



**REPUBLIC OF KENYA**

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

**Civil Case 348 of 2003**

**LUCY WANJIRU KUNG'U.....PLAINTIFF**

**VERSUS**

**JOHN NJUGUNA NDARUA.....DEFENDANT**

**RULING**

The plaintiff filed this suit against the defendant seeking judgment for:

- (a) A permanent order be issued by this court to restrain the defendant either by himself, agents and/or servants or anybody claiming through him from making forceful entry into the premises or in any other manner interfering with the plaintiff's premises being *Plot NO. GITHUNGURI/GITHUNGURI/1274*.
- (b) An order that the Land Registrar Kiambu District Land Registry do remove the Defendant's name *JOHN NJUGUNA NDARUA* as a joint owner of *LR. NO. GITHUNGURI/GITHUNGURI/1274*.
- (c) Costs of the suit and interest.

The defendant on being served with summons filed a defence and counterclaim.

In his defence he claims that the suit premises is owned jointly by both the plaintiff and the defendant in equal shares and that they have developed the same jointly and each is entitled to equal shares including the developments. In the counterclaim he claims that the plaintiff is unlawfully collecting rent amounting to Shs.292,400/= from the defendant's share and sought judgment against the plaintiff for dismissal of the suit with costs, a permanent injunction restraining the plaintiff, her servants and agents from interfering with the plaintiff's proprietary rights over *LR. NO. GITHUNGURI/GITHUNGURI/1274* and a sum of Shs.292,400/= rent arrears for the half share of the suit land.

The plaintiff on being served with the defence and counterclaim filed a reply and defence to counterclaim. She denied claims that the suit land was purchased jointly and that the funds for development were jointly sourced.

She further states that she entered into business with the defendant in 1989 on a mutual understanding that he would soon resign from Government employment and join her in private practice which he never did and that he was practicing on a locum licence, and only for a few hours since he was employed by the Government on full time basis.

In paragraph 8 of the defence the defendant avers that even though he was at the clinic on locum basis he was an equal partner with the plaintiff and both parties shared the profits equally. But in

paragraph 9 of the defence he avers that he only worked at the clinic for 2 days a week while the plaintiff worked for 5 days a week and the salary for the month was to be at a ratio of 5:2 respectively.

The dispute between the plaintiff and the defendant is over *LR NO.GITHUNGURI/GITHUNGURI/1274*. The basis of the claim is that the suit land is registered in both names of the plaintiff and the

defendant. But the plaintiff claims she brought it alone while the defendant claims that the suit land was purchased through the profits

from the partnership. The defendant submits that since the suit land is registered in jointly names the plaintiff cannot be heard to state that the suit land does not belong to both of them.

The effect of registration of land is provided for under Section 27 of the Registered Land Act (Cap 300 which provides thus:

*“Subject to this Act, the registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging on appurtenant thereto”.*

But that notwithstanding the court has to look into the surrounding circumstances that led to the registration. This is a suit which should not be struck out without the court having the benefit of discovery. The application is premature. Even assuming that the suit land was purchased by profits from the partnership the defendant having conceded that he only worked at the clinic for 2 days and the plaintiff worked for 5 days, the profits could not be

shared equally taking into account that the defendant was working for the Government earning a salary monthly while the plaintiff worked at the clinic full time. Evidence must be led to establish how much each contributed.

Secondly there are houses constructed on the plot from which extra income is earned. Evidence must be led to establish what each if at all contributed towards the construction of those houses.

The defendant applies to this court to strike out the plaintiff’s plaint for being an abuse of the process of the court. It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases.

In the case for *NAGLE VS. FIELDEN [1966] 2 QBD 633* at p.648 *DANCKWERTS LJ* had this to say:-

***“It is well settled that a statement of claim should not be struck out and the plaintiff driven from the judgment seat unless the case is unarguable.”***

Accordingly it is necessary to consider whether or no this plaintiff has an arguable case. No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action.

From what I have stated above it cannot be said that the plaintiff’s suit discloses no cause of action. I decline to strike out the plaintiff’s suit. Accordingly the defendant’s application is dismissed with costs.

Dated at Nairobi this 26<sup>th</sup> day of September 2005.

**J.L.A. OSIEMO**

**JUDGE**