



Shah & 5 others v Lucy Njeri Ngunyangi & Maxwell Munene (Both Sued as Legal Representatives of Ben Ngunyangi Iragu) & 2 others (Environment & Land Case 115 of 2019 & Civil Case 317 of 2011 (Consolidated)) [2022] KEELC 13646 (KLR) (19 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13646 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 115 OF 2019
& CIVIL CASE 317 OF 2011 (CONSOLIDATED)
FM NJOROGE, J
OCTOBER 19, 2022
FORMERLY NAKURU HCC NO. 122 OF 2002

BETWEEN

GIRISH VAGHJI SHAH 1ST PLAINTIFF

VIPUL PATEL 2ND PLAINTIFF

AND

LUCY NJERI NGUNYANGI & MAXWELL MUNENE (BOTH SUED AS LEGAL REPRESENTATIVES OF BEN NGUNYANGI IRAGU) 1ST DEFENDANT

LAND REGISTRAR NAKURU 2ND DEFENDANT

AS CONSOLIDATED WITH
CIVIL CASE 317 OF 2011

BETWEEN

LUCY NJERI NGUNYANGI 1ST PLAINTIFF

MAXWELL MUNENE 2ND PLAINTIFF

ESTHER WANGUI 3RD PLAINTIFF

JENIPHER WANGARI 4TH PLAINTIFF

AND

CHIEF LAND REGISTRAR DEFENDANT



RULING

The Application

1. The Plaintiffs in HCCC No 317 of 2011 are the Applicants herein. By a Notice of motion application dated June 22, 2022 and filed in court on June 27, 2022 brought under Article 159 of the Constitution and Section 1A, 1B and 3A of the Civil Procedure Act, 2010, they seek for orders that the Amended Plaint dated September 30, 2021 filed on October 15, 2021 be struck out for being frivolous, meant to delay the fair trial of the suit and an abuse of the court process.
2. The application is supported by the sworn affidavit of Lucy Njeri Ngunyangi sworn on June 22, 2022 in which she states that she has the authority of the other Applicants to swear this affidavit. The grounds on the face of the application and the supporting affidavit are as follows:
 - a. that the Plaintiffs in HCCC 317 of 2011 became owners of the suit property upon the death of their family patriarch;
 - b. that the 1st Defendant filed his Statement of Defence dated June 12, 2002;
 - c. that when ordered to substitute Lucy Njeri Ngunyangi and Maxwell Munene for their deceased patriarch, the plaintiffs purported to sue the said Lucy Njeri Ngunyangi and Maxwell Munene but summons have not been served upon them; that in the body of the Amended Plaint, the 2nd Plaintiff had not been shown to be served with the Amended Plaint; that she was served with the amended plaint via telephone;
 - d. that the 1st Defendant is said to be served with the summons through their advocates.
 - e. that the plaintiffs described the two as a “male adult” in paragraph 2 of the amended plaint;
 - f. that their names do not appear in the list of persons to be served with the amended plaint;
 - g. that there is no verifying affidavit to the plaint;
 - h. that though the plaint states that the 1st defendant presented himself to the 2nd defendant as the lawful owner of the suit property while he was not, the lease was not given to him but to a third party who later transferred it to him;
 - i. Since 2002 the plaintiffs have been reluctant to prosecute the suit;
 - j. The plaintiffs donated powers of attorney to 2 persons but the power of attorney said nothing about the prosecution of the suit and the attorneys can not therefore prosecute the suit; that it is illegal and an abuse of the court process for the plaintiffs to be reluctant to prosecute their suit and send other persons to deal with the case without giving any reasons as to why they can not prosecute the case by themselves;
 - k. The attorneys have purported to prosecute the suit and file documents without being made parties to it;
 - l. There are three consolidated suits whose subject matter is the same suit land;
 - m. From the pleadings and conduct of the prosecution of this case it is clear that justice to parties is being delayed;



- n. That from the form and substance of the amended plaint, there is clear intention to delay the disposal of the matter;
 - o. That the claim in the defence that the 2nd defendant has been wrongfully impleaded contrary to the [Government Proceedings Act](#) has for the last 20 years been ignored by the plaintiffs.
3. I will now delve into the respondent's response.

The Response

4. Both the Plaintiff and Defendants in Nakuru ELC 519 of 2013 were, naturally, not opposed to the application. The plaintiffs whose plaint was amended filed no replying affidavit but relied on submissions and authorities filed by Mr Konosi, advocate on October 14, 2022.

