



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

Civil Case 568 of 1995

JAMES NYASIMI KIANGA.....PLAINTIFF

-VERSUS-

DAVID MANKONE MBOA.....DEFENDANT

RULING

This is a ruling on an application by way of Chamber Summons dated 2nd November, 2009 and filed in court on the even date. The application is expressed to brought under Order VI rule 13(1), (b) (c) and (d) of the Civil Procedure rules and sections 3(1) and 6 of the Land Disputes Tribunals Act and all other enabling provisions of the Law. In the application, David Mankone Mboa, the applicant beseeched

this court to:-

“1...to be pleased to orders (sic) struck out, both the plaintiffs/respondents’ undated plaint lodged in court on 13th December, 1995 and the amended plaint dated 22nd July, 2003.

2. *Consequent to prayer (1) hereinabove being granted, the court be pleased to dismiss plaintiffs/respondent’s suit herein*
3. *Costs of this application and of the main suit be borne(sic) by the plaintiff/respondent*
4. *Such further and/or other orders be made as the court may deem fit and expedient.”*

The application was anchored on the following grounds:-

“(a) The applicant/defendant’s registration of the disputed parcel of land is a first registration, which cannot be challenged on grounds of fraud.

(b) The plaintiff/respondent’s suit was time barred by the time it was lodged in court.

(c) The plaintiff/respondent has his separate land being parcel No. North Mugirango/Bokeire 1/950 registered

in (sic) the same date as that of the defendant/applicant.

- (d) *The plaint is bad in law as it is undated.*
- (e) *That the suit herein is null and void and hence legally untenable.*
- (f) *That the suit herein is void ab initio and hence ought to be struck out Ex- Debito Justitiae*
- (g) *That the suit herein is frivolous, vexatious and otherwise an abuse of the due process of law.*
- (h) *That this is a fit and proper case wherein the suit should be struck out.”*

The applicant too swore an affidavit in support of the application and where relevant deponed that he was the sole registered proprietor of land parcel North Mugirango/Bokeira 1/627 “*the suit premises.*” This was a first registration which cannot be impeached on grounds of fraud as the respondents has purported in this suit. The suit too was time barred as the same was filed on 13th December, 1995 long after the limitation period of 12 years permitted for such suit had long expired. That the suit is belated and is an abuse of the process of court and the same ought to be struck out to save court’s time since it discloses no reasonable cause of action.

In response to the application the respondent neither filed grounds of opposition nor a replying affidavit.

At the hearing of the application interpartes, Mr Onyancha, learned counsel for the applicant submitted that the applicant is seeking to strike out the plaintiff’s suit on the grounds that the plaint is undated , the suit premises were a first registration and cannot be defeated on grounds of fraud. The applicant was registered as the proprietor of the suit premises on 16th July, 1976. Yet this suit was filed in 1995. The claim is therefore time barred in so far as it relates to recovery of land as it was not brought within 12 years.

Mr. Bosire, learned counsel for the respondent stated in reply that there was amended plaint on the record that was duly dated and signed. In any event such an omission was curable as it goes to want of form that is not prejudicial to the applicant. The claim too is based on trust hence, first registration cannot be a valid defence. The respondent only came to know that the applicant had taken away a portion of his land in 1985. In the circumstances limitation as a defence was not available to the applicant.

I have carefully studied the pleadings herein, rival oral submissions and the law. It is trite law that a pleading should never be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases and such jurisdiction should be exercised with extreme caution. The court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendment and must not dismiss an action merely because the story being told in the pleadings was rightly improbable, and one which it was difficult to believe could be proved. This jurisdiction is not intended to be exercised by minute and protracted examination of the documents and the facts of the case in order to see whether the plaintiff really has a cause of action. To do so is to usurp the position of the trial judge and to produce a trial of the case in chambers, on affidavits only, without discovery and without oral evidence tested by cross-examination. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. If a suit shows a mere semblance of a cause of action provided that it can be injected with real life by amendment, it ought to go forward to hearing for a court of justice ought not to act in darkness without the full facts before it. See Generally DT Dobie and Company (K) Ltd .v. Joseph Mbaria Muchiria and Another (1982) KLR 1. The foregoing was also reiterated in the case of Yaya Towers Ltd .V. Trade Bank Ltd (in Liquidation), C.A. no. 35 of 2000 (UR). In this case the court of appeal observed that a plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success may be. Unless the defendant

can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the court, it must be allowed to proceed to trial. Striking out a pleading is a jurisdiction, which ought to be sparingly exercised and only in rare and exceptional cases and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe could be proved.

The upshot of all the foregoing is that striking out a pleading is a draconian act which can only be resorted to in very plain and obvious cases.

Applying the above injunctions to the circumstances of this case, I have no doubt at all that this application must fail. To start with, the original plaint on record was duly signed by the plaintiff though not dated. Going strictly by the provisions of Order VI rule 14 of the Civil Procedure rules, it is not a mandatory requirement that every pleading be dated. Indeed that rule only insists on every pleading being signed by an advocate, or recognized agent, or by the party if he sues or defends in person. In any event what prejudice was occasioned to the applicant by the none dating of the plaint. I cannot think of any. The omission in any event, has since been taken care of by the subsequent amended plaint that has been filed. It is duly dated and signed.

The respondent's suit is anchored on both fraud and trust. The applicants position as I understand it, is that, even if there was fraud, the claim is time barred by virtue of the provisions of the Limitation of Actions Act and further that the suit premises being a first registration the title is not open challenge on grounds of fraud or indeed any other grounds. The issue whether, his title is a first registration or not is a matter of evidence. Secondly, whether the Respondent's suit based on fraud is time barred depends on when he became aware of the fraud allegedly perpetrated on him by the applicant. According to the plaint he became aware of the same sometimes in 1995. The applicant on the other hand takes a different view. That the respondent all along knew of the applicant's acquisition of a portion of the suit premises as both were present during land adjudication and that is how, they were registered as owners of their respective parcels of land. Clearly this is a matter that must be canvassed by way of oral evidence. It is not a matter which can be determined on affidavits and rival oral submissions by respective counsel. If the respondent discovered the fraud in 1995 then the applicant cannot claim that the suit is time barred. The suit was therefore filed in the same year that the respondent discovered the alleged fraud. The Twelve years threshold had thus not gone by at the time the suit was instituted.

The other aspect of the respondent's claim is trust. That claim is not caught up with time lines. In other words it cannot be the subject of limitation of time as it is a continuing process and or breach. Further the defence of first registration is not available to the applicant on account of trust. So that a claim based on a trust has abearing on a first registration. A party cannot be shielded from a claim based on a continuing trust on the grounds that his suit premises being a first registration, the title cannot impugned whatsoever as the applicant has sought to claim herein. The applicant's suit premises though being a first registration is nonetheless liable to be defeated on account of continuing trust.

The upshot of all the foregoing is that this is not a fit and proper case for the striking out of the plaint. The amended plaint on record certainly raises issues fit for a full trial. Accordingly, the application dated 2nd November, 2009 is dismissed with costs to the respondent.

Dated, signed and delivered at Kisii this 24th March, 2010.

ASIKIE-MAKHANDIA

JUDGE

