



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)  
CIVIL CASE 319 OF 2003**

**JOSEPH NDUNGU MWAURA..... PLAINTIFF/RESPONDENT**

**-VERSUS-**

**JAMES GITHIGA MWAURA ..... DEFENDANT/APPLICANT**

**RULING**

The defendant/applicant has in his chamber Summons application dated the 20<sup>th</sup> May 2004 moved the court seeking an order to strike out the plaint dated and filed on the 8<sup>th</sup> April 2003 on grounds including that it discloses no reasonable cause of action. The application is supported by the affidavit of the applicant also made on the 20<sup>th</sup> May 2004.

In his submissions, Charles Githuka, for the applicant, argued, *inter alia*, that the applicant, being the registered proprietor of the suit property is vested with the absolute ownership thereof together with all rights and privileges belonging or appurtenant thereto by virtue of section 27 of the Registered Land Act which rights shall not be liable to be defeated except as provided in the Act. Mr. Githuka contended, therefore, that the respondent, who avers in the plaint “**that the Defendant holds the suit property in trust, on behalf of the family**” has no *locus standi* to institute the suit because the trust alleged does not, in fact, exist and further that such a trust is not in any event a registrable interest under the provisions of the said Act. Counsel accordingly urged that the application be granted.

In reply, and opposing the application relying on the Replying Affidavit of the Plaintiff/Respondent made on the 30<sup>th</sup> June 2004, Miss Kimani urged that the suit be allowed to proceed to trial as the plaint discloses a reasonable cause of action on the averments therein. Learned counsel cited **D.T. Dobie (Kenya) & Co. Ltd. V. Muchina & Another** [1982] KLR.1 followed by the court of Appeal in **Nitin Properties Ltd. V. Jagjit Singh Kalsi & Another** (Civil Appeal No.132 of 1989) (unreported) in her support of her argument that the plaint herein should not be struck out unless it is incontestably or hopelessly bad.

I have considered the application in light of the submissions of both learned counsel.

While the applicant in paragraph 5 of the Defence dated the 13<sup>th</sup> May 2004 states that the alleged particulars of fraud contained in the plaint “**are really no particulars but rather the same are speculations, assumptions, misconceptions of law and facts and misstatements,**” there is nothing on the record to show that further and better particulars thereof have been sought from the Respondents and that the Respondents has been unable to answer such a request. As the matters raised in the plaint and Defence respectively can only properly be determined by the trial judge, I should be most reluctant in the present circumstances to excise my discretion in favor of the applicant as I do not find nor hold that this is a plain and obvious case in which I should invoke such discretion to strike out the plaint.

Accordingly, it is ordered that the Chamber Summons application dated the 20<sup>th</sup> May 2004 be and is hereby dismissed and further that each party shall bear their respective costs of the application.

Dated and delivered at Nairobi this 26<sup>th</sup> day of November 2004.

P. Kihara Kariuki

Judge