



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI  
CIVIL CASE NO. 1207 OF 2003**

**GRACE NJERI KIARIE..... PLAINTIFF**

**VERSUS**

**EVANSON K. GITAU..... 1ST  
DEFENDANT**

**REV. JULIUS GACHUCHE..... 2ND  
DEFENDANT**

**PARISH PRIEST MUCHAGARA..... 3RD  
DEFENDANT**

**PARISH-ANGLICAN CHURCH OF KENYA..... 4TH  
DEFENDANT**

**ANGLICAN CHURCH OF KENYA**

**(SUED THROUGH PRESIDING BISHOP**

**ARCHBISHOP NZIMBI ..... 5TH DEFENDANT**

**RULING**

The Applicant herein, Grace Njeri Kiarie has moved this Court by way of a Chamber Summons dated 15th September 2004 brought under Order VI Rule 13 (1) (a) (b) and (c) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act,

Chapter 21 of the Laws of Kenya. She seeks an order for the striking out of the 1st Defendant's defence dated 17th August 2004 on the following grounds.

- 1) That the same discloses no reasonable defence**
- 2) That the same raises no triable issues, consisting of only mere denials**
- 3) That it is frivolous vexatious and an abuse of the process of Court.**

The applicants also prays for costs. In her plaint as amended on 17th May 2004, the Applicant prays for judgment against the 1st Defendant as follows:

- a) A permanent injunction restraining him from contracting any statutory marriage during the subsistence of his marriage to the Plaintiff (Applicant).**

**b) A declaration that the 1st Defendant holds the property known as L.R. No. Maragua/Ridge/223 in trust for the Plaintiff (Applicant).**

**c) An order that the trust be determined and the said property L.R. Maragua/Ridge/233 be registered in the name of the Plaintiff (Applicant).**

An interlocutory injunction was granted herein on 26th January 2004 and remains in force in relation to prayer (a) above pending the hearing and determination of the suit. When this application was heard before me on 8th March 2004, the Respondents' advocate intimated to the Court that he had filed grounds of opposition but Counsel for the applicant Ms Mungai objected saying she had not been served with any. The Court did peruse the file and found that no grounds nor replying affidavit were on record at that time. Counsel for the Respondent then applied, and was allowed to reply to this application on points of law only.

Counsel for the Applicant submitted on all grounds on the strength of the Applicants affidavit of 15th September 2004. I feel compelled to point out at that by virtue of the provisions of Order VI Rule 13 (2) no evidence is admissible on an application for striking out under Rule 13 (1) (a). I will disregard the said affidavit in so far as the same is sought to prove that the defence complained of discloses no reasonable defence, raises no triable issues and is a mere denial. Counsel submitted that paragraphs 2,3,4,5 and 6 of the Defence are mere denials. Specifically on paragraph 4 Counsel pointed out that the same denies knowledge of the parcel of land claimed in prayer (b) and (c) above. Paragraph 7 was said to deny the jurisdiction of this Court while paragraph 8 is a denial of each and every allegation contained in the Plaintiff. My study of the Defence proves Counsel right on all the above points and also her submission that there no specific answers given to specific allegations made in the plaintiff wherein the applicant claims ownership of an existing property, alludes to a marriage between herself and the Defendant and an intended marriage between the Defendant and a specified person which is supported by an order exhibited as "GNK3" in the present application. Counsel has submitted that the defence is not a defence as should not be entertained by this Court as seen in RAGHBIR SINGH CHATTE -vs- NATIONAL BANK OF KENYA CIV. APPEAL NO. 50 of 1996 wherein it was held that a general traverse is not a sufficient defence.

In his submission on points of law Counsel for the Respondent only submitted that the applicant had not explained in what way the defence is frivolous vexatious and an abuse of the process. He also submitted quite rightly that striking out under Order IV Rule 13 (1) should only be allowed where there is no reasonable doubt that the defence is a mere denial. He asked the Court in exercising its discretion to consider the weight of the matter since the suit involves family land. According to Rule 3.4.1 of the Civil Procedure Rules of England Vol 1 (2003) the power to strike out pleadings is to be exercised only where pleadings are unreasonably vague, incoherent, vexatious, scurrilous or obviously ill-founded and those which do not amount to a legally recognizable claim or defence. It is good law, as submitted by Counsel for the Applicant that where a defence raises no triable issue it is suitable for striking out. Also that a mere denial does not amount to a defence. However, Courts are in agreement that striking out pleadings is a draconian move which must be undertaken with strict caution in the interests of justice. For this reason I have found myself inclined to consider the consequences of my exercise of discretion in order to arrive at a decision whether this application should be allowed. It is obvious that allowing the application and granting the orders sought will have the effect of confirming the injunction granted herein on 26th January 2004, declaring that the 1st Defendant holds the property known as L.R. Maragua/Ridge/223 in trust for the Applicant, and consequently ordering that the said trust be determined and the property registered in the name of the applicant. Would such a move be one wherein justice of the case will be seen to have been met? I do not think so for reasons that follow.

The suit relates to matrimonial differences between the Applicant and the Respondent. Their marriage is still subsisting. Is the present application one in which this Court can make orders which would have the effect of determining ownership of matrimonial property? Ownership of the said property does not form the main claim in this suit. The same is introduced in this suit in paragraph 6 of the amended Plaintiff where the Plaintiff claims that her father gave the subject property to her as a gift but that the same was registered in the name of the 1st Defendant "because

**at the time women were not being registered as land owners.”**

The Plaintiff in paragraph 9 of her plaint clearly shows that her interest in the said property arises out of her fear that by contracting the intended marriage as particularized in paragraph 7 of the amended Plaint the 1st Defendant would

**“disinvest the Plaintiff, who is the beneficiary, of her property, namely L.R. Maragua/Ridge/223.”**

Much as one cannot understand why the 1st Defendant in his defence would deny knowledge of the said piece of land which has been proven by annexure “GNK 2” to be registered in his name, I am not convinced that the said registration should be cancelled at the stroke of this pen when the trust claimed by the Applicant has not been proven.

Although the application herein is for striking out, I find that under the provisions of Order VI Rule 13 (1) the Court has the discretion and power to make an order for the amendment of pleadings falling under categories (a) (b) (c) or (d) of Rule 13 (1). As already noted, if I were to strike out the defence herein, it would follow that I would then enter judgment as prayed in the plaint. I do not consider that the ends of justice would be met in view of what I have already stated regarding the applicants claim to the land in question. I however do not consider that the issue of the ownership of the same as between the registered owner (1st Defendant) and the applicant would be properly adjudicated with the defence remaining as filed. Clearly, the same, if allowed to remain on record would prejudice, embarrass or delay the fair trial of the action. I therefore, whilst disallowing the application, order that the Defendant do within seven days of this Ruling apply to amend his defence herein failing which the same shall then be struck out. The Respondent shall pay the Applicants the costs of this application.

Orders accordingly.

Dated, Signed and Delivered at Nairobi this 22nd day of April 2005

**M.G. Mugo**

**Judge**

**In the presence of:**

***Ms Muigai Advocate for the Plaintiff***

***Mr. Mutisya Advocate for the 1st Defendant***