

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE 208 OF 2003

JOHN RIMOI NJAU.....PLAINTIFF

VERSUS

SAMUEL NJAU WAINAINA.....DEFENDANT

RULING

The plaintiff, John Rimui Njau, has made an application under **Order VI Rule 13(a), (b) & (c), Order XXXV Rule 1 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** seeking the orders of this court to strike out the defence and counterclaim filed by the defendant, Samuel Njau Wainaina, and thereafter enter judgment in favour of the plaintiff as prayed in his plaint. The application is supported by the annexed affidavit of the plaintiff and is based on the grounds stated on the face of the application. In summary, the plaintiff states that he is the first registered owner of all that parcel of land known as **Muguga/Jet Scheme/218** (*hereinafter referred as the suit land*) having been allocated the same by the Commissioner of Lands. The plaintiff contends that the defendant, (*who had trespassed into the said parcel of land*) had no interest on the said property which is recognized or capable of the protection by the law. Having filed the suit seeking the eviction of the defendant from the suit land, it is the plaintiff's application that the defence filed by the defendant is frivolous, vexatious, scandalous and meant to delay the expeditious disposal of the suit herein. The plaintiff contends that the counterclaim filed by the defendant discloses no reasonable cause of action and should likewise be struck out.

The application is opposed. The defendant has filed a replying affidavit in opposition to the application. In essence, the defendant depones that the suit land belonged to one Nyanja Rimoi who is now deceased (*hereinafter referred to as the deceased*). Succession proceedings were filed at the Kikuyu District Magistrate's Court which proceedings have to date not been finalized. The defendant further depones that the suit land was family land which should have been inherited by the sons of the deceased. The defendant contends that by cunning, trickery and fraud, the plaintiff had had the suit land declared *bona vacatia* after which he was duly allocated the same and issued with documents of title by the Commissioner of Lands. The defendant contends that his defence and counterclaim raises triable issues which ought to be ventilated in a full trial.

At the hearing of the application, I heard submissions made by Mr Kahiga, Learned Counsel for the plaintiff and by Mr Mburu Machua, Learned Counsel for the defendant. In his submission before court, Mr Kahiga argued that the plaintiff was the first registered owner of the suit land. He submitted that upon being served with the application, the defendant had not proved or established the fraud that he alleged was committed by the plaintiff in obtaining the said title to the suit land. He argued that as at the 19th of March 1980, the deceased was not the registered owner of the suit land and neither was the suit land mentioned in the succession proceedings as it relates to the deceased's estate. Learned Counsel argued that at the time the Succession Cause was filed before the District Magistrate's Court, Kikuyu, the land had already reverted back to the State and was therefore government property. The plaintiff further argued that the defendant was a trespasser on the suit land and further lacked capacity to bring the suit on behalf of the deceased as he had not obtained letters of administration to the said deceased's estate. Neither had the defendant filed any claim over the suit land based on adverse possession. It was the plaintiff's case that the defence and the counterclaim filed by the defendant did not raise any triable issues to warrant this court to allow the case to go to full trial. Mr Kahiga referred this court to several authorities in support of his submissions.

Mr Mburu for the defendant opposed the application. He reiterated the contents of the replying affidavit and submitted further that the suit land belonged to the family of the deceased. It was his contention that there was a Succession Cause which had been filed and was still pending determination. Learned Counsel conceded that some documents which were filed in the Succession Cause were missing and could not therefore be annexed to the application. The defendant argued that he had paid part of the purchase consideration for the suit land. He submitted that he had been residing on the suit land since 1983 and should therefore be allowed to defend the suit. Learned Counsel for the defendant submitted that the plaintiff's decision to file this suit was an afterthought. He urged the court to dismiss the application with costs.

I have carefully read the pleadings filed by the parties to this application including the plaint and the defence and counterclaim filed. I have also considered the submissions made by the Learned Counsels for the plaintiff and the defendant. I have also read the decided cases that were referred to this court by the plaintiff. After carefully considering the facts of this case, in my view, the issue for determination by this court is whether or not the plaintiff's suit establishes unassailable case that it cannot be resisted by the defendant and therefore this court ought to, as a matter of course, strike out the defence and the counterclaim filed by the defendant and thereafter enter judgment for the plaintiff as prayed in his plaint. This court is aware that the power granted to this court to strike out suits should be exercised sparingly and in circumstances where the pleadings sought to be struck out is so hopeless that it would be incapable of having any triable issues gleaned from it. As was stated by Madan J. A. in **D. T. Dobie & Company (Kenya) Ltd –vs- Muchina [1982]KLR 1** at page 9,

“No suit ought to 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. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of the case before it.”

