



Ndungu (Suing as the Legal Representative of the Estate of Jerad Ndungu alias Jerad Ndungu Nduti - Deceased) v Karanja (Sued in her own capacity and in her capacity as the Legal Personal Representative of Karanja Makimi -Deceased) & another (Environment & Land Case E092 of 2021) [2022] KEELC 14780 (KLR) (10 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14780 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E092 OF 2021**

**JG KEMEI, J
NOVEMBER 10, 2022**

BETWEEN

REVEL KINYANJUI NDUNGU PLAINTIFF

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JERAD
NDUNGU ALIAS JERAD NDUNGU NDUTI - DECEASED**

AND

**JANE NYOKABI KARANJA (SUED IN HER OWN CAPACITY AND IN HER
CAPACITY AS THE LEGAL PERSONAL REPRESENTATIVE OF KARANJA
MAKIMI -DECEASED) 1ST DEFENDANT**

LAND REGISTRAR-KIAMBU 2ND DEFENDANT

RULING

1. The 1st Defendant filed the instant Motion dated 2/2/2021 under Order 2 Rule 15 *Civil Procedure Rules* seeking orders that;
 - a. The Plaint filed herein be struck out for not disclosing a reasonable defense (sic) and being an abuse of the process of the Court.
 - b. Costs of this application be awarded to the 1st Defendant.
2. The application is based on the grounds that LR No. ndeiya/ndeiya/394 is not registered in the name of the 1st Defendant and that the 1st Defendant is not the legal personal representative of the estate of the late Karanja Makimi.
3. The motion is supported by the Affidavit of Jane Nyokabi Karanja who averred that the suit land, LR No. Ndeiya/Ndeiya/394, is registered in her deceased husband's name; Karanja Makimi according to



the copies of title deed and official search marked AK1. That the late Karanja Makimi passed on in August 2003 and no Petition for Grant of Letters of Administration of his estate has ever been sought and she thus lacks capacity to be sued as the administratrix of his estate.

4. The Application is opposed. The plaintiff, Revel Kinyanjui Ndungu swore his replying affidavit on 16/9/2022 and termed the Application as misconceived, unmerited and an abuse of the process of the Court. That the application falls short of the requirements of Order 2 Rule 15(2) Civil Procedure Rules and on that basis alone the application having been expressed under order 2 Rule 15(1) Civil Procedure Rules ought to be declined and the matter be heard on merit. That indeed the cause of action as contained in the plaint dated 9/8/2021 is against the Defendant in her own capacity as a trespasser and it raises triable issues warranting full hearing. That the Defendant has not denied being in occupation of the suit land and ought to be evicted and the Application therefore should be dismissed.
5. On 20/9/2022 directions were taken and parties elected to canvass the application by way of written submissions. At the time of writing this Ruling, only the 1st Defendant had filed submissions dated October 12, 2022 through the firm of Mwaura Shairi & Co. Advocates.
6. It was submitted that the 1st Defendant is not a trespasser on the suit land since the Plaintiff has never been registered as the owner of the suit land and neither has he ever been in occupation and possession thereof. That the 1st Defendant has been in occupation of the suit land since 1969 and as the widow to the deceased registered proprietor who was in occupation for over 40 years. That accordingly the Plaintiff's suit is time barred under Section 7 of the Limitation of Actions Act. She urged the Court to dismiss the Plaintiff's suit with costs.
7. The germane issue for determination is whether the Application is merited.
8. The Application is premised on Order 2 Rule 15 Civil Procedure Rules which states;

“ 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. The Plaintiff contends that the Application does not meet the threshold for Order 2 Rule 15 (2) Civil Procedure Rules and according to him it is made pursuant to Order 2 Rule 15(1) and should be dismissed.
10. That said it is trite that the Court has discretion to strike out any pleading at any stage of the proceedings. The said discretion must be exercised judicially and sparingly. See the case of Nguruman Ltd -vs- Shampole Group Ranch & others, Civil Appeal No.73 of 2004(2007) 2 EA 353, where the Court held that:-

“The power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution and this comes from the realization that the Court must not drive away any litigant however his case may be from the seat of justice. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is non-starter.”
11. More caution has been called for in the case of DT Dobie & Co. (K) Ltd..vs. Joseph Mbatia Muchina & Another, Civil Appeal No.37 of 1988, where the Court held that:-

