REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 632 OF 2004

HURRY NJUBI NDEKEI……..……..….PLAINTIFF/RESPONDENT

VERSUS

RUTH WANJIKU KAMAU…… DEFENDANT/APPLICANT

RULING

A. THE DEFENDANT'S APPLICATION TO STRIKE OUT SUIT

The defendant's Chamber Summons dated and filed on 7th September, 2004 was brought under Order VI, rule 13(b), (c) and (d) of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap. 21). The defendant's substantive prayer is that the Court be pleased to strike out the plaint, the *reply to defence*, and the *defence to counterclaim* and then proceed to *enter judgement as prayed in the counterclaim.*

The application is premised on the following grounds:

(i) that, the plaint discloses no reasonable cause of action as against the defendant;

(ii) that, the reply to defence and defence to counterclaim is a sham and discloses no triable issues and has no purpose other than to prejudice and delay the defendant's cause of action;

(iii) that, the reply to defence and defence to counterclaim is bad in law and an abuse of the process of the Court;

(iv) that, it is fair, just and equitable that the orders sought be granted.

B. EVIDENCE IN SUPPORT OF APPLICATION TO STRIKE OUT SUIT

Evidence in support of the application is set out in the depositions of the defendant. She avers that the plaintiff had commenced the suit against her on or about 15th June, 2004 seeking recovery of part of a parcel of L.R. No. Kabete/Lower Kabete/71 – the suit property. By a statement of defence and counterclaim filed on 27th July, 2004 the defendant denied that the plaintiff was entitled to any part of the suit property. The defendant depones that she is the absolute and the registered owner of the whole of the suit property, having obtained the same by transmission upon the death of her husband and upon the subsequent grant of representation for the estate of the deceased, ***Peter Kamau Ndekei,*** issued to her on 26th May, 1989 in High Court Succession Cause No. 402 of 1988 - ***In the Matter of the Estate of the Late Kamau Ndekei (Deceased)***. She avers that she obtained grant of representation as sole heir of the estate of ***Kamau Ndekei,*** being his legally wedded wife, the marriage having been solemnized on 3rd July, 1971 under the provisions of the African Christian Marriage and Divorce Act (Cap. 151), and

cohabitation as man and wife having thereafter taken place continuously until death of the husband. The defendant deposes that no objection had at any time been made by anyone against her application for grant of representation for the estate of the deceased or against the grant, once issued. She avers that at all material times prior to the death of her husband, and prior to the issue of the grant of representation, the entirety of the suit property had continuously been registered in the name of the said ***Peter Kamau Ndekei*** as from 7th July, 1958. Following confirmation of the grant of representation, the defendant was issued with a title deed for the suit property as absolute proprietor of all the land comprised in title No. Kabete/Lower Kabete/71 as from 29th June, 1989. The defendant depones that she has since then been, and continues to be the registered and absolute owner of the suit property and such ownership now spans over a period of some 15 years. She avers that on or about 17th October, 2003 a restriction was placed on the suit property by the Kiambu District Lands Registrar, at the instigation of the plaintiff, and that this act has limited her right of enjoyment of the suit property, in her capacity as the registered, absolute owner thereof. She believes the advice received from her advocates, that the plaintiff has no registrable interest over the suit property or any interest at all, and thus lacks the capacity to sustain the present suit.

C. EVIDENCE AGAINST APPLICATION TO STRIKE OUT SUIT

Mr. S.M.W. Kinuthia, who I presume to be from the firm of Mwicigi Kinuthia & Co. Advocates, which represents the plaintiff herein, has a "replying affidavit" sworn on 14th September, 2004 and filed on 27th September, 2004.

The deponent states that he has "read and understood the application dated 7/9/2004 filed by counsel for the defendant." He proceeds to assert: "That the application has no [merit,] is misconceived, incompetent and should be dismissed with costs to the plaintiff." He makes the statement much in the nature of counsel's submission, "That the plaint discloses reasonable cause of action (TRUST) and the reply to defence and defence to counterclaim are not a sham." Again, as with counsel making a submission, the deponent argues: "That the [plaintiff's] ownership of L.R. Kabete/Lower Kabete/71 [is] subject to the provisions of section 29 of the [Registered Land Act] and also to the proviso to section 28 of the said Act." He further argues "That the plaintiff's suit is well founded both in law and on fact." He thus concludes: "That what is stated herein is true to the best of my knowledge."

