA.....DEFENDANT**

**RULING**

By consent of the parties, the Applicant/Plaintiff's application dated 6<sup>th</sup> November 2009 was heard by way of written submissions. The application seeks for the following prayers:

- a) That the defence dated 5<sup>th</sup> May 2005 be struck out and judgment be entered for the Plaintiff.**
- b) That cost of the application be provided for.**

Mr. Waswa of Wabwile & Co. Advocates represented the Applicant Maurice Makhanu while Mr. Makali of J. O. Makali & Co. Advocates represented the Respondent, Municipal Council of Bungoma. The facts leading to this application are that the Applicant was allocated Plot no.801, Bungoma Municipality and issued with a lease certificate on 1<sup>st</sup> November 2004 for a period of 99 years after following the due process. In the year 2005 the Respondent wrote to the Applicant purporting to annul the lease. The Respondent sought audience with the then clerk of the Respondent to discuss the matter but to no avail. Thereafter two other clerks have demanded that the Applicant relinquishes the said plot to the council. It is the applicant's contention that the defence in this case is scandalous, vexatious and raises no triable issues. The defence should be struck out and judgment entered in favour of the Applicant.

In his replying affidavit, one Mr. William Chepkwony, depones that plot no.801 Bungoma Municipality belonged to the council and that on the plot stands a house built by the council. The plot is a public utility plot which was never available for allocation to any individual. The allocation of the plot is illegal and erroneous. A directive was issued by the government that all illegally acquired land as contained in the

Ndung'u report be repossessed. The plot is used for community purposes which gives the council a good defence. The council ought to be given an opportunity to adduce evidence to that effect.

I have carefully considered the arguments of the parties in their written submissions and the case law applied therein. This application is brought under section 3 A of the Civil Procedure Act and Order VI Rule 13 (1) (a) (b) and (c) of the Civil Procedure Rules. The provisions of Order VI Rule 13 (1) (a) are to the effect that a pleading may be struck out for the following reasons that;

**i) it discloses no reasonable cause of action or defence, or**

**ii) it is scandalous, frivolous or vexatious; or**

**iii) it may prejudice, embarrass or delay the fair trial of the action.**

The question that arises herein is whether the defence discloses any reasonable cause of action. I must admit that the Respondent's counsel cited several decisions which have made the work of this court easier in determining the issues at hand. The defence raised by the Respondent is that the plot in question was illegally and erroneously allocated to the Applicant in the year 2004. Was there a directive from the government to repossess all illegally allocated land? Was the plot in question a subject of the Ndungu Report on illegally allocated land? Order VI Rule 13 (1) (a) does not allow parties to annex evidence to their affidavits. The questions I have posed are issues of evidence. Should this court strike out the defence which raises the issues, the Defendant would be denied an opportunity to adduce evidence in support of the allegations raised in the defence. This is a land matter and the issues relating to allocation of the plot in question are core to the determination of this case. Such fundamental issues require to be determined through evidence from both parties. The issues are in my considered opinion triable issues.

In the case of ***D. T. DOBIE & COMPANY LTD VRS MUCHINA 1982 KLR*** it was held that the court can only look at the defence or plaint without affidavit evidence to decide whether the pleading discloses any reasonable cause of action or reasonable defence. This application does not satisfy the requirements of Order VI Rule 13 (a).

The second issue to be considered is whether the defence is scandalous, frivolous and vexatious. Having brought out the issues raised in the defence, I find those issues very important in determination of the case. I disagree with the argument that the defence is scandalous, vexatious or frivolous.

Thirdly, neither the Respondent or the applicant is occupying the plot to an extent that any inconvenience will be caused by the time the case will take to go for full hearing. None of the parties will be prejudiced or embarrassed by any delay.

It is established law that the discretion of the court to strike out a defence is a drastic measure and must only be exercised where the pleading is completely hopeless. In the case before me, I find that the defence raises triable issues which in the interests of justice ought to be tried. A reasonable defence is not a defence that must succeed but one which raises issues for determination by the court. I hereby find that the substantial issues raised by the defence are fit to go for full trial.

It is my finding that the application has no merit and I dismiss it with costs.

**F. N. MUCHEMI**

**JUDGE**

Ruling delivered and dated this 8<sup>th</sup> day of June, 2011 in the presence of Mr. Murunga for Defendant/Respondent.

**F. N. MUCHEMI**

**JUDGE**