



REPUBLIC OF KENYA



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**Moki v Muithya (Environment and Land Appeal E007 of 2021)
[2022] KEELC 4860 (KLR) (19 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 4860 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E007 OF 2021
LG KIMANI, J
SEPTEMBER 19, 2022**

BETWEEN

JOSEPH MUSEMBI MOKI APPELLANT

AND

RICHARD MWAILU MUTHYA RESPONDENT

(Being an Appeal from the Ruling and Orders of the Senior Principal Magistrate Hon. Kasera delivered on 9th November 2021 in the Chief Magistrate's Court in Chief Magistrate's Land Case E007 of 2021)

JUDGMENT

1. The appellant who was the defendant/applicant in Chief Magistrate's Court in Land Case E007 of 2021 appeals to this court from the ruling and orders of honourable Kasera Senior Principal Magistrate at Kitui delivered on November 9, 2021 against the whole decision on the following grounds of appeal:
 1. That the learned trial magistrate erred in law and in fact by finding that the pleadings filed by the respondent raised a triable issue fit to be heard and determined by way of a full trial.
 2. That the learned trial magistrate erred in law by introducing facts and extraneous matters not specifically pleaded for by the respondent in his impugned pleadings.
 3. That the trial magistrate erred in law by failing to find that the Plaintiff as filed did not disclose any reasonable cause of action against the appellant and was otherwise frivolous, scandalous and a complete abuse of the court process.
 4. That the trial magistrate erred by completely misapplying provisions of order 2 rule 15 of the [Civil Procedure Rules](#) 2010.
2. The ruling appealed from pertains to the defendant's notice of motion application dated March 17, 2021 brought under order 2 rule 15(b), (c) and (d) of the Civil Procedure Rules (2010) seeking that



the suit be struck out and costs of the suit be awarded to the defendant. The grounds relied on are that the suit does not disclose a reasonable cause of action and does not raise a single triable issue fit for determination. He claims that the suit is a sham since from records from the lands office parcel number Yatta/Ndunguni/2030 is still in existence and has never been sub-divided and/or mutated as wrongly alluded to in the suit papers. It is claimed that there are no entries in the land register corresponding to the imaginary parcels known as Yatta/Ndunguni/2534 and Yatta/Ndunguni/2535 capable of being cancelled and/or rectified as pleaded in the plaint.

3. The plaintiff claims that on the 24th of June 2013 he sold a portion of land parcel number Yatta/Ndunguni/2030 measuring 6 acres and that the defendant fraudulently caused sub-division and mutation of the entire parcel of land creating Yatta/Ndunguni/2534 and Yatta/Ndunguni/2535 and registering them in his name. The plaintiff prayed for a declaration that the sub-divisions were illegal and registration should revert back to Land Parcel number Yatta/Ndunguni/2030 registered in his name.
4. The honourable trial Magistrate found that the court's power to strike out pleadings is to be exercised sparingly and cautiously because the court exercises the power without being fully informed on the merits of the case through discovery and oral evidence. It was found that the survey sheet filed by the plaintiff showed portions 2534 and 2535. While dismissing the application the trial court found that the plaintiff indeed sold land to the defendant and that a triable issue had been raised which needs to be determined by way of a trial.

