



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Suit 238 of 2004**

**PENINAH WAMBUI MUGO.....PLAINTIFF/APPLICANT**

**VERSUS**

**MOSES N. KAMAU.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MARY M. NJARAMBA...2<sup>ND</sup> DEFENDANT/RESPONDENT**

**RULING**

This suit has been brought by the applicant against the two respondents for vacant possession of L.R. 6505/992 – NYAHURURU MUNICIPALITY BLOCK 6/506 (the suit property) which was transferred to her upon purchase from the 1<sup>st</sup> respondent who was the registered owner. The 2<sup>nd</sup> respondent who is the 1<sup>st</sup> respondent's wife has refused to vacate the suit property, hence this suit. The 2<sup>nd</sup> respondent filed a defence that the applicant is now seeking in the present application to be struck out and judgment entered against the defendants.

The 2<sup>nd</sup> respondent has filed grounds of opposition arguing that the application is incompetent and amounts to an abuse of the court process; that it does not satisfy the conditions for striking out of pleadings; that the defence and counter-claim raise triable issues.

I have considered the rival arguments, submissions, and the two authorities cited namely **Peter Mburu Echaria** Vs. **Priscilla Njeri Echaria** Civil Appeal No.75 of 2001 and **D.T. Dobie & Co. (K) Ltd.** Vs. **Muchina** (1982) KLR 1. The application is based on the provisions of **Order 35 rule 1(b)** of the **Civil Procedure Rules** which deals with the entry of judgment in specific circumstances, including against a trespasser to land. No reference, in the application, has been made to **Order 6 rule 13** of the **Civil Procedure Rules** where the power to strike out pleadings is provided. Nothing, however, turns on that omission.

**Order 6 rule 13** aforesaid specifies the circumstances for striking out pleadings. The instant application, although does not expressly state so, appears to be premised on the ground that the defence and the counter-claim disclose no reasonable defence and cause of action as provided under **rule 13(1)(a)**. The case of **D.T. Dobie** (supra) makes reference to a long line of authorities on how the power to strike out ought to be exercised. The considerations as can be gleaned from these authorities include:

- i) that the exercise of the power to strike out pleadings must be approached carefully and sparingly
- ii) that an application to strike out pleadings must be considered by the court without expression of a definite opinion on the merits of the main suit
- iii) that the power to strike out will only be resorted to in plain and obvious cases and even then, only when the court is satisfied that there is no case or defence at all
- iv) that no evidence is admissible on an application based on **rule 13 (1)(a)** aforesaid
- v) that an application under **rule 13(1)(a)** must state concisely the grounds on which it is made.

In this application, apart from the fact that no reference is made to, "*no reasonable cause of action or defence*" the applicant has sworn an affidavit in support, yet no evidence is admissible. But more fundamentally, the nature of the application and the grounds upon which it is premised will no doubt involve consideration of merit of the suit. There are issues such as the applicant's title, *locus standi* of the respondent and the jurisdiction of this court. The respondent on the other hand has pleaded fraud, trust, pendency of **Nyahururu P.M.C.C.No.348 of 2005** regarding the suit property.

This in my opinion, is not a suitable case for the exercise of the power to strike out without hearing parties and their witnesses as well as scrutiny of documents.

For these reasons, this application fails and is dismissed with costs.

**Dated, Signed and Delivered at Nakuru this 16<sup>th</sup> day of April, 2010.**

**W. OUKO**  
**JUDGE**