



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 1264 of 2005**

**JOHN KINGARU GICHIRI .....1<sup>ST</sup> PLAINTIFF**

**MARGARET NJAMBI KINGARU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**FURNCORN LIMITED .....DEFENDANT**

**RULING**

The application dated 28<sup>th</sup> July 2006 and filed herein on 3<sup>rd</sup> August 2006 sought the striking out of a suit filed in Court on 19<sup>th</sup> October 2005 on the grounds that it discloses no reasonable cause of action against the Defendant, it is scandalous, frivolous, and vexatious or it is otherwise an abuse of the Court process.

Another reason given for striking out the suit was that the Plaintiff's claim, if any was time barred.

There was also a prayer for costs of the suit.

The supporting affidavit to this application was deponed to by one **Solomon Kiore**, the Managing Director of the Defendant/Respondent. He stated that on 15<sup>th</sup> February 1991 the Defendant bought from Murigo Housing Development Company Limited the property known as **L.R. No. 8789/1/53** and was subsequently issued with a title deed.

That all the allegations contained in the Plaint do not raise any reasonable cause of action against the Defendant in the light of the agreement entered into between the Defendant herein and Murigo Housing Development Company Limited.

That the Plaintiff's herein allege that the Defendant applied and consolidated their plot known as **L.R. 8789/1/53A** an allegation that has no basis in law as the Defendant is not possessed of any legal powers to consolidate people's property into its own and that this is why the suit is scandalous, frivolous or vexatious and an abuse of the Court process.

A replying affidavit was sworn to by the 1<sup>st</sup> Plaintiff who stated he had the authority of the 2<sup>nd</sup> Defendant to do so.

He stated in that affidavit that his claim was based on fraudulent transfer to the Defendant/Applicant which to date had not been rectified; that to date the house the deponent had constructed on the suit plot was occupied by his tenant and that the Defendant had not claimed the same except that the documents of title show that his title was given to the Defendant, which act was fraudulent, which action had not

ceased; that a casual look at the defence of the Defendant shows he entered into some arrangement with a third party and that that arrangement cannot take away his rights.

The deponent avers that the Defendant does not dispute that the Plaintiff's plot forms part of his land though he alleges either to have bought the same or got it from a third party.

That as far as the deponent is concerned his plot was fraudulently taken by the Defendant and that the issue of fraud itself raises a triable issue and a cause of action and that the applicant has not specifically denied the particulars of fraud; hence the prayer that this application be dismissed so as to allow the matter to proceed to full trial.

In this Court on 13<sup>th</sup> June 2007 counsel for the parties, one **Ongwae** and one **Gatumuta** appeared to advance their arguments on the application. **Mr. Ongwae** for the applicant relied on the grounds on the face of the application and the supporting affidavit adding that the Defendant was a stranger to the Plaintiff. He prayed that the suit should be struck out.

**Mr. Gatumuta** on the other hand opposed the application on the basis of the replying affidavit and stated that the suit raises triable issues since the Defendant blames a third party for this transaction whom it should join to the proceedings as third parties.

That this is not a proper case where the suit should be struck out as there are triable issues.

That this application is looking for a shortcut to conclude the case but that it is proper for the Court to look at the plaint and defence to find triable issues. Counsel asked for dismissal of the application with costs thereof.

The Plaintiff's plaint in paragraph 3 claims that his **plot number 53A** is a subdivision out of **L.R. No. 8789/1**. That in 1994, the Defendant who had bought several plots from Murigo Housing Development Company Limited applied to consolidate the various plots into one title; but that in course of doing so, the Defendant fraudulently and without the knowledge or authority of the Plaintiff, included the latter's **plot No. 53A** into its one title to form plot number **L.R. 15950**; thus converting the Plaintiff's property to its own use.

The Plaintiffs then go on to give the particulars of fraud in paragraph 5 of the plaint against the Defendant.

This is the crux of the suit before this Court.

The Defendant denies the particulars of fraud or ever consolidating its plot number **L.R. 15950** and including therein the Plaintiff's **plot number 53A**. Instead it says, it bought **plot No. 15941** from Murigo Housing Development Company Limited which was subdivided from Plot No. **L.R. Number 8789/1/53** together with the development erected thereon, which was ago-down.

If this case goes on to full hearing, the Court will be called upon to determine whether the plot in dispute (No. 53A Kasarani) ever existed on the ground, and if so, if it was owned by the Plaintiffs jointly and/or if in 1994 it was converted and included in either **plot number 15950** or **15941** whichever was purchased by the Defendant, and if so fraudulently.

This is a triable issue which cannot be decided at the stage of this application for striking out, lest this Court be accused of ploughing into the merits of the case before hearing the evidence of the parties.

And since, according to the Plaintiffs, these events took place in 1994 and the suit herein was instituted in the year 2005, this case cannot be said to be time-barred – see Section 7 of the Limitation of Actions Act – Chapter 22 Laws of Kenya

Application for striking out pleadings is a serious one, particularly in land claims, as it may end up denying

a party a right to be heard on his claim. The Court's discretion thereon should be exercised in very clear, plain and obvious cases. This is not one of such cases.

As the late *Madan J.A.* put it in C.A. No. 37 of 1978 D.T. Dobie & Company (K) Limited v. Muchina,

*“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no cause of action and is so weak as to be beyond redemption by amendment. If a suit shows 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 the case before it”.*

In that case some authorities were cited in one of which Moore v. Lawson & Another (1915)31 TLR 419 Lord Justice Swinfen Eady had this to say:

*“It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases. I do not think, its exercise would be justified merely because the story told in the pleadings was highly improbable and one which was difficult to believe could be proved”.*

In Kellaway v. Bury (1852) 66 It 599 also quoted in Civil Appeal No. 37 of 1978 (ibid) *Deyman J.* had this to say at pages 600 and 601

*“That is a very strong power and should only be exercised in cases which are clear and ‘beyond all’ doubt ... the court must see that the Plaintiff has got no case ‘at all’, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments”.*

Emphasis mine.

This dispute before me relates to **plot number 53A** and fortunately both parties have mentioned Mirigu Housing Development Company Limited the original owner of **plot No. 8789/1** and who is alleged to have sold this plot to the Defendant and/or a portion thereof to the Plaintiffs.

It is only fair that this suit goes to full trial so that somebody representing that company can appear to testify in it and to give his side of the story in respect to the claims made by both parties for the proper determination of the dispute.

The arguments placed before this Court by Counsel for the applicant have not convinced me that this is one of those clear and obvious cases where an order should be made to strike out the plaint.

I therefore make an order to **dismiss** the application dated 28<sup>th</sup> July and filed in Court on 3<sup>rd</sup> August 2006 with costs.

**Dated** and **Delivered** at Nairobi this 22<sup>nd</sup> day of June 2007

**D. K. S. AGANYANYA**

**JUDGE**