Appellant's written submissions

5. The appellant submits that the plaint has a case theory wrongly propagated by the respondent in the lower court that the appellant herein had sub-divided Land Parcel No Yatta/Ndunguni/2030 into Yatta/Ndunguni/2534 and Yatta/Ndunguni/2535 which he denies doing. The appellant submits that from the land records, Yatta/Ndunguni/2534 and Yatta/Ndunguni/2535 do not exist. He attached a copy of the original title, official search and green card to demonstrate that the original parcel is still intact as well as the cadastral map in his list of documents. Conversely, the appellant submits that the respondent did not attach or produce evidence to demonstrate that the said sub-divisions existed and had records which were capable of being cancelled as sought in the plaint and going for a full hearing would be a great injustice to the appellant and a waste of precious judicial time.
6. It is therefore the appellant's submission that the respondent failed to demonstrate the existence of a single triable issue fit to be determined by the trial court by way of a full trial and thus the trial court erred by finding that the respondent had raised a triable issue.
7. Further, the appellant submits that the plaintiff never sought for and/or pleaded for cancellation of ownership in relation to the original title Yatta/Ndunguni/2030 and thus the trial court erred by suggesting that the issue in contention was whether the Land Parcel Yatta/Ndunguni/2030 had been acquired lawfully or not. He faulted the trial magistrate for introducing new matters.
8. It is the appellant's submission that the pleadings are scandalous, vexatious and/or frivolous as per the definition set forth by the Court of Appeal in *Trust Bank Limited vs Amin Company Ltd & Another*(2000)eKLR 164 and *JP Machira vs Wangechi Mwangi and Nation Newspaper* Civil Appeal No 179 of 1997. He also contends that the suit against him is untenable for all purposes and intents while relying on the decision in *Yaya Towers Limited vs Trade Bank Limited*(in liquidation) (2000)eKLR where the court quoted the holding in *Paolo Murri vs Gian Battista Murri & Another Civil Appeal No 59 of 1999*(unreported) where the court held that the remedy of striking out is



applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse on the process of the court or that it is unarguable.

9. The respondent has not filed submissions even though they were given 14 extra days to file their submissions on 28/6/2022. At the time of writing this judgement no submissions are on record.

Analysis and determination

10. The role of an appellate court has been restated in case law and in the case of *Abok James Odera t/a A J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] e KLR, it was stated with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

11. The grounds of appeal as stated in the memorandum of appeal are as hereunder:-

a) Whether the learned trial Magistrate erred in law and in fact by finding that the pleadings filed by the Respondent raised a triable issue fit to be heard and determined by way of a full trial

12. According to the plaint, the matter in dispute is the claim that the plaintiff sold a portion of land parcel Yatta/Nduguni/2030 measuring 6 acres at a total price of Ksh 240, 000 but the defendant in the trial court fraudulently caused sub-division and mutation of Land Parcel Yatta/Nduguni/2030 creating Yatta/Nduguni/2534 and Yatta/Nduguni/2535 and registering them in his name. The plaintiff prayed for a declaration that the sub-divisions were illegal and that they do revert back to land parcel number Yatta/Nduguni/2030. The copy of the title deed attached to the affidavit in support of the notice of motion indicates that the defendant is the proprietor of the said parcel of land as from September 10, 2015 while on the other hand, the copy of the title deed in the defendant’s bundle of documents indicates that the plaintiff was the proprietor of the said parcel of land as from August 13, 2007. This indicates that there must have been transfer of the title, an issue which the parties have not addressed fully.

13. It is the appellant’s contention both in the trial court and in this appeal that the said sub-divisions do not exist and he annexed a copy of the certificate of official search and a copy of the green card to land parcel Yatta/Nduguni/2030 to his supporting affidavit. However, the plaintiff has shown a map attached to his bundle of documents certified as a true copy by the District Surveyor, Kitui that shows the existence of sub-divisions 2534 and 2535. It is upon on the strength of this document that the trial court noted in her ruling that:

“The survey sheet filed show portions 2434 and 2535 the plaintiff states that he did not transfer his land to the defendant.”

14. I agree with the trial court that the presence of the survey sheet/map showing subdivisions 2534 and 2535 is evidence that there is an issue worth further investigation by way of a trial. Since the suit has not gone to full trial, we are not certain of the author of the said survey map since on the other hand, the green card to the Land Parcel Yatta/Nduguni/2030 indicates no mutation and/or subdivision and further, the cadastral map on the defendant’s list of documents does not indicate the presence of the said sub-divisions either.



15. The court notes that subdivision of land and issuance of new title deeds is a long process that involves surveyors who are mandated to prepare a subdivision schemes, which must be signed by a registered physical planner. The process further involves obtaining consent of the Land Control Board. New numbers for the subdivisions of land will normally be assigned before registration of the transfer of the subdivisions into the names of the owners of the subdivisions. All these processes can only be ascertained during a full trial.