On 8th November, 2004 M/s. Mwicigi & Co. Advocates also filed "grounds of objection to the application." These are set out more in the style of an affidavit than the replying affidavit of 14th September, 2004: for they contain factual information relating to service of the plaintiff's reply to defence and defence to counterclaim. I cannot, however, treat that document as an affidavit, as it does not purport to be one.

D. SUBMISSIONS IN FAVOUR OF STRIKING OUT OF PLAINT

Learned counsel, ***Ms. Ouma,*** presented the evidence in the defendant's affidavit, and noted that the plaintiff in his suit filed on 15th June, 2004 was seeking a declaration that the defendant held two-fifths of the suit land, Kabete/Lower Kabete/71 in trust for him, the plaintiff; and that the defendant be ordered to transfer the same to the plaintiff forthwith.

Learned counsel questioned the existence of a trust, which was the basis of the plaintiff's suit and of his claims in relation to the defendant's application. The allegation of trust initially appears in the plaint, paragraph 6:

> "The one acre of land bought by the plaintiff's father and the one half of an acre of land given to the plaintiff's mother were registered by the plaintiff's father and mother as L.R. Kabete/Lower Kabete/71 in the name of James Kamau Ndekei the elder brother of the plaintiff in trust for him and the plaintiff."

Counsel perceived the trust concept as a mere allegation, with no specific time indications, and no reasons given which prevented the beneficiary from having his title properly registered at the right time. Counsel

submitted that the trust claim did not stand up, as letters of administration had been applied for and granted without any opposition more than 15 years ago, and for that period of time the defendant has been the legal owner of the suit land and having the title document thereto.

Counsel made specific submissions on the case ***Gatimu Kinguru v. Muya Gathangi*** [1976] KLR 253 which she considered to be important to the plaintiff in his case. In that case, just as in the present one, the defendant had claimed a portion of land which otherwise belonged to the plaintiff, and the Court held (pp.265 –66):

> **"There will be judgement for the defendant against the plaintiff as follows. (1) A declaration that the defendant has acquired by adverse possession an absolute title to the portion of parcel Ikinu/58 which is in his possession and occupied by him. (2) A declaration that the defendant is entitled to an order under section 38 [Limitation of Actions Act – Cap. 22] to be registered as proprietor of that portion in place of the plaintiff who shall execute a valid transfer or assignment in favour of the defendant free from encumbrances. (3)** ***A declaration that the plaintiff holds the parcel Ikinu/58 in trust for himself and the defendant as tenants in common in equal shares and the defendant's name shall be entered in the register accordingly.*** **And (4) the plaintiff's suit is dismissed with costs and the defendant's counterclaim allowed with costs**."

Counsel submitted that in the ***Gatimu Kinguru*** case, a customary trust had been found to exist. The defendant's case has been that the plaintiff, who was his real brother, together with him inherited the suit land from their father, and they were to hold as tenants in common, in equal shares. However, the plaintiff became the registered owner while the defendant was away in detention, during the colonial Emergency. The defendant was in possession of half portion of the land, which he had occupied since 1959, secured with a clear boundary, erected his home thereon, and developed agriculturally.

Ms. Ouma submitted that claims of trust in the present case were merely allegations, and that the replying affidavit carried no evidence of a trust in favour of the plaintiff. Counsel submitted that there could have been no trust, unless the intention to create one was shown, and the beneficiary identified; and the property must then be transferred to a trustee. She submitted that no evidence was placed before the Court showing that the father of the deceased had intended to create a trust; and there was no evidence to show that the father of the deceased had any interest capable of being the subject of a trust. The name of the said father of the deceased has not featured in the title, and, it was submitted, this raised a question whether he had any property capable of being transferred; and there was no evidence that the plaintiff was intended to be a beneficiary.

