**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**
**AT NAKURU**

**CIVIL CASE NO. 460 OF 1999**

**PATRICK NGARI MBACHU……..…….....PLAINTIFF**

**VERSUS**

**FILOMENA NJOKI KAMAU…...……...…DEFENDANT**

**RULING**

This is an application made under the provisions of **Order VI Rule 13(1) (b) and (d) of the Civil Procedure Rules** by the defendant, Filomena Njoki Kamau. She is seeking the orders of this court that the plaint filed by the plaintiff, Patrick Ngari Mbachu be struck out for being scandalous, frivolous, vexatious and an abuse of the due process of the court. The grounds in support of the application were that the defendant was the first and absolute registered owner of the suit parcel of land. The defendant stated that her title over the suit land was indefeasible and could not be challenged in a suit. The defendant further stated that she came into possession of the suit land and was registered as its owner after complying with all the requirements of the law. The application is supported by the annexed affidavit of the defendant, Filomena Njoki Kamau. The application is opposed. The plaintiff, Patrick Ngari Mbachu has filed a replying affidavit opposing the application. In essence the plaintiff has deponed that the defendant obtained the title of the suit land fraudulent, as she was not a member of the land buying company which purchased the land and subsequently authorised the District Land Registrar to issue title deeds in respect of the said suit land.

At the hearing of the application, Mr Kahiga, Learned Counsel for the defendant submitted that the application was made under the provision of **Section 143 of the Registered Land Act.** He submitted that the plaintiff had not shown any evidence that would indicate that he had a cause of action against the defendant. He submitted that the plaintiff had failed to prove by affidavit that he should be allowed to proceed with the suit. He submitted that the plaintiff had not established that the defendant fraudulently obtained the title in respect of the suit land. He further argued that the plaintiff had made mere allegations without any documentary proof to prove fraud by the defendant. He argued that since there was no suit against the land buying company, the plaintiff's suit was a non-starter as there was no nexus between the shares issued by the company and title to land held by the defendant. It was contended on behalf of the defendant that being a first registered owner, the title issued to the defendant under the Registered Land Act was indefeasible. It was further argued that the plaintiff's suit as framed could not be granted by this court. The defendant therefore urged the court to allow the application with costs and strike out the plaint filed by the plaintiff.

Mr Githui, Learned Counsel for the plaintiff opposed the application. He reiterated the contents of the replying affidavit. He submitted that the certificate of search of the register at the District Land's Office showed that the owner of the suit land was another person other than the defendant. He submitted that the issue of who the owner of the suit land was had not been definitively determined. He further submitted

that the affidavit sworn by the defendant and that sworn by the plaintiff were contradictory and the issues raised therein could only be resolved by viva voce evidence being adduced and tested on cross-examination. He therefore urged the court to dismiss the application with costs.

I have considered the submissions made by the rival parties to this suit. I have also carefully read the pleadings filed by the parties herein. The issue for determination is whether the plaint filed by the plaintiff is so "hopeless" that it should be struck out as contemplated by the rules. According to the plaint, the plaintiff avers that the suit land known as *Kijabe/Kijabe Block 1/3046* was registered in the name of the defendant fraudulently. Although the plaintiff did not plead particulars of fraud as provided by **Order VI Rule 8 of the Civil Procedure Rules,** the pleadings are clear that the plaintiff was entitled to the said parcel of land having been a shareholder of Maai Mahiu Kijabe Longonot Company Ltd. The plaintiff has averred that the defendant was issued with the title of the said parcel of land even though she was not a member of the said land buying company. I have evaluated the affidavit evidence adduced by the parties to this suit. It is not clear how the defendant got herself registered as the owner of the suit land. It is also not clear who the real owner of the suit land is. The plaintiff and the defendants have annexed to their affidavits documents which are conflicting on who the actual owner of the suit property is. The conflict inherent in the said documents can only be resolved by viva voce evidence being taken and the averments made by the parties to this suit being tested on cross-examination.

I am not prepared at this stage of the trial to shut out the plaintiff from prosecuting his case. While it may be true that the defendant is the first registered owner of the suit property, that does not mean that all the actions undertaken by the defendant prior to being issued with the said title cannot be subjected to legal scrutiny.

The fact that a party is a first registered owner to parcel of land which is in dispute does not entitle him a right to shut out a party questioning his ownership of the suit property at an interlocutory stage. In the instant case I am not prepared to hold that just because the defendant is a first registered owner of the suit land, the plaintiff's suit by that very fact becomes "hopeless". In the circumstances of this case, I do find that the issues in dispute can only be resolved by this case being heard and determined in a full trial. I have read the proceedings which were conducted earlier in this case. I have noted that the defendant had been restrained by an injunction issued by this court from selling, alienating, mortgaging, charging or in any way dealing with the suit land pending the hearing and determination of the main suit. This court did find that the plaintiff had established a prima facie case with a probability of success. The facts that were pertaining at the time the said application was argued were still in existence at the time the current application was argued.

In **D. T. Dobie & Company (Kenya) Ltd –versus- Muchina [1982] K.L.R.1** at page 9 paragraph 5, Madan JA held that:

> **"The court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the trial judge at the 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."**
>
> At page 9 paragraph 25:
>
> **"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by 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 for a court of justice ought not to act in darkness without the full facts of the case before it."**

Having considered the facts of this case, it is only just fair that the plaintiff be allowed to ventilate his

case. Land being a emotive issue, the plaintiff should only be shut out after he has had his day in court.

For the reasons stated, the application filed by the defendant, lacks merit. The same is dismissed with costs to the plaintiff.

**DATED at NAKURU this 28th day of February 2005.**

**L. KIMARU**

**JUDGE**