



**Jesus Celebration Center Ministry Int & another v Redeemed Gospel Church Inc & 2 others (Environment and Land Appeal E003 of 2021)
[2022] KEELC 15314 (KLR) (7 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15314 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E003 OF 2021
LG KIMANI, J
DECEMBER 7, 2022**

BETWEEN

JESUS CELEBRATION CENTER MINISTRY INT 1ST APPELLANT

JEREMIAH MATIA ALIAS REVEREND 2ND APPELLANT

AND

REDEEMED GOSPEL CHURCH INC 1ST RESPONDENT

DISTRICT LAND REGISTRAR KITUI 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

(Being an Appeal against the entire Ruling of Hon. J.W Wang'ang'a at Mutomo on 25th August 2021 at the Senior Principal Magistrate's Court at Mutomo E008 OF 2021)

JUDGMENT

1. This is an Appeal against the Ruling of Senior Principal Magistrate Hon JW Wang'ang'a in Mutomo ELC E008 of 2021 delivered on August 25, 2021. The Memorandum of Appeal dated September 1, 2021 sets forth the following Grounds for appeal:
 1. That the Honourable Court erred in both fact and law by not finding that the Plaintiff is bound by its pleadings as determined by law and that as it stands, the suit is incurably defective and cannot be remedied by amendment save dismissal.
 2. That the Honourable Court erred in both fact and law in finding that the registrar can remedy the issuance of different search certificates being Kitui/Mwala/1103 and Mutomo/Mwala/1103 under Section 79 of the [Land Registration Act](#) which is not the case as the register can only rectify what is in the register.



3. That the Honourable Court erred in both fact and law in its finding that the Plaintiff's proceedings are not defective as prayed as the plaintiff has not sought any order for rectification of the register to have one parcel number.
4. That the Honourable Court erred in both fact and law in finding that the Plaintiff has proved his case on a balance of convenience.
2. The Appellant seeks orders setting aside the ruling delivered on August 25, 2021 and dismissal of the suit.
3. The Appellants herein were the 1st and 2nd Defendants respectively while the 2nd and 3rd Respondents were the 3rd and 4th Defendants before the trial court. The 1st Respondent was the Plaintiff.
4. The Plaintiff instituted a suit by way of a Plaint dated March 2, 2021, where the Plaintiff claimed to be the beneficial proprietor of all that land known as Mutomo/mwala/1103 situate in Mutomo town, Mutomo sub-county within Kitui County as a bonafide purchaser for value. It avers that the 1st and 2nd Defendants are registered as proprietors of the same parcel of land by virtue of an erroneous first registration of land. The Plaintiff averred that the 2nd Defendant was its agent at the time of purchasing the land that they have been in occupation since the year 1996 when they started buying the suit land up to sometime in the year 2016 when the 2nd Defendant converted the said property and registered it in the name of the 1st Defendant fraudulently.
5. The 1st and 2nd Defendants filed a joint statement of defence dated March 23, 2021 and denied being the registered owner of land parcel Mutomo/Mwala/1103 or having any interests in the said land and they indicated that they would seek to have the suit struck out for failure to disclose a cause of action against them. True to the averment in the Defence the 1st and 2nd Defendants filed the application dated March 23, 2021 seeking to strike out and dismiss the suit against them for being frivolous and vexatious. They relied on the grounds that they do not know, have no interest in nor do they own the property known as Mutomo/Mwala/1103. According to them, the 1st Defendant is the registered owner of Land Parcel Kitui/Mwala/1103.
6. The 1st and 2nd Defendants averred that the Certificate of search showing that the 1st Defendant is the registered proprietor of the suit land is doubtful while the 2nd Defendant denied being an agent of the Plaintiff while purchasing the land. They stated that the Plaintiff was bound by its pleadings in their claim of ownership of Mutomo/Mwala/1103.
7. The 2nd Appellant swore a further supporting affidavit stating that the suit was not properly instituted as it offends the mandatory provisions of Order 4 Rule 1(4) as the Plaintiff has not given its authority under seal to Philip Mutia to execute the Verifying Affidavit on its behalf. He further denied being in possession of any Title Deed for a parcel of land referred to as Mutomo/Mwala/1103 and stated that there cannot be two different title numbers for the same parcel of land.
8. The Plaintiff opposed the application and stated that the suit is properly before the court. That as per an advisory letter to them from the Kitui District Land Registrar, Land Parcels Mutomo/Mwala/1103 and Kitui/Mwala/1103 refer to one and the same parcel of land. He further stated that the 2nd Defendant acted as its agent at the time of purchasing the suit land and he was a witness to the said sale. That the 1st and 2nd Defendants colluded and fraudulently had the land registered in the name of the 1st Defendant. The Plaintiff further stated that the Section 26 (1) (a & b) provide for cancellation of title deeds in certain circumstances