Learned counsel questioned the lodgement of a restriction against the defendant's title on 17th October, 2003 merely on the basis of a letter from the District Officer in the area where the suit land is located. She perceived the plaintiff's pleadings as scandalous, and fit for striking out. Scandalous pleadings are recognised to be allegations in pleadings which are indecent, offensive, or are made so as to cause prejudice to the other party. They need not be inherently obnoxious to qualify as scandalous. They are no less scandalous if they are unnecessary, puerile or immaterial allegations. They are scandalous if they make imputations on the opposite party, or ascribe misconduct or bad faith against anyone else. Numerous unnecessary details which hardly serve in the clarification of issues under litigation will also be regarded as scandalous.

Learned counsel urged that the suit be dismissed for being an abuse of the process of the Court.

E. SUBMISSIONS AGAINST STRIKING OUT OF THE SUIT

Learned counsel, ***Mr. Kinuthia***, made his submissions on 14th February, 2005 and began by citing his replying affidavit of 14th September, 2004 and his grounds of objection of 4th November, 2004.

As soon as ***Mr. Kinuthia*** embarked upon his submissions, it became clear that his client's response was handicapped by the fact that no appropriate evidence had been tendered to meet the applicant's case.

Counsel started citing from the pleadings in the plaint of 14th June, 2004, as if this could prove anything. It should be clear that the pleadings by themselves are essentially assertions of broad factual positions as perceived by a party. They are, in character, *allegations* and are, by no means, self-proving. Proof for such assertions is not the business of interlocutory applications, but that of the full trial with evidence adduced through examination-in-chief, cross-examination and re-examination. Interlocutory applications rest only on prima facie positions, and evidence to support them is primarily by affidavits. Generally, interlocutory applications do not aim to prejudice the course of the full trial; but they sometimes pre-empt the trial when it is perceived that the pleadings have no foundation in law, cannot be sustained, or are merely scandalous or an abuse of the process of the Court. In the instant case the defendant/applicant has applied that, at this interlocutory stage, the suit be struck out.

> Although the defendant's application is clearly fateful for the plaintiff's case, the plaintiff has failed to provide any evidence at all to rebut the fact-foundation of the application. From my earlier analysis, it is clear that ***Mr. Kinuthia's*** replying affidavit did not at all address the factual basis of the defendant's application. The effect is that the defendant's clearly cogent factual account, well buttressed with validating documentation, is unchallenged. Such validating annexures are: (i) Certificate of Confirmation of Grant, in favour of the defendant, dated 26th May, 1989; (ii) Certificate of Marriage of the defendant to the deceased, dated 3rd July, 1971; (iii) Title Deed for the suit land, Kabete/Lower Kabete 71, in the name of the defendant, dated 29th June, 1989; (iv) District Officer's (Kikuyu Division) letter to the Kiambu District Land Registrar (dated 17th October, 2003) requesting that a restriction be lodged against the defendant's title, at the request of the plaintiff; (v) Certificate of Official Search dated 2nd July, 2004 showing that the defendant is the registered owner of the suit land, and that on 17th October, 2003 a restriction had been entered against the defendant's title, on the strength of a letter from the District Officer, Kikuyu, dated 17th October, 2003.

It is clear, therefore, that the plaintiff's counsel had no evidentiary material on which to rely. He would be limited, on that account, to raising points of law and to commenting on the defendant's evidence. It was improper for ***Mr. Kinuthia*** to assert, as he did, that "This suit was filed eight months after the discovery of the breach of trust," and that "Section 28 of the Registered Land Act had no provision to relieve a proprietor of trust obligations." No evidence at all of any trust had been placed before the Court by the plaintiff; and therefore there is no ***prima facie*** position that can, at this stage, be taken in favour of the existence of a trust.

Without any evidentiary basis for the existence of a trust, counsel proceeded to cite several cases to persuade the Court that the defendant was placed under certain trust obligations. He cited ***Gatimu Kingura v. Muya Gathang***i [1976] KLR 253***; Mwangi Muguthu v. Maina Muguthu,*** Civil Case No. 377 of 1963; ***Muthuita v. Wanoe*** [1982] KLR 167; ***Limuli v. Marko Sabayi*** [1979] KLR 251; and ***Musa Misango v. Eria Musigire & Others*** [1966] E.A. 390. He submitted that the ***Gatimu Kingura*** case carried the principle that the existence of a trust in land, even where it is not registered, is not compromised by the registration of title for such land in the name of a particular person.