16. I also find that a look at the plaintiffs written statement filed in court on January 14, 2021 shows that the plaintiff indeed is challenging the registration of the defendant as owner of the entire parcel of land Yatta/Ndunguni/2030 and the alleged sub-divisions and not just the subdivision of the same as claimed by the appellant. At paragraph 5 of the plaint it is averred as follows:-

“The defendant fraudulently caused subdivision and mutation of land parcel No Yatta/Ndunguni/2030 creating Yatta/Ndunguni/2534 and Yatta/Ndunguni/2535. The plaintiff then enumerates particulars of fraud. Paragraphs a) to d) and f) relate to the subdivision and registration of land parcel Yatta/Ndunguni/2030 while paragraph e states:-

e) Illegally securing and registering land parcel No Yatta/Ndunguni/2030”

17. In the case of *Job Kilach v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Rono* (2015) eKLR, the learned Justices of Appeal stated as follows

“A *bona fide* triable issue is any matter raised by the defendant that would require further interrogation by the court during a full trial. The *Black's Law Dictionary* defines the term “triable” as, “subject or liable to judicial examination and trial”

18. It is my considered view that the suit by the respondents suit raises triable issues and the trial court did not err in finding so.

b) Did the trial Magistrate err in law by introducing new facts and extraneous matters not specifically pleaded for?

19. It is trite in law that parties are bound by their pleadings. In Independent *Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others* [2014]eKLR it was held that:

“It is now very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

20. The plaintiff in the trial court seeks a declaration that the sub-divisions on his land were illegal, that they be cancelled and do revert back to land parcel number Yatta/Ndunguni/2030 registered in his name. However, the title deed to land parcel number Yatta/Ndunguni/2030 is not registered in the plaintiff's name but in the defendant's name since September 10, 2015. The defendant exhibited are three agreements for the sale of the suit property between the parties. One is dated 24/7/2013 for the sale of 3 acres, the other dated 24/6/2013 for the sale of 6 acres and the final one is dated 4/2/2015 for the sale of 13 acres at a purchase price of Ksh 850, 000 to the appellant herein.

21. The appellant herein has contended that the trial Court in its ruling raised a new issue not specifically prayed for since the plaintiff never sought for and or pleaded for cancellation of ownership in relation to land parcel number Yatta/Ndunguni/2030 and that this was wrongly introduced. I however disagree



with this submission since the plaintiff did state in the plaint that the land belongs to him and he only sold a portion of the land to the defendant. It is my opinion that the ownership of the suit property is a matter in issue. The trial Magistrate did not introduce any new issues not specifically prayed for.

22. Further as found previously in this judgement the respondent herein did claim in his plaint at paragraph 5 (e) the the appellant illegally secured and registered land parcel No Yatta/Ndunguni/2030.

c) Whether the trial magistrate erred in law by failing to find that the Plaint as filed did not disclose any reasonable cause of action otherwise frivolous, scandalous and a complete abuse of the court process.

23. On the first limb of this ground of appeal as to whether the plaint disclosed a reasonable cause of action, it is noted from a look at the notice on motion, the appellant brought his application dated March 17, 2021 under order 2 rule 15 b), c) and d) of the Civil Procedure Rules (2010) but did not anchor the application under sub-rule a) which provides that:

“At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that— (a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

24. Indeed if an application is anchored under rule 1 (a) the *proviso* to rule 1 states that “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.”

25. However even under this ground having found that there are triable issues raised in the plaint, I do find that the plaint does disclose a reasonable cause of action related to a claim of fraudulent registration and sub-division of land alleged to belong to the plaintiff.

26. On the second limb of the above ground of appeal that the plaintiffs suit is otherwise frivolous, scandalous and a complete abuse of the court process I wish to quote the case of Trust Bank Limited v HS Amin & Company Ltd & another [2000] eKLR cited by the appellant where in quoting Bullen & Leake and Jacobs precedents of pleading (12th Edition) on chapter dealing with striking out pleadings at page 145 it stated:

“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 and expense. “

27. The court further stated that:-

“And a pleading which tends to embarrass or delay fair trial is described as 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 and lastly a pleading



which is abuse of the process of the court really means in brief a pleading which is a misuse of the court machinery or process.”