Submissions

5. There are no submissions filed by the applicant but the respondent's submissions filed late on October 14, 2022 while the preparation of this ruling was in its final stages are on record.

Determination

6. It is my opinion that the main issue for determination is whether the Amended Plaint dated September 30, 2021 ought to be struck out.
7. Order 2 Rule 15 of the [Civil Procedure Rules](#) provides that a party may at any stage of proceedings apply to strike out pleadings for disclosing no reasonable cause of action; being scandalous, frivolous or vexatious; for being prejudicial or embarrassing or for being an abuse of the court process.
8. The proper wording of the said Order is as follows:

“ 15. Striking out pleadings [Order 2, rule 15.]

- (1) 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.
- (2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.
- (3) So far as applicable this rule shall apply to an originating summons and a petition.”



9. Order 2 rule 15 (1)(a) was not relied on in the application and thus reliance on an affidavit evidence is deemed proper in the instant application.
10. Is the amended plaint dated September 30, 2021 frivolous, meant to delay the fair trial of the suit, or otherwise an abuse of the process of the court?
11. I must, in order to place the instant application in proper perspective, give a brief history of the litigation relating to the suit property in so far as is decipherable from the record before me.
12. In Nakuru HCCC 317 of 2011 the plaintiffs, being beneficiaries of the estate of one Ben Ngunyangi sued the Chief Land Registrar seeking orders declaring them owners of the suit land, a prime property in Nakuru, that the defendant be restrained from changing the particulars of the owners in the land registry and that they be given consent to enable sale of the property.
13. Before the suit was filed the plaintiffs had secured the grant of representation to the estate of their late father and armed with it had sought the consent from the defendant to sell the property. Details would later emerge that Gichiri Ndua, the person whom they had intended to sell to was the plaintiff who later sued them for specific performance in Nakuru ELC 519 of 2013. While at the defendant's office the plaintiffs discovered that not only were Shah and Patel claiming ownership of the suit land but they had also sued their family patriarch, before he died, in case No Nakuru HCCC 122 of 2002 which had already abated by the time of that discovery. When confronted with the two claims to title, the Chief Land Registrar is said to have written to the Land Registrar Nakuru to change the particulars in the register to reflect Shah and Patel as proprietors of the suit land to the exclusion of the plaintiffs. The plaintiff's failure to establish their claim in Nakuru HCCC 317 of 2011 in the first instance can be majorly attributed to their mention in the body of the plaint of one case that had been filed by two gentlemen known as Shah and Patel, who were also claiming the same land. The Chief Land Registrar never filed any defence and hearing proceeded ex parte. The court found that the Chief Land Registrar had not demonstrated evidence to support his preference for the title held by Shah and Patel against the plaintiff's title. The court held also that the failure by the plaintiffs to sue Shah and Patel in Nakuru HCCC 317 of 2011 was mischievous, and that there was nothing to show that Shah and Patel were aware of the suit yet the proceedings before it required their participation, and it dismissed the suit on July 30, 2012. On September 10, 2012 an application for review of the said judgment was filed. Some of the grounds relied on were as follows:
 - a. the judgment was final and did not settle the ownership issue yet the injunction order issued had the term stating that it would last until the ownership issue was resolved;
 - b. the prayer that the defendant be restrained from changing particulars of registration was granted at page 6 of the judgment yet at page 8 (orders) that prayer had been declined;
 - c. Shah and Patel appeared to have been brought into the picture by the defendant yet they had not shown any interest in the suit;
 - d. it would be in the interests of justice for a review to issue the orders sought in the plaint;
 - e. the defendant appeared to be the person fighting for Shah and Patel.
14. Consequent to the review application, the court reviewed its judgment and granted the prayers sought in the plaint fully and a decree was extracted. Soon thereafter Shah and Patel applied to be joined to the suit as interested parties and the court allowed their application on November 22, 2013. The plaintiffs lodged an appeal against the court's decision on November 26, 2013. I have not seen any record of the outcome of that appeal.



