



**Ondatto & 2 others v Obimbira & 3 others (Environment & Land Case
217 of 2014) [2023] KEELC 17402 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17402 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 217 OF 2014**

BN OLAO, J

MAY 10, 2023

BETWEEN

CATHERINE ONDATTO 1ST PLAINTIFF

HENERICO NAULO OUMA 2ND PLAINTIFF

MARY MURIZA ONDATTO 3RD PLAINTIFF

AND

LEONARD W. OBIMBIRA 1ST DEFENDANT

RUBELA NERIMA OBIMBIRA 2ND DEFENDANT

ROSE AMUKASA OKWAKO 3RD DEFENDANT

THE LAND REGISTRAR BUSIA 4TH DEFENDANT

RULING

1. What calls for my determination is whether the defendants in this case have any defence on record. I therefore need not delve into the history of the dispute herein notwithstanding the invitation by counsel of all parties to do so. Suffice it to state that by a further amended plaint dated February 16, 2021 and filed on March 3, 2021, the plaintiffs sought against the defendants various orders with respect to the land parcels No Bunyala/Bulemia/2622 and 4291 details whereof are not necessary for purposes of this ruling.
2. The record shows that the 1st, 2nd and 3rd defendants filed a joint statement of defence on March 28, 2017. The 4th defendant appears not to have filed any defence.
3. Meanwhile, by a notice of motion dated October 22, 2018, one Mary Muriza Ondato filed an application seeking to be enjoined in these proceedings as an interested party. That application was placed before Kaniaru J on December 3, 2018 and was allowed by consent. I notice that the same Mary



Muriza Ondato is named in the amended plaint as the 3rd plaintiff. Hopefully that will be sorted out during the trial.

4. The record also shows that the hearing commenced before Kaniaru J on February 18, 2016 and four witnesses testified before him namely:
 1. Mourine Ogema Ondato
 2. Heneriko Naluo Ouma
 3. Catherine Khabiria Ondao (PW3) and;
 4. Tom Chepkwesi
5. They testified between February 18, 2016 and March 7, 2018 before the plaint was further amended on February 16, 2021 and filed on March 3, 2021 pursuant to an application dated January 20, 2021 and allowed by Omollo J on March 11, 2021 when the judge also allowed the defendants 14 days to file their amended defence. The record shows that the 1st, 2nd and 3rd defendants filed their amended statement of defence and counter-claim by the 2nd defendant one year later on March 21, 2022 well beyond the 14 days allowed on March 11, 2021.
6. As all the above was going on, several other applications were filed. What is relevant for this ruling is the plaintiff's notice of motion dated November 29, 2021 and filed on December 4, 2021 in which they sought the following orders:
 1. That the defence by the defendants herein be struck out.
 2. That judgment be entered accordingly in favour of the plaintiffs as per the amended plaint.
 3. That costs of this application be provided for.
7. The gravamen of the application is not relevant for purposes of this ruling. When the said application was placed before Omollo J on February 17, 2022, she granted the 1st, 2nd and 3rd defendants time to file their responses and exchange skeletal submissions within 10 days with the same listed for highlighting on March 21, 2022. However, when the matter came up on March 21, 2022, Mr Jumba counsel for the 1st, 2nd and 3rd defendants informed the court that he needed more time to respond to the application. The proceedings show that he was recorded as saying that he needed "time to respond to the application dated February 28, 2022" but that can only have been an error because what was coming up for highlighting was the submissions in respect to the application dated November 29, 2021. Both Mr Siganga counsel for the 1st and 2nd plaintiffs and Ms Okoth counsel for the 3rd plaintiff objected to any extension of time and urged the court to strike out the 1st, 2nd and 3rd defendants' defence. Omollo J delivered a short ruling allowing the application dated November 29, 2021 as un-opposed and striking out the 1st, 2nd and 3rd defendants' defence. Although Mr Jumba sought leave to appeal that ruling, which leave was granted, there is nothing to suggest that any such appeal was filed.
8. Other applications continued to be filed.
9. On December 6, 2022 when the matter came up before me for mention, Ms Okoth referred the court to the orders by Omollo J striking out the 1st, 2nd and 3rd defendants' defence and asked the court to give her a date for the 3rd plaintiff to testify since she had been enjoined in these proceedings after the 1st and 2nd plaintiffs had already testified. Mr Ashioya holding brief for Mr Ouma for the 3rd defendant informed the court that the parties had never agreed to enjoin the 3rd plaintiff in these proceedings. At that stage, the court lost contact with Ms Okoth who was addressing it virtually. The proceedings had to be adjourned and resumed on January 31, 2023 when Mr Jumba informed the court that there was



a defence by the 1st defendant filed on July 1, 2019 and that the 2nd defendant was deceased and needs to be substituted. Counsel added that the defence filed on July 9, 2019 had not been struck out and that the deceased 2nd defendant was in fact the registered proprietor of the land in dispute. Further that there was an order made by the court for the land in dispute to be surveyed and that the survey exercise would go a long way in determining this dispute. He was supported by Mr Ouma.

