



REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
HC. CIVIL . NO.12 OF 2010

1. **JOHN NYONGESA**
2. **WAMBULWA MAHELO LIHANDA**
3. **LUTULI ALEX WANYONYI NYONGESA.....PLAINTIFFS/RESPONDENTS**
4. **JOSEPHINE NASIMIYU NYONGESA**
5. **RAPHAEL WEKESA NYONGESA LIHANDA**

~VRS~

1. **ALICE KHISA**
2. **MARK KHISA**
3. **JAPHETH MUKHWANA KIBERENGEDEFENDANTS/APPLICANTS**
4. **NAMASACHA KIBERENGE**
5. **RICHARD KIBERENGE**

RULING

In the plaint filed by the Plaintiffs they alleged that they were the registered owners of land parcel no. Ndivisi/Ndivisi/632 measuring about 4.56 Hectares which the Defendants had unlawfully encroached on and committed acts of waste. They sought to permanently restrain the Defendants in respect of the land. The Defendants filed a joint defence to deny that they had unlawfully encroached on the Plaintiffs' parcel of land. They claimed that they live on their own parcels of land which were created following the subdivision of land parcel no. Ndivisi/Ndivisi 1036 which created parcels nos. Ndivisi/Ndivisi/2216 to 2221. The court will certainly have to decide whether the land in the plaint belongs to the Plaintiffs and whether it is true that the Defendants have trespassed on the same. One cannot say at this stage that the plaint does not raise a legitimate complaint against the Defendants that should be allowed to go to trial.

The Defendants allege that land parcel no. Ndivisi/Ndivis/632 no longer exists; that the parcel was subdivided into various titles and the register closed. The title may have been subdivided and register closed but the certificate of official search annexed to the supporting affidavit of the summons by the Plaintiffs shows that the title still existed when the suit was filed. The mutation form that the Defendants relied on is dated 17/3/2010 and was registered on 19/4/2010. This suit was filed on 5/2/2010. How the land in respect of which the Plaintiffs were registered came to be subdivided and titles issued to the Defendants is a matter that the court will have to inquire into.

It was pointed out by the Defendants that there is another suit at the Chief Magistrate's Court, Bungoma, No.534 of 2010, between the present 3rd Plaintiff and the 1st Defendant over land parcel no. Ndivisi/Ndivisi/2646 which is a subdivision of land parcel no. Ndivisi/Ndivisi/632. Their argument is that the present suit is an abuse of process given the existence of the suit in the subordinate court. The suit in the subordinate court does not deal with all the land that the Plaintiffs claim in this case. Not all the parties in the instant case are parties in the case in the subordinate court. In any case, an appropriate application can be made to stay the proceedings in the subordinate court.

The present application was filed by the Defendants under Order 2 rule 15 (1) (a) of the Civil Procedure

Rules to have the Plaintiffs' suit struck out with costs on the basis that it did not disclose a reasonable cause of action and was an abuse of the process of the court. It should be pointed out that a complaint that a suit is an abuse of the process of the court should be brought under Order 2 rule 15 (1) (d). As was held in the case of **DT Dobie & Company (Kenya) Ltd v Muchina [1982] KLR 1**, a case that discloses no reasonable cause of action is a case with no chance of success; it is a case that raises no issue that should go to trial. I find that this is not such a case.

Consequently, the application is dismissed with costs.

Dated and delivered at Bungoma this 8th day of November, 2011 in the presence of the Plaintiffs and Mr. Murunga for Mr. Kassim for the Defendants and Lilian Gimose the court clerk.

A. O. MUCHELULE
JUDGE