



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE 97 OF 1997**

**OMAR SALIM BENDO ..... PLAINTIFF**

**- Versus -**

**1. LUKE M.**

**MUTISO**

**2. MONICA NDUNGE KITANA ..... DEFENDANTS**

**Coram: Before Hon. Justice Mwera**

**Muthama for Applicant/2<sup>nd</sup> Defendant**

**Asige for Respondent/Plaintiff**

**Court clerk – Kazungu**

**R U L I N G**

In a long chamber summons dated 20/6/2005 the 2<sup>nd</sup> defendant (the legal representative of the original defendant one Tilus Kilonzo) sought orders under Sections 3A, 63 Civil Procedure Act, Order 6 rule 13 (1) (a) (b) (d) and Order 39 rule 4 Civil Procedure Rules. The first 3 prayers were that the suit against the applicant be struck out because it was frivolous, vexatious or an abuse of the court process. there was an affidavit to support that stance. There was a further prayer that the plaint be struck out because it did not disclose a reasonable cause of action against the applicant/2<sup>nd</sup> defendant. In alternative to the above, the applicant prayed that prohibitory and injunction orders granted in this cause including one of 23/5/2001 be vacated or if left to stand, on conditions. For the prayer under Order 6 rule 13 (1) (a) Civil Procedure Rules five (5) grounds were set out in the body of the application. There were several annexures appended to the supporting affidavit and Mr. Muthama relied on them to argue his client's case.

In essence the court heard the late Tilus Kilonzo (whose estate the 2<sup>nd</sup> defendant appears for here) bought the subject land LR No. KWALE/GALU/KINONDO/683, the subject land, from one Laban Muchemi, now also deceased, in August 1985. Full consideration was paid and after due consents from the local land control board, and the President were given, that land was transferred and registered in the name of Tilus on 12/3/1986. The relevant documents were exhibited. That the late Muchemi had bought the subject land from the 1<sup>st</sup> defendant (Mutiso) in 1975, the 1<sup>st</sup> defendant having acquired the first registration after adjudication, on 15/11/1974. That with all that history, the 2<sup>nd</sup> defendant (read Tilus

Kilonzo) had bought the land from Muchemi for valuable consideration and with no notice of fraud – some 11 years after the first registration. That the 2<sup>nd</sup> defendant had owned that land for some 16 years before the plaintiff brought this suit, except for the Land Disputes Tribunal Cause No. 8 of 1997 which dismissed his case against the 2<sup>nd</sup> defendant. He did not appeal and accordingly the present suit was frivolous, vexatious, and an abuse of the court process.

Regarding (prayer 3, no reasonable cause) Mr. Muthama stressed that the plaintiff had not laid any basis in law as to his claim of owning the subject land. He had laid a ground of fraud in paragraph 5 of the plaint but failed to specifically plead any element of fraud committed by the 2<sup>nd</sup> defendant. That in fact the 2<sup>nd</sup> defendant's defence had clearly averred how the land was acquired for valuable consideration in 1985, giving the history of the title as already alluded to. And that having acquired that title regularly and according to law for valuable consideration and with no notice of or having been involved in the alleged fraud, the 2<sup>nd</sup> defendant should not remain in this suit any longer.

As to setting aside the prohibitory and injunction orders the court heard that they were obtained ex parte and not served on the 2<sup>nd</sup> defendant or her advocates M/s Muranje & Co. who were then on record. But to this Mr. Asige for the plaintiff posited that the order (s) were properly served on M/s Chacha Mwita Advocates who were acting for the 2<sup>nd</sup> defendant before M/s Muranje. This seemed to have ended the argument on this point.

Mr. Asige in response, to the other aspects that the suit should not be struck out against the 2<sup>nd</sup> defendant told the court that the fraud complained of started from the beginning of the title to this subject land. That the first owner, the 1<sup>st</sup> defendant by trick and otherwise, got himself registered over the plaintiff's land right after adjudication. That accordingly the title was tainted with fraud and so the 1<sup>st</sup> defendant could not pass a good title to Muchemi and Muchemi in turn could not pass a good title to the 2<sup>nd</sup> defendant. That it is no matter that the 1<sup>st</sup> defendant had the first registration. That that cannot sanitise a title tainted with fraud and this court should so hold.

It was stressed without specificity, that the 2<sup>nd</sup> defendant knew of the fraud or ought reasonably to have known of it and that therefore he has no valid title. That subdividing the plot also showed tendency to circumvent the claim here. The plaintiff deponed that a forged court order had been used in the exercise. This forgery bit was not much argued here.

On the whole this court was asked to consider the plaint carefully as it is the basis of the intended striking out the suit. That to strike out a pleading is a drastic course indeed and because all falls within the discretion of the court, the court ought to move with great caution and only exercise it as sought in very plain and clear cases. That this was not such a case and the court should thus allow all parties to be heard at the trial. That a claim on fraud should not be disposed of at a point in proceedings other than after evidence has been laid and subjected to due examination – i.e. at a trial. And finally that the existing prohibitory orders do remain to the end, a default judgment having been entered against the 1<sup>st</sup> defendant. The plaintiffs replying affidavit also carried exhibits the court referred to.

