

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

Civil Case 533 of 2002

JOHN NGATIA KARAGU.....1ST
PLAINTIFF

JOHNSON GITHII KINGORI.....2ND
PLAINTIFF

JAMES MUCHAI NGUGI suing on behalf of MWIKI WELFARE ASSOCIATION.....3RD
PLAINTIFF

VERSUS

MWIKI COMPANY LTD.....
DEFENDANT

RULING

The plaintiff by way of this Chamber Summons brought under Order VI Rule 13 (i) (b) and (c) of the Civil Procedure Rules seeks orders that the defendant's statement of defence dated 26th April 2002 be struck out for being scandalous, and frivolous and may prejudice, embarrass or delay the fair trial of this suit and that pursuant to the foregoing judgment be entered forthwith against the defendant in terms of the plaint with appropriate directions thereof. The plaintiff also prays for costs of this application.

The application is based on the ground that the defendant has merely and spuriously denied the plaintiff's claim, that the defence does not candidly and earnestly traverse the multifarious allegations of fact and/or law canvassed in the plaint and that the defence is a sham par excellence.

The application is opposed by the defendant who has filed replying affidavit in which he avers that the plaintiffs purchased plots in 1980 and the Mwiki Welfare Association was registered on 12th July 2001; that the plaintiffs relationship with the defendant was contractual and the Association was not a party to the contract; that the suit land reference No.8469/4 was obsolete and non-existent at the time the suit was commenced; that the suit is statute barred and that the plaintiffs' suit offends the provisions of the Civil Procedure Rules where many persons are involved.

Mr. Njagi counsel for the plaintiffs submitted that the defendant does not deny that members of the plaintiffs Association purchased and acquired rights in plots excised from LR NO. 8469/4 and that the plaintiffs took possession of the plots and that the plaintiffs only want the transfer to them of the plots they have already taken possession.

Mr. Macharia counsel for the defendants submitted that by the time those plots were purchased the said Association was not in existence and therefore there is no contractual relationship between the plaintiffs and the defendant and the plaintiffs individually and that that the plaintiffs ought to have brought this suit in their individual capacity.

He further submitted that the defence raises triable issues and that it ought not be struck out.

The exercise of this summary power to strike out a pleading is only in plain and obvious cases when the pleading in question is on the face of it unsustainable.

Counsel for the plaintiff has not convinced the court that the defence is scandalous nor frivolous or vexatious and has no substratum. At this stage as MADAN JA as he then was said in **DT DOBIE & COMPANY LTD VS. JOSEPH MBARIA MUCHINA & ANOTHER CA NO. 37 OF 1978** (unreported) the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at trial as the court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross examination in the ordinary way. I find that the defence raises trial issues and therefore I decline to struck out the defendant's defence and dismiss the plaintiff's application with costs to the defendant.

Dated and delivered at Nairobi this 7th day of July 2006.

J.L.A. OSIEMO

JUDGE