



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 2119 of 2007**

**JANE WANJIKU MWANGI.....1<sup>ST</sup> PLAINTIFF**  
**CATHERINE NYAMBURA MWANGI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NATHAN NDEGWA NJERU.....DEFENDANT**

**R U L I N G**

1. Nathan Ndegwa who is the defendant in this suit seeks to have the plaint subject of the suit against him struck out. The plaint was filed on 17<sup>th</sup> September, 2007 by Jane Wanjiku Mwangi and Catherine Nyambura Mwangi (hereinafter referred to as the plaintiffs). It is the defendant's contention that he is the registered owner of Land titled No. Loc/19/Rwathia/1675 (hereinafter referred to as the suit property). The defendant explains that the suit property which was a sub-division of Loc 19/Rwathia/1738, was transferred to the defendant by Amos Kihara who is now deceased. The transfer was done during the deceased's lifetime. The defendant maintains that the plaintiff's suit as framed is incapable of giving the plaintiff any effective relief against the defendant since the prayers sought are not capable of being granted by this court.

2. Counsel for the defendant argued that the deceased Amos Kihara has never been registered as the owner of the suit property. Therefore the plaintiff's prayer seeking to have the registration of defendant as owner of the suit property cancelled so that the land reverts to the name of the deceased, cannot be granted. It is further maintained that the order sought for a succession case to be filed so as to determine the heirs of land reference Loc 19/Rwathia/1675 was not necessary as succession is done as of right, and cannot apply to only one part of the estate. In support of the application counsel for the defendant relied on *HCCC No.772 of 2001 James Nganga Kamau vs Isaac Wairagu Kariuki and another*.

3. The application is opposed through a replying affidavit sworn by Catherine Nyambura Mwangi. She depones in the affidavit that the suit property was bequeathed to them by their deceased father. She maintains that the defendant fraudulently acquired the suit land from the deceased when he was old and senile. It is maintained that the transaction was fraudulent as the defendant has not been able to exhibit any land control board consent for the transaction or the transfer document in the defendant's favour.

4. Relying on *Nyagal vs Nyamu and another [1976] KLR 73*, *Mulla's Commentary on Civil Procedure*, and *Musa Musango vs Eria Musigire and others [1966] EA 390*, Counsel for the plaintiffs submitted that at this stage the court ought not to be concerned with the sufficiency of evidence but must take the pleadings as averred. It was argued that the issue of fraud which is an important issue of law had been raised in the plaint. Therefore the plaintiffs should not be driven away from the judgment seat without being heard. It was submitted that the plaintiffs who

are daughters of the deceased and who were entitled to inherit the suit land have a right to question the registration of the defendant as owner of the suit property.

5. I have carefully considered the application, the submissions made by both counsel and the authorities cited. Firstly, the application is wrongly brought under Order VI Rules 13(1)(a)(b)(c) & (d) of the Civil Procedure Rules together. This is because under Order VI Rule 13(2) of the Civil Procedure Rules, no evidence is admissible in respect of an application under Order VI Rule 13(1)(a) of the Civil Procedure Rules. It is therefore ill advised to combine such an application with an application under Order VI Rule 13(1)(b)(c) & (d) which is required to be supported by an affidavit. Moreover, in his prayer the defendant has just sought to have the plaintiff's suit struck out generally without specific reference to any ground under Order VI Rule 13(1).

6. That notwithstanding, I have considered whether the plaint as filed discloses a reasonable cause of action. As already stated under Order VI Rule 13(2), in considering such an application, I am bound to look at only the plaint and the stated grounds upon which the application for striking out the plaint is made on the assumption that any express or implied allegations of fact are true. As was stated by *Madan J.A. in D.T. Dobie & Company (Kenya) Ltd vs Muchina [1982] KLR 1* at page 9:

***“At this stage the court ought not to deal with the merits of the case for that is a function solely reserved for the Judge at the trial as the court itself is not fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way.”***

7. That is precisely the same situation herein. Therefore, I have to examine the plaint and the grounds upon which the application is brought with a view to determine whether a reasonable cause of action has been disclosed. Essentially, it is contended that the plaintiffs' suit as framed is incapable of giving the plaintiffs any effective relief against the defendant because the prayers sought are not capable of being granted.

8. The plaintiffs' cause of action as is evident from the plaint is that the defendants fraudulently and illegally had the suit property transferred to him thereby depriving the plaintiffs of their inheritance. It cannot be said that the plaint as framed does not raise a reasonable cause of action. The suit property has been registered in the name of the defendant. The plaintiffs are questioning the transfer of the suit property to the defendant, contending that the transfer was fraudulent. They are doing so in their capacity as persons who would be entitled to the suit property if the transfer to the defendant is indeed fraudulent. The plaintiffs are raising issues of fraud, which under Section 27 of the Registered Land Act if proved would be sufficient to impeach the defendant's title to the suit property.