15. By an application dated February 14, 2014 the interested parties applied for the setting aside of the judgment.
16. As stated before, prior to these events, the plaintiffs appear to have sold the suit land to one Gichiri Ndua vide an agreement dated September 6, 2010 and he paid 10% of the price. The sale was subject to the plaintiffs obtaining consent from the government and from the court to sell the suit land. Soon thereafter in Nakuru HCCC No 519 of 2013 the would-be buyer sued the sellers seeking specific performance upon their refusal to proceed with the sale despite payment of deposit. That suit was transferred to the Chief Magistrate's court by an order of the court dated September 20, 2013; in the lower court it was assigned No Nakuru CMCC 1074 of 2013. The defendants at the same time filed a defence in Nakuru HCCC No 519 of 2013 in which they pleaded that they were unable to proceed with the sale since third parties (Shah and Patel) had appeared, claiming ownership of the suit land, and they therefore offered to refund the deposit. I have not seen any order on the record stating that that suit was at any time thereafter re-transferred to this court. By an order made on February 10, 2015 the suit 1074 of 2013 (formerly Nakuru HCCC No 519 of 2013) was stayed pending the hearing of Nakuru HCCC 122 of 2002 and Nakuru Nakuru HCCC 317 of 2011. (I think the ruling by Ohungo J dated October 12, 2018 erroneously stated that Nakuru HCCC 317 of 2011 had been stayed by Sila J.) It is therefore a mystery as to why the title to the application now filed by Mr Mindo on June 27, 2022 as well as the amended plaint appear to suggest that Nakuru HCCC No 519 of 2013 was consolidated with the other two suits while the express opinion of Omondi J was that the other related suits needed to await the hearing of Nakuru HCCC No 317 of 2011 and Nakuru HCCC 122 of 2002 which she consolidated. It is upon Mr Mindo and Mr Konosi therefore to demonstrate to the court that that additional consolidation was done.
17. Notwithstanding the foregoing, this court's view which I must express at this juncture, is that the possibility of exploration of the merit of the claim by the plaintiff in Nakuru HCCC No 519 of 2013 is purely predicated on whether the defendants therein can establish their title against the plaintiffs in Nakuru ELC 115 of 2019.
18. The judgment given in the ex parte proceedings on July 3, 2012, the subsequent review orders and the decree and all consequential orders were set aside by Emukule J on December 6, 2013 and he further ordered that the suit be heard de novo. (However the confusing thing is that the ruling from which that order was extracted appears to have been issued by H. Omondi J on September 22, 2014. Nakuru ELC 122 of 2002 and Nakuru HCCC No 317 of 2011 were ordered consolidated in that ruling. I can see no ruling by Emukule J on the file record.) The other issue that adds to the confusion is that there are two sets of consolidation orders in this matter, one by Omondi J on September 22, 2014 and the other by Sila J. on 10/2/2015. The orders of Omondi J indicate that Nakuru HCCC 122 of 2002 is to be the lead file while orders by Sila J are silent on the issue. Since Nakuru ELC 122 of 2002 was baptised Nakuru ELC 115 Of 2019 upon receipt of the file record in the Environment and Land Court registry the latter is therefore the lead file for all the current litigation, by whatever description, over the suit land as we speak. It is noteworthy that under the consolidation no re-arrangement of parties was done.
19. It is important to note that the jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In the case of *The Co-operative Merchant Bank Ltd v George Fredrick Wekesa* (Civil Appeal No 54 of 1999) the Court of Appeal held as follows:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice,



embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.”

20. The Applicants contend that the Amended Plaint dated September 30, 2021 is meant to delay the determination of the case as it holds other stayed cases in abeyance. They also contend that the plaint was not effectively served upon parties and that it does not contain a verifying affidavit. They also argue that from the pleadings the 1st and 2nd Defendant have no connection between them since the lease was transferred to the 1st Defendant from one Mahinda Joseph Mbutia.
21. In the case of *Yaya Towers Limited v Trade Bank Limited* (In Liquidation) (Civil Appeal No 35 of 2000) the court expressed itself 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.”
22. In the present case, this court's finding is that the amended plaint is not frivolous. It raises allegations of fraud as well as the Defendants' connection with the suit property which this court finds that they are triable issues. Whether the amended plaint was served or not is in my view not an issue because Mr Mindo has already appeared for the 1st defendant in the suit Nakuru ELC No 115 of 2019 whose plaint was amended, and the 1st defendant comprises of two persons who are expressed to be legal representatives of their deceased family patriarch's estate; Mr Mindo's presence for the same parties as plaintiffs in Nakuru ELC 317 of 2011 is also noteworthy, as is the fact that the suits having been consolidated, any order of striking out of the plaint would, without Mr Mindo's seeking of elucidatory directions in his application, leave everyone in quandary as to the fate of the remaining litigation. In conclusion, though I do not find the amended plaint to be the epitome of elegant drafting, I hardly think that the objection raised about their description as “male adult” not goes into the core of the dispute and it does not therefore form a proper basis for striking out the amended plaint. It is merely a rectifiable defect in that pleading. In any event the title in the amended plaint has clearly stated that the 1st defendant is being sued as “the legal representatives of Ben Ngunyangi Iragu, Deceased.” If anything, it is the applicants who must be faulted due to their failure, for quite unclear reasons, to give themselves a proper description in the original plaint dated October 31, 2011 in Nakuru HCCC 317 of 2011.
23. The fact that there is no verifying affidavit annexed to the Amended plaint and the error in arrangement of the 1st and 2nd Plaintiff in the case citation in my view does not amount to a ground to strike out an amended plaint while the original plaint dated April 24, 2002 had a verifying affidavit attached to it; it is a defect that can be corrected by way of an order that a verifying affidavit be filed within a time frame.
24. Regarding the joinder of the Chief Land Registrar and the Land Registrar, I find it proper to state that the civil procedure rules emphasize that no suit shall be defeated by the misjoinder or non-joinder of parties and the court shall adjudicate the dispute between the parties before it. However, as the Land Registrar and the Chief Land Registrar are government officers with emoluments paid from the consolidated fund, this court finds it necessary that the plaintiff should join the Attorney General as a defendant under Section 12(1) of the *Government Proceedings Act* and serve him with summons.