9. The 3rd and 4th Defendants filed a replying affidavit opposing the application and stating that the Plaintiff was properly before the court. Further the 3rd and 4th Defendants stated that the register for Mutomo/mwala/1103 was opened on March 8, 2017 and on the same day it was registered in the name of the 1st Defendant and a title deed was issued on March 25, 2017. It was then confirmed that Mutomo/mwala/1103 Kitui/mwala/1103 refer to parcel of land and that the error was occasioned due to a typographical error during titling.
10. The court heard the application delivered a ruling on August 25, 2021 dismissing the application with costs. The court held that there was no fault on the part of the plaintiff since it exercised due diligence to establish the land reference number and used the information from the 3rd Defendant to file the suit. The Learned Magistrate found that there was a triable cause of action since the error was amenable without material changes to the original suit. The trial court further found that failure by the Plaintiff to particularize its claim of fraud did not warrant striking out the suit.
11. Regarding the issue of lack of authority to swear the Verifying Affidavit, the trial court quoted and bound itself to the authority in the case of *Szaredo Investments Limited v Chief Land Registrar & 2 others* [2018] eKLR and found that the court has discretion on whether or not to order striking out any pleading but that in the new dispensation under the provisions of Article 159 of the *Constitution of Kenya 2010* a litigant ought to be given a chance to comply before drastic steps are taken.

Appellants' submissions before this court

12. The Appellants reiterated the averments made before the trial court that the 1st Respondents plaint did not disclose any cause of action against them in that they are not the owners and neither do they possess land parcel Mutomo/Mwala/1103. They claim that the 1st Appellants property is Title Number Kitui/Mwala/1103 and that they attached a copy of their Title Deed and Official Search. They denied parcel No Mutomo/Mwala/1103 and No Kitui/Mwala/1103 are one and the same and claim that they are strangers to the parcel of land Mutomo/Mwala/1103 referred to in the Plaint. They further submit that their title cannot be challenged unless it was illegally acquired.
13. Quoting from Section 79 of the *Land Registration Act* on rectification of the Land Register by the Land Registrar, the Appellants submitted that a certificate of search is not an instrument for registration nor does a search alter the Register and therefore cannot be rectified.
14. Submitting that parties are bound to their pleadings, the Appellants relied on the case of *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda & 3 others* [2014] eKLR and held the stand that the 1st Respondent should be made to stand by their Plaint and pleadings.
15. It is their final submission that the Learned trial Magistrate erred in failing to properly understand the law with regard to the provisions of Section 79 of the *Land Registration Act* and pointed out that 1st Respondent's Application to amend its Plaint was an afterthought and the same has not been heard and determined. The Appellants urged this Court to exercise its discretion to overrule the ruling of the Trial court.

The 1st respondent's submissions

16. The 1st Respondent relied on the holding in the case of *DT Dobie & co Ltd v Muchina* (1982) KLR and stated that the suit disclosed a reasonable cause of action and that a court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. They submitted that they have an Amended Plaint dated June 29, 2021 with orders noting that Mutomo/mwala/1103 And Kitui/mwala/1103 are one and the same.



17. They further submitted that failure by the 1st Respondent to pray for rectification of the suit property to have one parcel number does not render the suit incurably defective. Submitting that the suit before the subordinate court is still in its preliminary stages and there is still room to have the Plaint amended, the 1st Respondent cited the case of *Susan Rokih v Joyce Kandie & 6 others* [2018] eKLR and *Crescent Construction co Ltd v Delphis Bank* [2007] eKLR.
18. The 1st Respondent observed that it is only after the case has gone to full trial that the confusion surrounding Mutomo/Mwala/1103 and Kitui/Mwala/1103 can be clarified and that it would amount to a miscarriage of justice for the case to be dismissed at a preliminary level, without being given a chance to be heard. Their view is that at this stage of proceedings, the Court ought not to deal with the merits of the case for that is reserved for the trial while citing the case of *DT Dobie and co Ltd* (Supra).