9. In my view, the plaint does in fact raise a reasonable cause of action. What seem to be amiss is the prayers. Again I would follow Madan J.A.s dictum in *D.T. Dobie & Company (K) Ltd vs Muchina*.

***“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a lawsuit is for pursuing. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”***

10. The plaintiffs' suit does in fact disclose a reasonable cause of action and the anomaly in the prayers sought can be easily cured through an amendment. *HCCC 772 of 2001 James Nganga Kamau vs Isaac Wairagu Kariuki & another* which was relied upon by the defendant is distinguishable as in that case the plaintiff did not have any proprietary rights or any rights over the suit property capable of enforcement. The plaintiffs relied on a temporary allocation which was apparently withdrawn by the subsequent sub-division and allocation of the property. In this case, the plaintiffs' claim the suit land as the persons to whom it was bequeathed by the deceased. The plaintiffs' claim is also anchored on fraud particulars of which have been given.

11. Further, as regards the contention that the plaintiffs' suit is frivolous, vexatious, scandalous or an abuse of the court process, I find nothing frivolous or vexatious or scandalous about the plaintiffs' claim. Neither the grounds relied upon in support of the application, nor the supporting affidavit reveal any abuse of the court process. To

the contrary, the defendant has made allegations of fact which contradict the plaintiffs' allegation and which therefore need to be resolved at a full trial. Finally the defendant filed his defence on 23<sup>rd</sup> January, 2008. No further pleadings were filed, and therefore pleadings closed shortly thereafter. In fact a statement of agreed issues signed by both parties' counsel was filed on 28<sup>th</sup> October, 2009. The following issues were listed for determination by the court.

- (i) Whether on 20<sup>th</sup> April, 2005 the defendant registered himself as owner of L.R.No.Loc.19/Rwathia/1675 illegally or wrongfully and thus deprived the plaintiffs of their right to inherit the land from their deceased father Mr. Amos Kihara Kibuthu.
- (ii) Whether the registration of the defendant as owner of L.R.No.Loc.19/Rwathia/1675 was obtained by fraud.
- (iii) Whether the registration of the defendant as the owner of L.R.No.Loc.19/Rwathia/1675 should be cancelled and the land reverts to the name of the deceased (previous owner) Mr. Amos Kihara Kibuthu to enable a new succession cause be held to determine its rightful heirs.
- (iv) Whether L.R.No.Loc.19/Rwathia/1675 was transferred to the plaintiff by the deceased Amos Kihara Kibuthu lawfully or fraudulently in the life time of the deceased.
- (v) Whether there was any or any adequate consideration or at all for the transfer of L.R.No.Loc.19/Rwathia/1675 by the deceased Amos Kihara Kibuthu in his life time to the plaintiff.
- (vi) Whether L.R.No.Loc.19/Rwathia/1675 was/is a sub-division of L.R.No.Loc.19/Rwathia/738 being one of the subdivisions of the mother Title or at all.
- (vii) Whether L.R.No.Loc.19/Rwathia/738 had been subdivided by the deceased Amos Kihara Kibuthu to different portions and transferred to some of his children and one portion being L.R.No.Loc. 19/Rwathia/1675 to the plaintiff.
- (viii) Whether the plaintiffs were/are entitled to any share of the estate of the deceased Amos Kihara Kibuthu in its entirety after the deceased subdivided and transferred the estate in his lifetime to the rightful heirs (some sons, daughters and the defendant) because the plaintiffs were and are still married far away (though daughters of the deceased).
- (ix) Whether the deceased subdivided and transferred the estate in his lifetime to the rightful heirs and if not so, do the plaintiffs have any recourse to any portion of the estate or at all.
- (x) Whether a succession cause can be filed so as to include the plaintiffs as possible heirs of the deceased when the deceased Amos Kihara Kibuthu subdivided his estate or whether the deceased transferred the same to the rightful heirs during his lifetime.

12. The defendant cannot turn around about a month later and claim that the plaintiffs' suit discloses no reasonable cause of action or that it is frivolous, scandalous or vexatious having identified so many issues. For the above reasons I find no merit in the defendant's application dated 17<sup>th</sup> December, 2009. The application is accordingly dismissed with costs.

**Dated and delivered this 20<sup>th</sup> day of September, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Kinuthia for the plaintiffs/respondents

Kariuki for the defendant/applicant

Kosgei - Court clerk