REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 14 OF 2004

PETER KAGURU NGUNG'U ……..……..……..…1ST PLAINTIFF

DAVID MUCHIRI NG'ANG'A ……..……..……..… 2ND PLAINTIFF

JOHN NJOROGE MUNGAI ……...……..… 3RD PLAINTIFF

JAMES MBUGUA KAMAU ……...……..…….…..… 4TH PLAINTIFF

FRANKLIN MWANGI WARUINGI …...…….....……..…… 5TH PLAINTIFF

PETER N. MUNGAI …… 6TH PLAINTIFF

JOHN K. MUNGAI ……...……...…… 7TH PLAINTIFF

GEORGE WAWERU GATANGA ……..……...……..… 8TH PLAINTIFF

SIMON MAKUMI NJUGUNA ……..…… 9TH PLAINTIFF

JANE WANGOI MURIITHI ….……..…… 10TH PLAINTIFF

JOHN MUCHIIRI MWANGI……..……..……..…….…… 11TH PLAINTIFF

EUSTACE MAINA WACHIRA ……..……..……..……..… 12TH PLAINTIFF

ERASTUS N. MWANGI …..……..…… 13TH PLAINTIFF

NDINDIKA SELF HELP GROUP ……...……..… 14TH PLAINTIFF

-VERSUS-

JAMES KIMANI KAIRO ……..…..……..… 1ST DEFENDANT

SIMON MUNGAI MBUGUA ……...…… 2ND DEFENDANT

RULING

Before me is a Chamber Summons brought under Order 6 rule 13(1) (b), (c) and (d) of the Civil Procedure Rules as well as section 3 and 3A of the Civil Procedure Act (Cap.21). It seeks for orders that the defendants' defence be struck out with costs, secondly that judgement to be entered for the plaintiffs

against the defendants as prayed in the amended plaint. Thirdly that costs of the suit and the applicant be awarded to the plaintiffs. There are grounds on the face of the application as well as supporting affidavit sworn by Peter Kaguru Ndung'u. The application is opposed and a replying affidavit was filed.

At the hearing of the application, Mr. Otieno for the applicants stated that the matter began with the Kapseret Land Disputes Tribunal and an award was given. The said award was adopted by the subordinate court on 1st February 2002 and a decree of the court was issued on 5th March 2002 in Eldoret CMCC Award No.54 of 2001. The respondents were not satisfied and moved to the High Court and filed MCA.83 of 2002 and sought orders of certiorari and prohibition. The application was struck out by Justice Etyang' on 22nd July 2002. The respondents applied for the reinstatement of the application. Justice Juma dismissed that application. The respondents then lodged a notice of appeal, which was served on the applicants on 2nd October 2003. The notice of appeal was for an appeal to the Court of Appeal. The notice of appeal should have been served within 7 days from the date of filing, however, it was served after three months. He submitted that no memorandum of appeal has yet been served. Therefore, the defence filed to this suit before this court is scandalous, frivolous and vexatious. He submitted that the plaintiffs have filed this suit to enforce the court order. If the defence is left on record it will delay this case.

Mr. Ngigi Mbugua for the respondents opposed the application. He submitted that the claim is not a liquidated claim. The plaint is seeking for prayers that cannot be granted at the application stage. He stated that this court does not have jurisdiction to entertain the case. He further submitted that enforcement of matters under the Land Disputes Tribunal Act (1990) is for the subordinate court and not for the High Court. After filing the defence, an amended plaint was filed, which shows that the defence raises triable issues. He stated that discretion of the court to strike out pleadings has been described to be of a draconian nature by the court. The court has not been given a demonstration of the prejudice that will be suffered by the plaintiffs. He further submitted that a judgement cannot be entered against the defendants through an application.

I have considered the arguments by both counsels. I have also perused the pleadings and documents filed herein. This case was brought by way of plaint and the plaint was served on the respondents and appearance was entered on their behalf and a defence filed. I am requested through this application to strike out the defence filed on the grounds that it is scandalous, frivolous and vexatious. I have not been given any details of matters in the defence that are scandalous, frivolous or vexatious. I have only been informed that the applicants wish to enforce a court order through this case. Secondly, that if the defence is left on record it will delay this case. In my view, both these arguments cannot amount to a defence being scandalous, frivolous or vexatious.

Every party who is sued in a case and is served is entitled to defend himself by filing papers in response to the allegations made and orders sought against him. He is also entitled to be heard. It is true that this court has discretion under Order 5 rule 13 (b) to strike out a pleading filed in court for being scandalous, frivolous or vexatious. That, in my view, is a draconian step. The court has to be convinced that the pleading is indeed scandalous, frivolous and vexatious. In this particular matter, the reasons given do not, in my view, establish that the defence is scandalous, frivolous and vexatious. The mere fact that this suit intends to enforce orders of a court does not mean that a defendant who has been served should not defend himself, nor does the fact that there will be a delay in the finalization of the matter mean that a defendant should be prevented from defending himself. The defendants were served and have a right to defend themselves. I find no merit in this application.

In view of the above reasons, I dismiss the application with costs to the respondents/defendants.

Dated and Delivered at Eldoret this 9th Day of February 2005

George Dulu

Ag. Judge

In the Presence of: