



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
Election Petition 393 of 2008**

**RAYMOND MWANGI WAWERU**

**KARIUKI NJOROGE**

**JOSEPH NDUATI NG'ENDO**

**PETER KERUMBI KEINGAI**

**KIAMBU DANDORA FARMERS LTD ..... PLAINTIFFS**

**VS.**

**AMBOSELI COURT LIMITED ..... DEFENDANT**

**RULING**

The Plaintiffs herein brought this suit against the defendant for a declaration that 18.8 hectares of plaintiffs' land belong to them and that it should be excised from LR. NO.15400 and that there should be an injunction restraining the defendant from entering or remaining on the said piece of land. The plaintiffs' claim has been resisted by the defendant who also claims an interest on that parcel of land.

The record before me shows that the parties herein have exchanged the relevant documents and made discovery under the relevant provisions of the Civil Procedure Rules and agreed on the issues for determination.

That notwithstanding, on 30<sup>th</sup> June 2009, the defendant herein moved the court by way of chamber summons under **Order VI rule 13 (a), (b), (c) and (d)** of the **Civil Procedure Rules** and **section 3A** and **63(e)** of the **Civil Procedure Act** for orders that, the plaintiffs' suit be dismissed with costs to the defendant.

The grounds upon which the said order is sought are set out on the face of the said application and also there is an affidavit sworn by one Lucy Wangeci Kairu in support of the said application.

This ruling is in respect of the said application. Both learned counsel for the parties herein have taken the court through the pleadings, the application and the affidavits thereto. I have also found some time to go through the relevant material with a view to addressing the issues herein.

My first observation is that under **Order VI Rule 13(2)** no evidence shall be admissible on an application under **sub-rule (1) (a)** but the application shall state concisely the grounds on which it is made. The filing of affidavits in this case would appear to offend that particular provision, but this is understandable because the said application cites the other sub-rules under **rule 13**.

I have already observed that this suit is in fact ready for hearing, the parties having complied with all the pre-trial procedures. I have tried to comprehend the timing of this particular application in vain. However, parties are at liberty to file whatever applications they deem fit if those or if such applications would be able to determine the issues before the court.

It is common ground that striking out a pleading is a drastic measure that can only be justified in very clear cases. The pleadings in this case in themselves give rise to several issues which in fact both learned counsel have identified must go for trial

With respect therefore, it cannot be said that this case is such a clear case to warrant a summary procedure sought to be invoked by the defendant. The learned counsel for the plaintiffs has cited the case of **Trust Bank Ltd. vs. Amin & Company Ltd. & Anor [2000] KLR 164**, where the following holdings appear:

***“1. The Court can strike out a pleading or have it amended in plain and obvious cases only. If a pleading is arguable or if a pleading raises even a single triable issue, the Court will allow the defendant to argue it.***

***2. In cases falling under Order VI rule 13(1) (b) (c) and (d) of the Civil Procedure Rules, it must be shown to the Court that the pleading is scandalous, frivolous and vexatious, tends to prejudice, embarrass or delay the fair trial of the suit or is an abuse of the process of the court.***

***3. ....***

***4. A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense.***

***5. A pleading which tends to embarrass or delay a fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses, trouble and delay and that which contains unnecessary or irrelevant allegations which will prejudice the fair trial of the action.***

***6. A pleading which is an abuse of the process of the court means a pleading which is a misuse of the court machinery or process.***

***7. Under order VI rule 13(1) (b) (c) and (d) the pleading itself has to show that it cannot stand, because of the pleadings in the plaint and/or matters raised in the affidavits and annexures whereas under order 35(1) (a) of the defendant has to show that the defences he has filed raise at least one triable issue before the defendant can be allowed unconditional leave to defend. In either case, the power given to the Court is enormous and has to be exercised with a lot of care for it has a power that brings a case to an end without hearing the parties in their evidence.”***

With respect, I subscribe and agree entirely with the findings and holdings of the learned judge in that case. Both parties herein have laid a claim over the subject matter. These are competing interests and it would fly in the face of the administration of justice if either of them were to be locked out at this stage of the case.

In view of the foregoing, I find that the application before me is totally misplaced and misconceived. I order that the same shall be and is hereby dismissed with costs to the plaintiffs.

Orders accordingly.

Dated, signed and delivered at Nairobi this 31<sup>st</sup> day of July, 2009.

**A. MBOGHOLI MSAGHA**

**JUDGE**

*Mr. Namada for the Plaintiff*

*Miss Chege for Mr. Ngunjiri for the Defendant/Applicant*