



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 46 OF 2020

DAVID SITUMA WEKESA.....PLAINTIFF

VERSUS

BHIMJI KERA.....1ST DEFENDANT

JACKS CHERIREI KITIYO.....2ND DEFENDANT

DANIEL MBUGUA.....3RD DEFENDANT

RULING

1. By a Notice of Motion dated 22/10/2020 and filed on 23/10/2020, brought under provisions of **Sections 3(1)** of the **Environment and Land Act**, **Order 2 Rule 15(1) (c)** and **Order 51 Rule 1** of the **Civil Procedure Rules**, the applicant/plaintiff seeks the following orders:

- 1. That this application be certified as urgent and directions be given over the hearing of the application on priority.**
- 2. That the statement of the defence filed on 24/9/2020 be struck out.**
- 3. That judgment be entered for the applicant/plaintiff as prayed in the plaint.**
- 4. That costs of this application be provided for.**

2. The application is supported by the affidavit of the plaintiff sworn on 22/10/2020. The application is premised on the grounds that the defence filed shall only serve to delay the fair trial of the action. The reasons for that proposition are further elaborated at the foot of the application.

The Response

3. The defendants failed to file any affidavit in response to the application.

Submissions

4. The court directed that the hearing of the application dated be by way of written submissions. The defendants filed their submissions on 16/12/2020. I have perused through the file record and found no submissions filed on behalf of the plaintiff.

Determination

5. The issue that arises in the instant application is whether the defendants' defence in the matter should be struck out on the sole ground that the defence filed shall only serve to delay the fair trial of the action.

6. The application is brought under **Order 2 Rule 15(1) (c)** of the **Civil Procedure Rules** which provides as follows:

Striking out pleadings [Order 2, rule 15.]

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

(a).....

(b).....

(c) **It may prejudice, embarrass or delay the fair trial of the action; or**

(d).....

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

7. The question is whether the plaintiff has established whether the defence of the defendants may delay the fair trial of the action. The defendants have put up a spirited attempt against the application, stating in their written submissions that the plaintiff has failed to discharge his burden. Citing Odunga's Digest on Civil Case Law and Procedure Volume 4 2nd Edition, they state that the defendants' defence does not fall under any of the categories that are set out therein, to wit:

a. is evasive;

b. is obscuring or concealing the real question between the parties;

c. is ambiguous or unintelligible;

d. raises immaterial matter;

e. raises pleading the defendants are not entitled to make use of; or

f. is a defence in which the defendant does not say how much of the claim he admits and how much he denies.

8. Citing the decision of **DT Dobie Vs Muchina [1982] KLR 1** counsel for the defendants submits that this court should only strike out a pleading in a clear case and aim at sustaining rather than terminating a suit. It is urged that the defence raises issues of law which ought to go for trial and that allowing the present application would violate the defendant's constitutional right to a fair hearing.

9. It is therefore clear that the court therefore has discretion to strike out pleadings in appropriate circumstances under **Order 2 Rule 15** of the **Civil Procedure Rules**. But in this case should the defence be struck out?

10. I have perused the defence. It is an elaborate pleading that states by what authority the defendants claim to be on the suit land. It raises the question of whether the defendants were involved in the earlier litigation in which the plaintiff obtained judgment against other parties. On its face, the defendant's defence can not be said to be evasive at all.

11. In the case of **Francis Kamande V Vanguard Electrical Services Ltd [1998] eKLR** the Court of Appeal stated as follows:-

“A pleading is embarrassing if it is so drawn that it is not clear what case the opposite party has to meet at the trial. If the defendant raises relevant issues, his defence cannot be termed as embarrassing or delaying the fair trial of the suit. Nor it can be struck out because the other party declares it to be untrue.”

12. In the same case it was stated as follows:-

“What Madan JA said about the Plaintiff's suit equally applies to the defendant answer or defence. In Attorney General of Duchy of Lancaster vs. L & N. W. Rly Co [1982] 3 Ch. 274 C. A. it was held:

“The summary procedure under this rule can only be adopted when it can be clearly seen that a claim or answer is on the face of it “obviously unsustainable.”

The learned Judge was right when he said that Counsel for the appellant/plaintiff did not show how the defence and counterclaim offended the rules of pleading. Surely it raised a defence of failure of consideration and counterclaimed refund of money paid under a mistake of fact and for loss and damage suffered by the defendant.”

13. In their defence the defendants certainly do not admit the plaintiff's claim. Though the plaintiff avers in the plaint that the defendants entered the suit land at the instance of the plaintiff's and during the pendency of earlier litigation, the defendants correctly state that they were not named as parties in **Kitale ELC No. 140 of 2013** and claim to be strangers thereto and that issue remains untried.

14. In **Pan African Bank Limited V Gulmareba Limited & 2 Others [2006] eKLR** the court quoted the decision of Justice A. Ringera in **Lynette B. Oyier and others v. Savings and Loan Kenya Limited: HCCC No. 891 of 1996 (UR)** as follows:-

“The function of the Court in its jurisdiction of striking out pleadings under Order VI rule 13 of the Civil Procedure Rules is not to determine whether the action or defence as framed will or will not succeed at the trial. That is the function of the trial

court after hearing evidence and legal submissions. The function of the Court under that jurisdiction is to determine whether the pleadings have been formulated in accordance with the established rules of pleadings and to impose appropriate sanctions if they have not been so formulated.”

15. In my view the defendants’ defence has been appropriately formulated and the remedy that the plaintiff seeks can not be obtained. When a plaintiff applies for a defence to be struck out only on the basis that it may prejudice or embarrass or delay the fair trial of the action, the court is not required to go far and wide to discover whether there is any other ground upon which the defence may be struck out. Also, when the court ascertains that the defence states clearly what case the opposite party has to meet, at the trial, and that it raises relevant issues, the court does not need examine at the interlocutory stage whether the contents of that defence are true or not, it is bound to let it remain on the record.

16. In the foregoing circumstances it is not possible to find for the plaintiff in a summary manner that the defence filed shall only serve to prejudice, embarrass or delay the fair trial of the action. The application dated **22/10/2020** therefore has no merit and the same is dismissed with costs to the defendants.

Dated, signed and delivered at Kitale via electronic mail on this 23rd day of February, 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.