25. As for the issue of the plaintiff's use of attorneys, it is premature to deal with at the present stage as that would require the taking of evidence which this court is not wont to do in interlocutory proceedings. That issue, though sufficient to bar the testimony of the purported attorneys, would not be sufficient to occasion the striking out of a pleading that has been found to have triable issues, as the twin matters of admissibility of evidence and eligibility to testify on behalf of any person are reserved for the determination of the court at the hearing stage. This is therefore a matter that can be dealt with at another stage and it can not be entertained now.
26. It is this court's view that the reasons advanced by the Applicants in seeking to strike out the Amended plaint are thus not compelling. Furthermore, the instant case has already been consolidated with Nakuru HCCC 317 of 2011 and shall be heard together and the same parties would have to be heard in the event striking out occurs. I think the best course of action in the circumstances would be to have the correctable offending defects rectified to enable an expedition of the hearing and determination of this dispute.
27. Before I pen off I must indicate to the parties that it is time the true substance of this dispute was addressed to enable final disposal. The agony of having to deal with a multiplicity of suits in this dispute, as observed by H Omondi J in her ruling dated September 22, 2014, does not have to be a burden on any party any longer in view of the analysis I gave herein before to the effect that since the likelihood of proceeding to hearing of the claim in Nakuru ELC 517 of 2013 is predicated on the outcome thereof, only Nakuru ELC 115 of 2019 and Nakuru HCCC 317 Of 2011 (as consolidated) need be heard and determined to resolve the dispute substantially. Measures need be taken by parties to ensure expedition of the said hearing.
28. In view of the foregoing, I find that the Amended plaint dated September 30, 2022 ought not be struck out. However, in the upshot, I find that the application dated June 22, 2022 is not entirely without merit. It has been partially successful in bringing out issues of some trite significance but which are remediable before hearing. These are the description in paragraph 2 of the amended plaint and the absence of a verifying affidavit. I hereby order as follows:
- a. The amended plaint dated September 30, 2022 shall be further amended to as sufficiently as possible address the applicant's concerns regarding the proper description of the defendants at paragraph 2;
 - b. The plaintiff shall join the Attorney General as the 3rd defendant under Section 12(1) of the *Government Proceedings Act* and shall serve him with summons at his Nakuru office;
 - c. The further amended plaint shall be accompanied by a verifying affidavit and it shall be filed and served within 5 days of this order;
 - d. The plaintiffs in Nakuru ELC 115 of 2019 shall ensure compliance without fail within 14 days of this order and no documents shall be filed outside the said period without leave of court formally applied for with sufficient justification given;
 - e. The defendants in Nakuru ELC 115 of 2019 shall ensure compliance without fail within 28 days of this order and no documents shall be filed outside the said period without leave of court formally applied for with sufficient justification given;
 - f. The timelines in (d) and (e) above shall run concurrently;
 - g. There will be a mention of the suit on October 27, 2022 for the purpose of dealing with the issue of whether Nakuru ELC 519 of 2013 was or should be consolidated with Nakuru



ELC 115 of 2019 and Nakuru ELC 317 of 2011 and when, and all counsel including counsel handling Nakuru ELC 519 of 2013 shall appear for the purpose of being heard;

- h. Each party shall bear their own costs of the application.

DATED, SIGNED AND DELIVERED AT NAKURU BY ELECTRONIC MAIL ON THIS 19TH DAY OF OCTOBER, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

