



REPUBLIC OF KENYA



**Francis v Thomas & 2 others (Environment & Land Case 87 of 2021)  
[2022] KEELC 14945 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14945 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 87 OF 2021  
NA MATHEKA, J  
NOVEMBER 23, 2022**

**BETWEEN**

**SAMWEL KATANA FRANCIS ..... APPLICANT**

**AND**

**ESTATE OF CERI VOUGHAN THOMAS ..... 1<sup>ST</sup> RESPONDENT**

**JOAN ATIENO DIMA ..... 2<sup>ND</sup> RESPONDENT**

**MICHAEL A. OCHOK ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The application is dated July 6, 2022 and brought under sections IA, 3 and 3A, of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya, order 2 rule 15 (l) at b, c, d and (3) and order 51 rule 1 of the *Civil Procedure Rules 2010* and seeking the following orders
  1. That this honourable court be pleased to strike out this suit with costs for being frivolous, vexatious and an abuse of the process of the court.
  2. That costs of this application be provided for.
2. It is based on the grounds that the suit brought before this court falls short of legal threshold for adverse possession as prayed for in the originating summons. That the suit is scandalous, frivolous and vexatious and is an abuse of the court process therefore incompetent and ought to be struck out with costs. That the plaintiff/ respondent has in his supplementary affidavit dated December 3, 2021 and filed in court on December 8, 2021 at paragraph 10 admitted that he does not stay on the suit properties and therefore he is not in actual occupation, possession or otherwise of the suit properties. That the plaintiff/ respondent and applicant are both in agreement that the plaintiff/ respondent is not in actual possession or occupation of the suit properties by the fact that the plaintiff/ respondent has admitted that he does not stay or reside on the suit properties and his claim for adverse possession



is stillborn. That the plaintiff's/ respondent's claim is therefore frivolous, and otherwise an abuse of the process of the court.

3. The applicant states that he is in occupation of the land and currently he has even planted seasonal crops which he will soon harvest. That the 2<sup>nd</sup> and 3<sup>rd</sup> respondents are both employees of M/s Asige Keverenge and Anyanzwa advocates who were the advocates for the deceased Ceri Vaughan Thomas. That the applicant has not explained how the property was transferred 20 years after the demise of Ceri Vaughan Thomas.
4. This court has considered the application and the submissions therein. The applicant's claim according to their originating summons dated May 10, 2021 is that he has acquired Parcel No 2445/VI/MN CR No 14503 and Plot No 2446/VI/MN CR No 13504 by adverse possession, belonging to Ceri Vaughan Thomas. In his supporting affidavit the applicant deponed that Ceri Vaughan Thomas expressly gave him the suit properties but died before he could transfer the suit properties to him. The applicant maintained that it has been more than 12 years since he took possession of the suit property and he argued that the initial owner's title has since been extinguished at the expiry of 12 years by way of limitation of time. He prayed for court to order the land registrar Mombasa to register him as the lawful owner of Parcel No 2445/VI/MN CR No 14503 and Plot No 2446/VI/MN CR No 13504.
5. The 3<sup>rd</sup> respondent filed a replying affidavit dated November 3, 2021 in response to the originating summons and deponed that he and the 2<sup>nd</sup> respondent are the lawful registered owners of Parcel No 2445/VI/MN CR No 14503 and Plot No 2446/VI/MN CR No 13504 and denied that the applicant has acquired title by adverse possession. The deponent contended that the applicant could not maintain a claim of adverse possession if he claimed that the previous owner Ceri Vaughan Thomas allocated them same to him. The 3<sup>rd</sup> respondent argued that the applicant has not tendered any evidence to support his claim of being in actual physical occupation of the suit properties and claimed that title has already passed to him and the 2<sup>nd</sup> respondent therefore the applicant cannot claim ownership, possession and or occupation of the suit properties by virtue of Limitation of Actions Act against Ceri Vaughan Thomas, himself or his co-owner.
6. Striking out of pleadings involves the exercise of discretion which should be exercised only in the clearest of cases and sparingly. Parties should be allowed by court to have their day in court and argue out their case, and the only time that right to be heard can be denied is when their case is so hopeless that it plainly discloses unreasonable cause of action. An application for striking out pleadings is brought under order 2 rule 15, which provides as follows:
7. 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'
8. The respondents state that the originating summons fall short of the legal threshold for adverse possession hence it is being scandalous, frivolous, and vexatious and abusing the court process. Even though the 3<sup>rd</sup> respondents holds the view that the story being pleaded by the applicant is highly improbable and difficult to believe, I find that the applicant has every right to seek from court any relief he deems fit. It is the duty of court upon hearing all parties and examining the evidence before it to



determine whether the suit has merits or not. In *James Kimani Kabogo vs Kenya Commercial Bank Limited & Another* (2014) eKLR, it was held;

An act of striking out of pleadings by the court should therefore be exercised cautiously and with a lot of restraint. Reasons advanced to the court for striking out a pleading must be so cogent and water-tight and the pleading must be so useless prima facie that any reasonable or prudent man would confidently find the pleading so be so baseless and a waste of time.

9. The main aim is to sustain rather than terminate a suit, striking out a suit is a draconian step which must be used as a last resort. This was a position that was espoused in *Geminia Insurance Co Limited vs Kennedy Otieno Onyango* [2005] eKLR where Musinga J (as he then was) had the following to say:-

'It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.'

10. The Court of Appeal also stated in *DT Dobie & Co (Kenya) Ltd vs Muchina* [1982] KLR that:-

'As the power to strike out pleading is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously. The court should aim at sustaining rather than terminating a suit. As long as a suit can be injected with life by amendment, it should not be struck out.'

11. The applicant is entitled to pursue his claim however implausible and improbable his chances of success are. It is up to the applicant to demonstrate to court at what point did his occupation became adverse to the respondents. Applying the principles of the decisions cited above to the present circumstances, the application before court dated July 6, 2022 lacks merit and is dismissed with costs to the applicant.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2022.**

**NA MATHEKA**

**JUDGE**