The 3rd and 4th Respondent's submissions

19. The 3rd and 4th Respondents represented by the office of the Attorney General submitted that the Land Registrar, having confirmed in his replying affidavit dated July 29, 2021 that Mutomo/Mwala/1103 and Kitui/Mwala/1103 are one and the same property, the Appellants cannot claim that the Plaint discloses no cause of action against them.
20. They relied on the holding in the case of *Madison Insurance Company Limited v Augustine Kamanda Gitau* [2020] eKLR where the Court held that the power to strike out pleadings must be sparingly exercised only in the clearest of cases. They hold the view that there are triable issues that have been raised by the Plaint and ought to go for hearing and that I would be unjust to strike out a Plaint on the basis of an error that can be remedied by amendment and submitted that the Appeal is unmerited and should be dismissed with costs.
21. When the Appeal came up for highlighting of submissions on September 22, 2022, the parties reiterated the contents of their submissions with the Appellants submitting that there was prejudice on their part for being dragged through court proceedings where the pleadings raise no triable issue and no cause of action. The Appellants insisted on pointing out that amendment of the Plaint was an afterthought on the 1st Respondent's part and that the Plaint does.

Analysis and determination

22. I have considered the grounds set forth by the Appellants in the Memorandum of Appeal, the Record of Appeal and the Supplementary Record of Appeal, submissions by Counsel for the parties and the authorities relied on.
23. The Appeal herein relates to the ruling of the trial court on the 1st and 2nd Appellant's application dated March 23, 2021 seeking to strike out the suit. In my opinion, the Grounds of Appeal may be summarized and dealt together as;

“Whether the Learned Trial Magistrate erred in law and in fact by failing to find the suit before the trial court incurably defective that it and ought to be struck out and dismissed.”
24. Striking out of pleadings is provided for under Order 2 Rule 15 of the *Civil Procedure Rules (2010)* which provides that:

At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

 - (a) it discloses no reasonable cause of action or defence in law; or



- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

25. Before the trial court the 1st Respondent produced a Certificate of Official Search showing that Mutomo/mwala/1103 which they claim ownership is registered in the name of the Jesus Celebration Centre Ministries International, the 1st Appellant herein. The 1st and 2nd Appellants deny and stand firm that they are strangers to that parcel of land; this remains an issue that must be examined by the trial court to establish why the search came out in their name. The Appellants claim that they own land parcel Kitui/mwala/1103 which according to them has no dispute.

26. Further the 3rd and 4th Respondents filed before the trial court a replying affidavit and stated that the register for Mutomo/mwala/1103 was opened on March 8, 2017 and on the same day it was registered in the name of the 1st Defendant and a title deed was issued on March 25, 2017. They confirmed that Mutomo/mwala/1103 and Kitui/mwala/1103 refer to the same parcel of land and that the error was occasioned due to a typographical error during titling.

27. Further to that, there is a letter from the Ministry of Lands and physical planning stating that Mutomo/mwala/1103 and Kitui/mwala/1103 confirming this position.

State Counsel for the 3rd and 4th Respondents confirmed this position in their submissions. In my opinion, this is a triable issue since the 1st Respondent claims ownership to that parcel of land that is now registered in the 1st Appellant’s name. Further, whether the two references belong to the same parcel of land is a matter that remains to be determined by the Trial Court, hence the suit cannot be dismissed on tis ground.

28. The 1st Respondent claimed in its pleadings that they were in occupation of the land since purchase in the year 1996 until 2006 when the ownership was as they claim fraudulently changed. This is an issue that can only be determined during trial.

29. In the case of *DT Dobie & co Ltd v Muchina* [1982] KLR relied on by the 1st Respondent which I agree with, the Court held that:

“The court ought to act very cautiously and carefully and consider all 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 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". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.”

30. In my view the 1st Respondent reasonably believed the contents of the Certificate of Official Search that was issued to it and which they produced in court indicating that the 1st Appellant is the registered proprietor of Mutomo/Mwala/1103 as any ordinary person would. The Appellants denial of the contents of this search is a further triable issue that can only be addressed by the trial court. In any



case, the substratum of the suit is a dispute on ownership of the land whose location seems not to be in dispute and not a question of whether the certificate of official search is correct.