The court listened to both sides patiently and at length. It is not in dispute that according to the operation of Order 6 rule 13 Civil Procedure Rules striking out a pleading can be at any time of the proceedings. It is however undertaken by the court in exercise of a discretion. That discretion ought to be exercised judicially and judiciously, due care being taken not to be influenced by whim, caprice or impetuosity. Honest attempts must go into laying firm grounds to strike out a pleading – lest it cause injustice. Those grounds must of necessity also include a fact that where injustice will be done by dragging along a party who need not be in a given case, then that party should be set free at the earliest opportunity. Litigation is expensive, time consuming and even inconvenient.

In these proceedings Mr. Asige rightly alluded to all the foregoing and asked the court to focus on the plaint here when considering whether to strike it out against the 2<sup>nd</sup> defendant or not. And that is the way it should be. A plaint must set out a cause of action by the plaintiff against the defendant. Because the

cause of action is actually the dispute to be determined, the plaintiff should say what stands out against the other party. Only with a dispute falling to be determined, is a case made out thereby forming a basis as to why two or more disputants came and remain in court to the end. And that cause must be reasonable – so the provisions of the law mandate.

In the present proceeding, focus is set on paragraphs 4 and 5 of the plaintiff filed here on 8/4/1997. That is where in essence the plaintiff sets out his claim against the defendant (s).

“4. The plaintiff is the legal owner of the land registration

Number Kwale/Galu/Kinondo/683 which is situated at

Kinondo Location, Kwale district of the Coast Province.

5. The plaintiff states that on checking his land for the purpose of effecting the necessary developments thereon the property discovered (sic) that the said parcel of land on Plot No. Kwale/Galu/Kinondo/683 had been fraudulently subdivided and registered in the names of the defendants.

#### PARTICULARS OF FRAUD

- (a) Subdividing parcel of land Plot No. Kwale/Galu/Kinondo/683 into plots without the consent of the plaintiff who is the owner of the said land.
- (b) Transfer and registered (sic) the said parcel of land into the names of the defendant (sic) without the knowledge of the plaintiff.
- (c) Taking possession of the said piece of land without the knowledge of the plaintiff who is the legal owner.”

From these two paragraphs the court examined the plea that the plaintiff was the legal owner of the subject plot.

The same was repeated in the replying affidavit of the plaintiff sworn on 20/7/2005 (para 5). But there was no evidence of such legal ownership – no title deed, no abstract or other document evidencing legal ownership of plot No. 683 by the plaintiff.

So what legal right of the plaintiff is violated over the subject land? Apparently none. Of course the court is alive to the fact that the suit is not being decided at this time. That can only be at the trial period. But if one, as the plaintiff asserts at this point in his plaint and replying affidavits that he is the legal owner, surely he ought to exhibit the basis of his assertion. There is none.

The other point is that the plaintiff is pleading that as at 8/4/1997 when this suit was instituted the defendants had fraudulently subdivided “his” land and taken titles. But the property section of the title to this land does not say so. On 15/11/1974 the title opened with Luke Mutiso (the 1<sup>st</sup> defendant). Then on 15/9/1975 it went to Laban Muchemi who in turn passed it to Tilus Kilonzo on 12/3/1986. Besides other entries there, is this one of 11/2/2003: TITLE CLOSED ON SUBDIVISION – NOW SEE NOS 1515 & 1516.

So is the plaintiff’s averments in accord with the transactions/entries on the title No. 683? It does not appear so.

Anyway, the core of this cause is the allegation of fraud. As set out, the particulars of fraud do not appear to be specific as per Order 6 rule 81 (a). There are two defendants here. Which acts of fraud are attributed to either and particularly the 2<sup>nd</sup> defendant? None at all. Can it thus be said that the plaintiff has made out a case against the 2<sup>nd</sup> defendant? Hardly. When this was set out as a ground to strike out the plaint, the plaintiff responded:

“6. That the 2<sup>nd</sup> defendant knew or ought to have known that the purported owners and successors in title had fraudulently registered the plots in their names despite the fact that I was and still I am the owner and in actual possession of the suit land and had been developing the same.” (see replying affidavit)

Fraud is a serious claim. It is even criminal. With that the Civil Procedure Rules require that its particulars should be specifically set out to enable the defendant(s) to react to them. It cannot be said that such has been the case here against the 2<sup>nd</sup> defendant alone or jointly. Pressed as to exactly when and where this litigant allegedly committed the fraud when he acquired the land more than 10 years before this suit, Mr. Asige did not clearly enlighten the court on the same. Of course, if a pleading can be amended, and as it were that amendment breathes some life in the pleading, then it continues to exist. But that is not before the court now. The plaintiff maintains that the plaint is perfect and we leave it at that. But in this court’s opinion, as that plaint stands, it does not put forth a reasonable cause against the 2<sup>nd</sup> defendant. The same against her is hereby struck out with costs.

In arriving at the above this court is alive to the fact that it need not go very deeply in the subject, as it were to strike out the pleading. That should be left to evidence at a trial, if so required. But for this matter the course taken to arrive at the foregoing conclusion did not require minute examination of the evidence on affidavits with annexures to say that no reasonable cause is made out against the 2<sup>nd</sup> defendant.

In sum the plaint is struck out for failing to disclose a reasonable cause against the 2<sup>nd</sup> defendant. She gets costs of this application and the suit. The plaintiff should contend himself with moving against the 1<sup>st</sup> defendant against whom there is default judgment.

Orders accordingly.

Delivered on 22<sup>nd</sup> September 2005.

J.W. MWERA

JUDGE