What is the plaintiff's case in this suit?

The plaintiff has averred that he is the registered owner of the suit land. He has annexed a title deed which was issued to him on the 27th of August 2003. He has further deponed in the affidavit in support of this application that he did a search at the Land registry and realised that the suit land was then registered as owned by the Government of Kenya. He duly applied to be allocated the suit land and the same was allocated to him. The plaintiff upon being registered as the owner of the suit land became the first registered owner. The plaintiff then filed this suit seeking to have the defendant, whom he considered to be a trespasser, evicted from the suit land.

What is the defendant's defence to the plaintiff's case? The defendant avers that the suit land was family land having been previously owned by Nyanja Rimoi – deceased, who died in the year 1974 according to the death certificate which was annexed to the replying affidavit sworn by the defendant. It is the defendant's case that succession proceedings which were filed by the family of the deceased in respect of the suit land had not been concluded as the said proceedings were still pending before the District Magistrate's Court Kikuyu (*I suppose due to the passage of time the said court is now a Senior Resident Magistrate's Court*). The defendant further states that he has resided on the suit land since 1983 on the strength of his right as a beneficiary to the deceased's estate. The defendant further contends that the plaintiff fraudulently obtained title to the said suit property and did so to defeat the just claim to the said parcel of land by the beneficiaries of the deceased's estate. The defendant did not however annex any documents to support his averments as stated in his defence and counterclaim other than annex incomplete succession proceedings before the then District Magistrate's Court, Kikuyu in respect of the deceased estate.

Having carefully considered the rival arguments made by the parties to this application, certain facts are not in dispute. Firstly, it is not disputed that the suit land was owned by the Government of Kenya which allocated the same to the plaintiff. It is further not disputed that the plaintiff is the first registered owner of the suit land. The defendant did not further seriously challenge the fact that at the time the

succession proceedings in respect of the deceased's estate were filed before the District Magistrate, Kikuyu the suit land had already reverted back to the Government and the same was then owned by the Government. The defendant could not therefore have inherited the suit land as the same no longer belonged to the deceased as alleged by the defendant. It is further not disputed that the defendant occupied the suit land in 1983, more than nine years after the death of the deceased – Nyanja Rimoi. The defendant's case could have had more strength had the defendant established that he had taken possession of the suit land, either during the lifetime of the deceased or immediately upon the death of the deceased.

In the circumstances of this case it is clear that the defendant took a risk in occupying a parcel of land whose ownership he had not first established. Now that the plaintiff has proved beyond per adventure that he is the registered owner of the suit land, and a first registered owner at that, the defendant cannot resist the plaintiff's application. Apart from what the defendant averred in his pleadings, the defendant did not exhibit any evidence to support his contention that the suit land once belonged to the deceased. What the court has been left to ruminate upon is mere speculation on the part of the defendant. There is no scintilla of evidence by the defendant that would enable this court to latch on and compel it to reach a determination that the defence and counterclaim filed by the defendant raised triable issues which would make this court order the matters in dispute to be ventilated in a full trial.

Upon careful analysis of the evidence placed before me, I do hold that to allow the defendant to defend the plaintiff's claim and to allow him to ventilate his counterclaim would amount to this court unjustly and unnecessarily delaying the just conclusion of this case. The plaintiff's claim cannot be resisted by the defendant. To order that this case proceeds to full trial will just be to postpone the inevitable entry of judgment in favour of the plaintiff.

For the reasons stated, the plaintiff's application is hereby allowed. The defence and counterclaim filed by the defendant herein is hereby struck out. Judgment is entered for the plaintiff against the defendant as prayed in the plaint. The defendant is hereby ordered to vacate the suit land within sixty (60) days of being served with the decree of this court, in default thereof, the plaintiff shall be at liberty to evict the defendant from the suit land.

The plaintiff shall have the costs of this application and the costs of the suit.

DATED at NAKURU this 3rd day of October 2005.

L. KIMARU

JUDGE