31. The Court in *DT Dobie & co Ltd v Muchina*(Supra) further gave guidance on the meaning of a reasonable cause of action:

“No exact paraphrase can be given but I think reasonable cause of action means a cause of action with some chance of success when (as required by paragraph (2) of the rule) only the allegations in the plaint are considered-.” per Lord Pearson in *Drummond-Jackson v BMA* [1970] 1 WLR 688 at p 696.

“A cause of action is an act on the part of the defendant which gives the plaintiff his cause of complaint.” Words and Phrases, Vol, 1 p 228. There is some difficulty in affixing a precise meaning to the term reasonable cause of action

In point of law, and consequently in the view of a Court of justice, every cause of action is a reasonable cause. But; obviously some meaning must be assigned to the term 'reasonable'..... a pleading will not be struck out unless it is demurrable and something worse than demurrable.” per Chitty J in *Republic of Peru v Peruvian Guano Company*, 36 Ch Div 489 at pp 495 and 496.”

32. In my opinion, the Plaint by the 1st Respondent herein has raised a reasonable cause of action as they claim the same parcel of land that is said by the Ministry of Lands and Physical Planning to be known variously as Mutomo/mwala/1103 and Kitui/mwala/1103.

33. The Appellants further contended that a certificate of official search is not a register that is capable of rectification. In my opinion, a certificate of search is a reflection of the Land Register. Section 34 of the *Land Registration Act* No 3 of 2012 provides that:

“A person who requires an official search in respect of any parcel, shall be entitled to receive particulars of the subsisting entries in the register, certified copies of any document, the cadastral map, or plan filed in the registry upon payment of the prescribed fee.”

34. Acquiring a certificate of official search allows one a look into the register of that particular parcel of land. Rectification is possible if the parties so desire, according to Section 79 of the *Land Registration Act* provides as follows:

“The Registrar may rectify the register or any instrument presented for registration in the following cases— (a) in formal matters and in the case of errors or omissions not materially affecting the interests of any proprietor;

(b) in any case and at any time with the consent of all affected parties; or

(c) if upon resurvey, a dimension or area shown in the register is found to be incorrect, in such case the Registrar shall first give notice in writing to all persons with an interest in the rectification of the parcel. (2) Notwithstanding subsection (1), the Registrar may rectify or direct the rectification of a register or document where the document in question has been obtained by fraud.

35. At this preliminary stage, there is still much that can be done by the trial court such as amendments to pleadings and there is much to be determined. Under Order 2 rule 15 quoted above, pleadings can be amended at the instance of the parties or on the court’s own motion and can be done at any stage before close of pleadings.



36. In the case of *John Nyagaka Osoro v Reynold Karisa Charo & 5 others* [2021] eKLR the Court cited from *Halsbury's Laws of England, 4th Ed* (re-issue), Vol 36(1) at paragraph 76, about amendments of pleadings: -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”

37. In this case, amendment of pleadings would not cause the Appellants any prejudice as it is in the interest of justice that the case be fully determined to answer all questions that have arisen in the matter. The Trial court had the discretion to decline striking out the Plaint, which it exercised as the court saw it prudent for the entire case to proceed to full trial.

38. In the case of *Crescent Construction co Ltd v Delphis Bank Ltd* [2007] eKLR the Court agreed with the holding in the DT Dobie case(Supra) and further held as follows:

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice.”

39. Similarly, the Court of Appeal in the case of *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* [2000] eKLR expressed itself thus:

“No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment.”

40. In my view the 1st Respondents suit before the trial court cannot be said to be so hopeless or so plainly and obviously discloses no reasonable cause of action. The said suit cannot be said to be so weak as to be beyond redemption and incurable by amendment. In my view striking out the suit herein would have been against the rules of natural justice that require that the court must not drive away any litigant however weak his case may be from the seat of justice without giving an opportunity to be heard. I therefore uphold the trial court's decision made on 25th August 2021.

Final orders

41. For the foregoing reasons I do find that this appeal lacks merit and the same is hereby dismissed with costs. I further direct that the trial court file be returned to the Senior Principal Magistrate's Court at Mutomo in ELC E008 of 2021 for hearing and final determination of the suit. Costs of the appeal shall be to the Respondents.

DATED, SIGNED AND DELIVERED IN KITUI THIS 7TH DAY OF DECEMBER, 2022.

L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE KITUI



Judgement read in open court and virtually in the presence of:

Musyoki – Court Assistant

M/s Wekesa Advocate for Appellant

Maingi holding brief for Nzioki Nzilu for Respondent

