



REPUBLIC OF KENYA



**Karanja & 3 others v Ndungu (Environmental and Land Originating Summons
E007 of 2022) [2024] KEELC 1345 (KLR) (4 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1345 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E007 OF 2022**

BM EBOSO, J

MARCH 4, 2024

BETWEEN

DAVID GITHUKA KARANJA 1ST PLAINTIFF

CHARLES NGANGA KARANJA 2ND PLAINTIFF

BERNARD GITHUKA KARANJA 3RD PLAINTIFF

MARY WAMBUI KARANJA 4TH PLAINTIFF

AND

MICHAEL MWAURA NDUNGU DEFENDANT

RULING

1. The subject of this ruling is the defendant's notice of motion dated 2/6/2023, through which he seeks an order striking out this suit. The application is premised on the grounds outlined in the motion and in the supporting affidavit sworn on 7/6/2023 by the defendant. The application was canvassed through written submissions dated 16/11/2023, filed by M/s Kimondo Mubea & Company Advocates.
2. The case of the applicant is that he purchased land parcel numbers Ndarugu/Kamunyaka/721 and Ndarugu/Kamunyaka/722 [the suit properties] through a public auction conducted by Family Finance Building Society [the chargee] in August 2004 and he was subsequently registered as proprietor of the two parcels on 13/10/2004. At the time of the public auction, the two parcels were registered in the name of Wilfred Karanja Githuka [referred to in this ruling as "the chargor"]. Prior to the public auction, Teresia Nyambura Karanja, a wife and guardian ad litem of Wilfred Karanja Githuka, instituted Miliminai High Court Commercial Division HCCC No 512 of 2003 against the charge, seeking to restrain the chargee against exercising the chargee's statutory power of sale. Their plea for an interlocutory injunctive order in the said suit was rejected by the High Court through a ruling rendered by Kasango J on 22/6/2004. Following the dismissal of the plea, the chargee proceeded to



exercise the statutory power of sale. I will, for convenience, refer to Teresia Nyambura Karanja simply as “Teresia”.

3. The applicant adds that his attempt to take possession of the suit properties in 2004 was resisted by Teresia, prompting him to file Thika CMCCC No 1194 [which was later redesignated as Thika CMC E & L Case No 153 of 2018] which is pending determination by the Thika Chief Magistrate Court. He contends that Teresia filed a preliminary objection in Thika CMCC No 1194 of 2004 which was dismissed through a ruling rendered on 19/6/2006. Dissatisfied with the ruling, Teresia filed Nairobi High Court Civil Appeal No 433 of 2006 which was subsequently redesignated as Nairobi (Milimani) ELC Appeal No 34 of 2014. The said appeal was subsequently dismissed by Obaga J on 28/6/2018 and the original file of the Chief Magistrate Court was returned to Thika Chief Magistrate Court for hearing. On being returned to the Chief Magistrate Court at Thika, the file was re-designated as Thika CMC E & L Case No 153 of 2018.
4. The applicant contends that Teresia is a wife to the chargor and is still defending Thika CMC E & L Case No 153 of 2018 as the guardian ad litem of the chargor [the pervious registered proprietor], Wilfred Karanja Githuka. He adds that the plaintiffs in the present originating summons [Thika ELC OS No E007 of 2002] are either children of the couple [Teresia and the chargor] or their relatives who are fully aware that the only reason why he has not taken possession of the two parcels of land is that the chargor, through Teresia, has resisted his attempts and there is the above case pending before the Thika Chief Magistrate Court. It is the position of the applicant that by the plaintiffs, who are close family members of the chargor, filing this suit while aware of the above circumstances, they are engaging in blatant abuse of the process of the court. He contends that for the above reasons, this originating summons is scandalous, frivolous, vexatious and an abuse of the due process of the court. He invites the court to strike out the originating summons on the above grounds.
5. The plaintiffs/respondents elected not to tender affidavit evidence in response to the evidence that the applicant tendered. They elected to oppose the application through grounds of opposition dated 2/8/2023 and written submissions dated 21/11/2023, filed by M/s Karuga Wandai & Co Advocates. The case of the respondents is that the originating summons raises triable issues which require full trial and determination. They further contend that they are not parties to Thika CMC Civil Case No 1194 of 2004 and Nairobi HCCC No 512 of 2003. They invoke Article 159 (d) of *the Constitution* and contend that this suit should be decided on merits. They urge the court to reject the application.
6. I have considered the application; the grounds of opposition; and the parties’ respective submissions. I have also considered the legal framework and the jurisprudence relevant to the key issues in the application. The two questions to be answered in this ruling are: (i) Whether this suit is scandalous, frivolous or vexatious; and (ii) Whether this suit is an abuse of the process of the court. I will dispose the two questions contemporaneously.
7. The court is invited to exercise the draconian jurisdiction of striking out a suit. The key principle upon which this jurisdiction is exercised is well-settled. The Court of Appeal discussed and outlined the relevant principle in *The Co-operative Merchant Bank Ltd v George Fredrick Wekesa*, Civil Appeal No 54 of 1999 as follows:

“striking out a pleading is a draconian act which may only be resorted to in plain cases Whether or not a case is plain is a matter of fact A court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”



8. *Bullen & Leake & Jacobs Precedents of Pleadings [12th Edition]* contain the following exposition on what constitutes a scandalous, frivolous or vexatious pleading:

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action.”

9. In *Muchanga Investment Ltd v Safaris Unlimited (Africa) Ltd & 2 others [2009]eKLR*, the Court of Appeal of Kenya adopted the following exposition by the Court of Appeal of South Africa in *Beinosi Wiyley 1973 SA 721 [SCA]* at Page 734 F-G on what constitutes an abuse of the process of the court:

“What constitutes an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of “abuse process”. It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous to that objective.”

10. The application under consideration was anchored on evidence contained in an affidavit and annexures to the affidavit. The affidavit contained critical evidence that required controverting evidence by the respondents. The applicant deposed that the suit properties previously belonged to Wilfred Karanja Githuka, adding that he purchased them in a public auction in 2004. The applicant further asserted on oath that upon acquiring the two parcels, the chargor, through his wife and guardian ad litem, resisted his attempts to take possession of the two parcels of land. He further deposed that in the same year [2004], he initiated a suit against the chargor, seeking eviction orders. The said suit is still pending before a court of law. The applicant added that the respondents in this suit are children and relatives of the chargor and the guardian ad litem who, while aware of the subsisting case that was initiated by the applicant in 2004 against the chargor through the guardian ad litem, brought this originating summons seeking orders of adverse possession. The applicant contended that for the above reasons, this suit is scandalous, frivolous, vexatious and an abuse of the process of the court. What did the respondents do about the above evidence by the applicant?
11. For reasons that only the respondents know, they elected not to controvert the above evidence through a replying affidavit. Consequently, all the factual depositions which the applicant placed before the court through the supporting affidavit remain unconverted. Put differently, all the evidence which the applicant placed before this court stood unchallenged.
12. In the absence of controverting evidence, the court is satisfied that, on the balance of probabilities, the applicant has proved that: (i) the four plaintiffs are close family members of the chargor and the chargor’s guardian ad litem; (ii) the guardian ad litem is a wife to the chargor; (iii) while aware of the subsisting case through which the defendant/applicant asserted his right to have possession of the suit properties, the four plaintiffs who are members of the chargor’s family brought the present originating summons disguising themselves as bonafide adverse possessors. Based on the above evidence, it is my finding that the four plaintiffs cannot be bonafide adverse possessors because they belong to the household of the chargor and the chargor’s guardian ad litem and are aware of the subsisting litigation.
13. For the above reasons, the court agrees with the applicant that the key elements of a scandalous, frivolous and vexatious claim and the key elements of abuse of the process of the court are evident in this



originating summons and have been adequately demonstrated in the application under consideration. The court is satisfied that the criteria for exercising the draconian jurisdiction to strike out a suit has been met.

14. The result is that the originating summons/suit is struck out. The plaintiffs shall bear costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 4TH DAY OF MARCH 2024

B M EBOSO

JUDGE

In the presence of: -

Mr Karuga Wandai Advocate for the Plaintiffs

Mr Kiingara for the Defendant

Court Assistant - Hinga