28. The concepts of vexatious, frivolous, scandalous pleadings when they are taken to be an abuse of the process of the court have been discussed in *Halsbury's Laws of England* (Civil Procedure) (Volume 11 (2009) 5th Edition, Paras 1-1108; At paragraph 534 the concept of ‘abuse of process’ is explained in the context of the court’s inherent power to stay or strike out proceedings; it is explained in the following terms:

534. Abuse of process.

The most important ground on which the court exercises its inherent jurisdiction to stay proceedings is that of abuse of process. This power will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity (*See Dawkins v Prince Edward of Saxe Weimar (1876) 1 QBD 499*). The applicant for a stay on this ground must show not merely that the claimant might not, or probably would not, succeed, but that he could not possibly succeed on the basis of the pleadings and the facts of the case.

It is an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. (*See Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581, PC*).

A party may be guilty of an abuse of the process of the court even though he may comply with the strict literal terms of an applicable rule of law, where he does so for improper or ulterior motives or purposes. (*see Castanho v Brown and Root (UK) Ltd [1981] AC 557, [1981] 1 All ER 143, HL*).

29. Can the plaintiffs suit be said to be without substance or groundless or fanciful or can it be said to lack *bona fides* and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense? In my view the plaintiffs claim cannot be described in the terms that the Appellant claims.
30. On the courts power to strike out a suit, the court in *Yaya Towers Limited vs Trade Bank Limited (in liquidation)* (2000)eKLR cited by the appellant, the court quoted the decision in *Paolo Murri v Gian Battista Murri & another* Civil Appeal No 59 of 1999 (unreported):

“....., it was said that the power to strike out was one which should be exercised only in plain and obvious cases. In my judgment, the summary remedy of striking out is applicable whenever it can be shown that the action is one which cannot succeed or is in some way an abuse on the process of the court or that it is unarguable. It has nothing to do with a case being complex or difficult or that it requires a minute or protracted examination of the documents and the facts of the case. The summary jurisdiction was stated by Lord Greene, MR in *Cow v Casey* [1949] 1 KB 474 at 481 as follows:-

“A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the court has inherent jurisdiction to dismiss that, which is an abuse of the process of the court. It is a jurisdiction, which ought to be sparingly exercised and only in 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.”

31. In my opinion, it is not plain and obvious that the subdivisions to Land Parcel Yatta/Nduguni/2030 do not exist because of contradicting evidence from both parties to the suit. It requires a full trial to determine this issue and whether or not the sub-divisions, if they exist, are illegal as claimed by the plaintiff.
32. In *D T Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, Madan JA, stated:

“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. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”
33. My finding is that the trial court did not err in hesitating to invoke the draconian power to striking out the suit without subjecting the issues at hand to a full trial. Further, I do find that the fact that there is a triable issue is indicative of the fact that the she suit is not frivolous, vexatious or an abuse of the process of the court. I therefore agree with the trial Magistrate that the plaint has raised a triable issue.

d) Whether The Trial Magistrate Erred By Completely Misapplying Provisions Of Order 2 Rule 15 Of The Civil Procedure Rules 2010.

34. The above ground has been considered elsewhere under the other grounds of appeal and I do find that the trial court did not misapply the provisions of order 2 rule 15 of the *Civil Procedure Rules* 2010.
35. It is therefore my opinion that the trial Magistrate hon Kasera Senior Principal Magistrate did not err in her ruling delivered on November 9, 2021 and that the appeal should be dismissed to allow the suit to proceed to full hearing.
36. The final orders of the court are that the appeal herein lacks merit and is dismissed with no order as to costs. The trial courts file to be returned to the Chief Magistrates Court for hearing and final determination.

DELIVERED, DATED AND SIGNED AT KITUI THIS 19TH DAY OF SEPTEMBER 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Judgement read in open court and virtually in the presence of-

Musyoki Court Assistant

Masaviru Advocate for the Appellant

No attendance for the Respondent