“A pleading will not be struck out unless it is demurrable and something worse than demurrable and the rule is only acted upon in plain and obvious cases and the jurisdiction should be exercised with extreme caution. 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 and must not dismiss an action merely because the story told in the pleadings was highly improbable and one which was difficult to believe could be proved.”
12. The power to strike out cases should be exercised by a Court in clear and obvious cases so as not to drive a litigant from the seat of justice. See the case of Blue Sky EPZ Ltd -vs- Natalia Polyakova & Anor. (2007) eKLR, where the Court held that:-

“The power to strike out pleadings is draconian and the Court will exercise it only in clear cases where upon looking at the pleadings concerned, there is no reasonable cause of action or defence disclosed. A defence must raise a triable issue”.
13. Lastly in the case of Crescent Construction Co Ltd vs. Delphis Bank Limited, [2007] eKLR, the Court held as thus;

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the Rules of natural justice require that the Court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”
14. With the principles enunciated in the cases cited above in mind I shall now evaluate the application.
15. The claim of the Plaintiffs against the Defendants and more specifically the 1st Defendant is that they are the owners of the suit land being Ndeiya /Ndeiya/394 which parcel measuring 4.8 hectares was allegedly allocated to their deceased father one Jerad Ndungu by the County Council of Kiambu vide the minutes of 1957 which minutes were confirmed in 1972. That in 1968 their late father allowed one Karanja Makimi to occupy the suit land as his caretaker. As fate would have it Jerad passed away in 1986 before getting a title for the suit land whereupon the Plaintiffs commenced succession proceedings in



- the estate of their father Jerad and it is at this point, they allege, that they learned that Karanja had fraudulently caused himself to be registered as the owner of the suit land.
16. That the 1st Defendant has refused to relinquish the title to the Plaintiffs hence the filing of the suit. Inter alia that the 1st Defendant and her family have refused to vacate the suit land despite demand to do so and under para 17 of the Plaint the Plaintiffs have pleaded particulars of trespass, fraud, misrepresentation, deceit and illegality against the 1st Defendant.
 17. Ultimately the Plaintiffs have sought eviction inter alia against the 1st Defendant from the suit land, a permanent injunction restraining the 1st Defendant from interfering with the suit land, general damages and costs of the suit.
 18. I agree with the 1st Defendant that there is no evidence to show that she has been sued as the legal representative of the estate of Karanja Makimi. It is also undisputed that the suit land is registered in the name of the said Karanja Makimi who is said to be deceased. The fact of the demise of the said Karanja is commonly accepted by the parties save that the 1st Defendant's argument is that though she is the wife of the late Karanja she is not the administratrix of his estate and therefore lacks capacity to be sued with respect to the issues emanating from the acquisition of the title by the deceased Karanja. That may be so.
 19. However, it is not lost on the Court that the 1st Defendant has admitted that she has lived on the land since 1973 and that her deceased husband is the proprietor of the land.
 20. To the extent that the 1st Defendant has been sued for trespass, I am satisfied that the Plaintiffs' cause of action against her is reasonable and cannot be said to be an abuse of the process of the Court.
 21. I subscribe to the tried principle that where a case as pleaded is not obviously hopeless, in the interest of dispensing substantive justice as the Courts are enjoined to do under Sections 1 A and 1 B of the *Civil Procedure Act* and Article 159 (2) (d) of *the Constitution*, the Court should lean more towards sustaining a suit so that it can be determined on merit instead of terminating it summarily by striking out the plaint especially where a suit such as the present one is still in its preliminary stages and there is still room to have the plaint amended should the Plaintiff consider it necessary. I find that this is a case that should be sustained as there is an obvious cause of action on the face of the pleadings against the 1st Defendant.
 22. On the other hand, the 2nd Defendant filed a preliminary objection dated 23/3/2022 on grounds that;
 - “The suit is barred by provisions of Section 4 & 7 of the *Limitation of Actions Act*. Section 7 of the *Limitation of Actions Act* provides;
 - ‘An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.’The suit is an abuse of the Court process.
The suit is incompetent and ought to be struck out with costs.”
 23. None of the parties filed their submissions in respect of the preliminary objection. Given the Ruling of the court issued on the 21/6/2016 where the Plaintiffs were granted leave of the court to file the suit out of time, it is my respectful view that the preliminary objection is moot.
 24. In the upshot the application dated the 2/2/2022 is unmerited. It is dismissed.



25. Costs shall be in favour of the Plaintiffs.

26. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 10TH DAY OF NOVEMBER,
2022 VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of:

Ms. Karungu for Plaintiff

Mwaura for 1st Defendant

2nd Defendant - Absent

Court Assistants – Phyllis / Kevin