Learned counsel sought to rely on a passage in the ***Mwangi Muguthu*** case:

> **"I think it is contrary to the custom of the Kikuyu people that a father during his lifetime could give away land belonging to him to one son only to the exclusion of the other sons" [Madan, J.]**

This was in aid of the contention that the suit land had once upon a time emanated from the common father of the deceased and the plaintiff; and therefore it could not in customary law, be inherited exclusively by the deceased - and so could not be the exclusive property of the defendant through inheritance. As already noted, however, the plaintiff made no depositions on such a background of historical fact.

In the ***Limuli*** case, counsel relied on the following passage (p.253 – ***Cotran, J***):

> **"It is now generally accepted by the Courts of Kenya that there is nothing in the Registered Land Act which prevents the declaration of a trust in respect of registered land, even if it is a first registration; and there is nothing to prevent giving effect to such a trust by requiring the trustee to do his duty by executing transfer documents…"**

It remains the case, however, that the plaintiff provided no evidence on the circumstances in which the trust came to exist.

From ***Muthuita v. Wanoe*** counsel drew the Court's attention to a passage in the judgement of the Court of Appeal [1982) KLR at p. 169:

> **"…the absence of any reference to a trust in the instrument of acquisition of the land does not affect the enforceability of the trust…"**

While the legal principle presents no difficulty, there remains a missing link in the factual foundation of the alleged trust. The plaintiff brought before the Court no ***prima facie*** evidence showing the existence of a trust.

Learned counsel for the plaintiff addressed himself to such glaring shortcomings of his client's case by pleading that: "Such evidence of history must await the trial stage, and the recording of witness testimony." This point was taken together with the principle stated in ***Musa Misango v. Eria Musigire & Others*** [1966] E.A. 390, where ***Sir Udo Udoma, C.J.*** quoted with approval from the judgement of ***Fletcher Moulton, L.J. in Dyson v. Attorney-General*** [1911] 1 K.B. 410:

> **"…it is unquestionable that, both under the inherent power of the Court, and also under a specific rule to that effect made under the Judicature Act, the Court has a right to stop an action at this stage if it is wantonly brought without the shadow of an excuse, so that to permit the action to go through its ordinary stages up to trial would be to allow the defendant to be vexed under the form of legal process when there could not at any stage be any doubt that the action was baseless. But from this to the summary dismissal of actions because the judge in chambers does not think they will be successful in the end lies a wide region, and the courts have properly considered that this power of arresting an action and deciding it without trial is one to be *very sparingly used,* and rarely, if ever, excepting in cases where the action is an *abuse of legal procedure*. They have laid down again and again that this process is not intended to take the place of the old demurrer by which the defendant challenged the validity of the plaintiff's claims as a matter of law…. To my mind it is evident that our judicial system would never permit a plaintiff to be 'driven from the judgement seat' in this way without any court having considered his right to be heard except in cases where the cause of action was obviously and almost incontestably bad."**

Learned counsel, ***Mr. Kinuthia*** contended that the plaintiff's case was not incontestably bad, and that it raises "serious issues of customary law and of sections 28 and 29 of the Registered Land Act."

Counsel went on to argue that it would be inappropriate to enter judgement in favour of the defendant on the counterclaim, as the damages there claimed are not liquidated. He submitted that the restriction that had been entered against the defendant's property was so entered not by the plaintiff, but by the Registrar who had authority to do as he did; and he urged that the Registrar should have been joined as a party.

f. FURTHER ANALYSIS, AND ORDERS

If this application were considered on its own merits, the respondent's position could not possibly be sustained, as there has been no proper replying affidavit made by a person such as the plaintiff, who has knowledge and information on the pertinent facts. The detailed facts set out in the defendant's supporting affidavit had the potential to raise controversy; and on this account it was most improper that counsel should take upon himself the task of swearing a replying affidavit. This is firstly because counsel just will not have the full knowledge of facts necessary to meet the affirmations in the supporting affidavit.

Secondly, and more importantly from a professional standpoint, counsel had now clearly abandoned his professional role and crossed over to the arena of the witness; yet if he were cross-examined he could not acquit himself correctly. Counsel placed in such a position ought to step down and become a witness, pure and simple, so that his client instructs another advocate. This principle is well established in earlier decisions, in ***Kenya Horticultural Exporters*** [1977] ***Ltd. v. Pape*** (t/a ***Osirua Estate***) [1986] KLR 705; ***East African Foundry Works (K) Ltd. v. Kenya Commercial Bank Ltd***. [2002] 1 KLR 443 and ***Kisya Investments Ltd. & Another v. Kenya Finance Corporation Ltd***., HCCC No. 3504 of 1993.

