



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
Civil Suit 492 of 2009**

**ALICE NJAMBI WAITIKI**

**LOISE NJERI KINUTHIA (Both suing as the administrators of the  
estate of the late**

**ROBINSON KINUTHIA MURIAKIARA)...PLAINTIFFS/APPLICANTS**

**VERSUS**

**JOHN MUCHAI.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**PATRICK GITHAE.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JECINTA W. NDIRANGU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**BENJAMIN WAMAGATA MBUTHIA.....4<sup>TH</sup> DEF/RESPONDENT**

**(Sued as Trustees of Kinoo Water Trust)**

**R U L I N G**

1. By a chamber summons dated 9<sup>th</sup> April, 2010, the plaintiffs herein seek to have the defence and counterclaim dated 5<sup>th</sup> November, 2009 struck out and judgment entered in favour of the plaintiff as prayed in the plaint. The plaintiffs are the administrators of the estate of the late Robinson Kinuthia Muriakiara (Deceased). The plaintiffs have sued the defendants who are the trustees of Kinoo Water Trust, seeking to have a caution placed against the deceased's property Land Title No. Dagoreti/Kinoo/786 (hereinafter referred to as the suit property) removed. The plaintiffs further seek an order that the defendants give vacant possession to the plaintiffs. In addition, the plaintiffs also seek judgment for a sum of Kshs.664,000/= being loss of profits from the usage of the land from January, 1981 to August, 2009, and Kshs.8,050/= being amount due and owing to the deceased from the defendants as compensation for use of his land.

2. The plaintiffs' claim is anchored on an agreement entered into between the deceased and Kinoo Self Help Water Project in the year 1981. According to the agreement the deceased allowed Kinoo Self Help Water Project to enter his land and use water, in consideration for compensation of a sum of Kshs.10,050/=. The deceased was also to be given another parcel of land as compensation. In breach of the agreement, the defendant only paid Kshs.2,000/= out of the agreed sum of Kshs.10,050/=. The deceased was also never given another parcel of land as agreed. On 13<sup>th</sup> March, 2002, the defendants caused a caution to be registered on the suit property claiming a licensee's interest. The Land Registrar having heard an objection to the removal of the caution ruled that the caution should remain as registered. Kinoo Water Trust was incorporated in 2008 and is a successor to Kinoo Self Help Water Project.

3. The defendants filed a defence in which they denied the plaintiffs' claim maintaining that the agreement was for the plaintiffs to be paid a sum of Kshs.6,025/= as compensation for some crops which were on the land and that the amount was paid in full. The defendants further explained that the plot which was to be given to the deceased as compensation was Dagoreti/Kinoo/T407 which was to be allocated to the plaintiffs by the Council. The defendants maintained that they did what they were required to do to secure the transfer of that property to the deceased, and therefore the plaintiffs should sue Kiambu

County Council and its successor Kikuyu Town Council who were to compensate the deceased. The defendants maintained that they have been utilizing the suit property for more than 28 years. During that period the defendants have spent over 25 million in the suit property in installations of water reservoirs, boreholes, pump houses and water pipes, to provide water to over 3,000 families including the plaintiffs. The defendants therefore filed a counterclaim seeking an order that it has become the owners of the suit property through adverse possession. The defendants prayed that an order should issue directing the plaintiffs to transfer the suit property to the defendants.

4. The plaintiffs now contend that the defence filed by the defendants is scandalous, frivolous and an abuse of the court process, hence the application dated 9<sup>th</sup> April, 2010 seeking to have the defence and counterclaim struck out. Following an agreement between the parties, written submissions have been duly filed, upon which this court is invited to determine the application.

5. I have carefully considered the application, the affidavit in support and in reply as well as the submissions and the authorities cited. The plaintiffs seek to have the defence and counterclaim struck out under Order VI Rule 13(1)(b), (c) and (d) of the Civil Procedure Rules. Therefore, it is necessary that the plaintiffs demonstrate that the defence and counterclaim filed by the defendants is scandalous, frivolous, vexatious; or that it may prejudice, embarrass, or delay the fair trial of the action; or that it is otherwise an abuse of the process of the court.

6. The plaintiffs main contention appears to be that the defence and counterclaim is frivolous, as the defendants having alleged that they were licencees while registering the caution against the suit property, the defendants cannot now turn around and claim to have acquired the property by way of adverse possession. It is obvious to me that the issues being pleaded herein require evidence. For example, the agreement entered into between the defendants and the deceased has not been exhibited and therefore it is not clear how the plaintiff was to acquire another plot. Nor is it evident as to what would be the effect of breach of that condition. There is also need for evidence so as to establish the circumstances in which the defendants have continued to use water from the suit property, and whether the defendants have acquired any interests on the suit property.

7. As was stated in *Transnational Bank vs Mugaka, [1991] KLR 389*, the question whether or not a plaint or defence discloses a reasonable cause of action, must be determined upon perusal of the plaint or defence alone, together with anything attached so as to form part of the pleadings. Moreover, such a question has to be determined upon the assumption that any express or implied allegations of facts are true. In this case, it is evident that there is need for the court to establish facts upon which the parties rely on their pleadings. This can only be done during the trial. Attempts have been made to introduce evidence through annexures to the affidavit in support of the application. However, such evidence need to be tested at the trial. I do not find it necessary at this stage to go into issues which have been raised. Suffice to state that I find that there are triable issues raised in the pleadings, and that this is not an appropriate case for striking out pleadings. Accordingly, the application dated 9<sup>th</sup> February, 2010 is dismissed.

**Dated and delivered this 12<sup>th</sup> day of October, 2010**

**H. M. OKWENGU**

**JUDGE**

In the presence of: -

Ogolla for the plaintiffs/applicants

Njuguna H/B for defendant for the defendants/respondents

B. Kosgei - Court clerk