



Fugicha & 3 others v Musa & another (Environment & Land Case 019 of 2021) [2022] KEELC 13641 (KLR) (17 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13641 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO
ENVIRONMENT & LAND CASE 019 OF 2021
PM NJOROGE, J
OCTOBER 17, 2022**

BETWEEN

**HERSI FUGICHA 1ST PLAINTIFF
ABDI HOKILE 2ND PLAINTIFF
JILO HERSI 3RD PLAINTIFF
SADIA SORA DIBAH 4TH PLAINTIFF**

AND

**BISHAR MUSA 1ST DEFENDANT
SADIA ALI HUKA 2ND DEFENDANT**

RULING

1. This application states in its face that it is brought under Order 2 Rule 15 (1) (a) of the [Civil Procedure Rules 2010](#). It is dated January 11, 2022 and it seeks the following orders:
 1. That the suit and/or plaint herein be struck out as against the 1st Defendant.
 2. That in the alternative and without prejudice to the foregoing, the name of 1st Defendant be struck out from the suit.
 3. That the 1st Defendant be awarded the costs of this application and the costs of the entire suit.
 4. That this Honourable Court do grant any other or further orders as may be deemed fit in the circumstances.
2. The application is supported by the affidavit of the 1st Defendant/Applicant sworn on January 13, 2022 and has the following grounds;
 1. That the plaintiff's pleadings do not disclose any cause of action against the 1st Defendant.



2. The plaintiff does not reveal any liability or cause for the 1st defendant to be called upon to answer.
 3. That from the face of the plaintiffs' prayers in its pleadings, no action is maintainable as against the 1st Defendant.
 4. That from the annexed statement and documents, the plaintiffs have failed to establish or reveal a *prima facie* case against the 1st defendant.
 5. Other and further grounds shall be adduced at the hearing of this application.
3. The application was canvassed by way of written submissions.
 4. The first defendant claims that the dispute in this case concerns the 2nd defendant and the plaintiff and for this reason he should be removed from the suit. He says that the suit does not disclose any reasonable cause of action and as such should be struck out under Order 2 Rule 15 (1) (a) of the *Civil Procedure Rules, 2010*. He says that in the case of *DT Dobie & Co (K) Ltd v Muchina* [1982] KLR, the court of appeal defined the term "reasonable cause of action" to mean "an action with some chance of success when allegations on the plaint only are considered. A cause of action will not be considered reasonable if it does not state any facts as to support the claimed prayer".
 5. The plaintiffs oppose the application and unequivocally state that the suit evinces a clear cause of action. To demonstrate the veracity of their assertion they proffer that the plaint dated August 6, 2009 at paragraph 10 states as follows "That in the month of November, 2007 the defendant without any colour of right and without the consent of the plaintiffs herein who are the rightful owners of the plots came and entered into the suit plot and fenced the same with metal posts with an intention of developing the same".
 6. The plaintiffs proffer that at paragraph 11 of their plaint, they state as follows:

"That the defendant who has an adjacent plot within the same area, joined the plaintiff's plot and fenced all of them and further destroyed the plaintiffs' posts and barbed wire. The plaintiff has put sand and planted trees on the plot".
 7. The plaintiff's assert that in *DT Dobie & Co K Ltd v Muchina* (1982) KLR the Court of Appeal defined "reasonable cause" as "An action with some chance of success when allegations in the plaint only are considered"

The plaintiffs quote Madaru J.A as having opined as follows:

"No suit ought to be summarily dismissed unless it appears so hopeless that it partly and obviously discloses no reasonable cause of action and is to peak as to be beyond redemption and incurable by an 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"
 8. In the same Court Madam, JA opined as follows:

"At this stage, the Court ought not to deal with any merits of the case for that is function solely reserved for the Judge at the trial as the court is usually fully informed as to deal with the merits without discovery without oral evidence and tested by cross-examination in the ordinary way".



9. To buttress their assertion, the plaintiffs' also proffered the case of *Crescent Construction Co Ltd v Dephis Bank Ltd* [2007] eKLR.

10. I do note that the plaint in this case was filed on August 6, 2009. This court does not understand why it took the 1st defendant 11 years to realize that the plaintiff did not evince any reasonable cause of action. This is an old case which should have been heard and determined a long time ago.

The plaintiffs claim that the 1st defendant encroached upon his plot. A claim for encroachment clearly evinces a reasonable cause of action which can only be debunked during oral hearing of the case. I agree with the plaintiffs that the plaint discloses a reasonable cause of action. The plaintiffs' claims are best canvassed during the hearing of the suit when the parties will be heard by the court before a determination can be made in favour or against the parties depending on the evidence they adduce in support of their competing assertions.

11. In the circumstances, the following orders are hereby issued;

- a. This application is dismissed.
- b. Costs concerning this application are awarded to the plaintiffs.
- c. The parties will come to court for further directions on October 31, 2022.

Delivered in open court at Isiolo this 17th day of October, 2022 in the presence of;

Court assistant: Balozi

Parties and/or advocates are not in court.

HON. JUSTICE P.M NJOROGE

JUDGE