The application, however, is not one of limited character as it seeks to terminate the entire suit. Therefore it is necessary to consider the nature of the suit, for the purpose of determining whether it is one the continuation of which is no more than an act of vexation against the defendant and an abuse of the process of the Court. The governing judicial principle in this regard is that laid down in ***Dyson v. Attorney-General*** [1911] 1 K.B. 410 and now fully adopted in East African case law (see ***Musa Misango v. Eria Musigare & Others*** [1966] E.A. 390). The Court does not drive the plaintiff from the seat of justice; but it retains the discretion "to stop an action at [the interlocutory] stage if it is *wantonly brought without the shadow of an excuse."*

It is not disputed that the suit land had been registered in the name of the deceased, ***Peter Kamau Ndekei*** on 7th July, 1958. After his death, duly gazetted succession proceedings, ***In the Matter of the Estate of the Late Kamau Ndekei*** (Deceased), High Court Succession Cause No. 402 of 1988 did take place, and ended in grant of Letters of Representation to the defendant herein. No objection was ever raised by the plaintiff to the succession proceedings. The defendant was on 29th June, 1989 issued with title deed for the suit property and for 15 years she enjoyed the same, before suddenly, on 17th October, 2003 the plaintiff instigated the District Officer in charge of Kikuyu Division to get the Kiambu Land Registrar to enter a restriction on the defendant's title. The plaintiff's suit was filed on 15th June, 2004, forty-five-odd years since the suit land was registered exclusively in the name of the deceased; and fifteen years since the defendant was registered as absolute owner of the suit land.

The general rule applicable in claims of trust property is stated in the Limitation of Actions Act (Cap.22), s.20(2): namely that there is a six-year limitation period except in cases of fraud – which has not been alleged by the plaintiff. I am, in these circumstances, in agreement with the submission by counsel for the defendant that the suit is caught by the rule of *laches*, and the Court's discretion should not apply in favour of the continuance of the suit.

I therefore find that there is no credible legal basis for the plaintiff's suit and it amounts to a vain engagement of the process of the Court. It is an abuse of Court process. Dismissing such a suit at this stage does not, in my view, amount to driving the plaintiff away from the seat of justice. I can only conclude from the facts before me and from the documentation available, that the real purpose of the suit is to vex the defendant in her enjoyment of her constitutional rights to private property. It is the obligation of this Court to protect the defendant in her enjoyment of those rights.

Consequently, I find in favour of the defendant and against the plaintiff, and allow the defendant's application of 7th September, 2004. Specifically, I will make the following Orders:

1. I hereby strike out the plaint dated 14th June, 2004.

2. I hereby strike out the reply to defence and defence to counterclaim dated 4th August, 2004.

3. I hereby declare that the restriction registered against L.R. No. Kabete/Lower Kabete/71 by the plaintiff is unlawful.

4. The plaintiff shall, within 15 days from the date hereof, cause to be removed the restriction on L.R. No. Kabete/Lower Kabete/71, failing which the Registrar of Lands shall remove the same forthwith.

5. Subject to the Orders herein, I hereby enter judgement for the defendant in the terms of the counterclaim of 23rd July, 2004.

6. The plaintiff shall bear the costs of the counterclaim which shall carry interest at Court rates henceforth, until payment in full.

7. The plaintiff shall bear the costs of the Chamber Summons application of 7th September, 2004, which costs shall carry interest at Court rates henceforth until payment in full.

8. The parties shall ***take a date, to be given on the basis of priority, for proof of general damages as prayed under paragraph 19(4) of the defendant's statement of defence and counterclaim dated 23rd July, 2004*****.**

DATED and DELIVERED at Nairobi this 15th day of April, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Defendant/Applicant: Ms. Ouma, instructed by M/s. B.A. Ouma & Associates, Advocates

For the Plaintiff/Respondent: Mr. Kinuthia, instructed by M/s. Mwici gi Kinuthia & Co. Advocates;