10. Ms Okoth in reply informed the court that the defendants had been given 14 days on March 11, 2021 to file their defence. That although orders to survey the land had been granted, that exercise has never taken place and in any case, the application to survey the land was subsequently withdrawn and following the grant of the orders sought in the application dated November 29, 2021, there is no defence on record. She was supported by Mr Siganga who added that the plaintiffs did not wish to substitute the deceased 2nd defendant.
11. Counsel having addressed me orally, I directed that they file and exchange submissions. That was done by Mr Jumba for the 1st defendant, Mr Ouma for the 3rd defendant and Mr J. O Juma for the 3rd plaintiff.
12. I have considered the oral and written submissions on the issue at hand and which is basically whether there is a defence on record. I must however express my displeasure at the manner in which counsel appear to be walking in and out of these proceedings. For instance, Mr Ouma has filed submissions on behalf of the 3rd defendant but on August 4, 2022, he filed an undertaking on behalf of the 1st and 3rd defendants. Meanwhile Mr Jumba filed submissions on behalf of the 1st defendant while on March 21, 2022, the firm of Balongo & Company Advocates filed an amended defence and counter-claim on behalf of the 1st, 2nd and 3rd defendants. I advise counsel to regularize their appearances in this matter so that we can proceed expeditiously and in an orderly fashion without the pleadings and appearances looking like a plate of spaghetti or macaroni.
13. By the time the plaintiffs notice of motion dated November 29, 2021 came up before Omollo J for directions on February 17, 2022, the only defence on record was the 1st, 2nd and 3rd defendants' statement of defence dated March 28, 2017 and filed on the same day by the firm of Balongo & Company Advocates. The same firm subsequently filed an amended statement of defence and counter-claim on March 21, 2022 on behalf of the 1st, 2nd and 3rd defendants. Therefore when Omollo J issued directions on February 17, 2022 with regard to how the plaintiffs' notice of motion dated November 29, 2021 would be canvassed, she could only have had in mind the statement of defence by the 1st, 2nd and 3rd defendants dated and filed on March 28, 2017. That is because, that was the only defence on record as at February 17, 2022. The inevitable conclusion therefore is that the judge's ruling delivered on March 21, 2022 (incidentally the same day that the 1st, 2nd and 3rd defendants' amended defence and counter-claim was filed) could not have been in reference to any other defence other than the defence dated and filed on March 28, 2017. Indeed, I am satisfied that Omollo J's attention was either not brought to the fact that the amended defence and counter-claim had also been filed on March 21, 2022 when she delivered her ruling striking out the defence. Alternatively, the said amended defence and counter-claim was filed after she had delivered her ruling. The bottom line, however, is that the ruling by Omollo J on March 21, 2022 striking out the 1st, 2nd and 3rd defendants' defence could only have been in relation to the defence filed on March 28, 2017 in respect to which directions were issued on February 17, 2022. The application dated November 29, 2021 seeking to strike out the defence of the 1st, 2nd and 3rd defendants could only have been in respect to a defence already filed. This is because the court could not have been approached to strike out what was not already on record. To strike out or to expunge basically means to remove from the record. The amended defence and counter-claim dated February 25, 2022 and filed on March 21, 2022 was not on the record on December 4, 2021 when the



notice of motion dated November 29, 2021 was filed. It could therefore not have been the subject of that application. I therefore make a finding that by the ruling dated March 21, 2022, Omollo J only struck out the defence by the 1st, 2nd and 3rd defendants dated and filed on March 28, 2017.

14. Having said so, is there still a defence by the 1st, 2nd and 3rd defendants on the record? The record is clear that although Omollo J allowed the defendants 14 days from March 11, 2021 within which to file their defence, they only did so one year later on March 21, 2022 and without seeking leave. I have agonized on whether that defence and counter-claim should suffer the same fate as the defence filed on March 28, 2017 and have decided that in the interest of justice, it ought to remain on record so that all the issues relating to the subject matter herein can be fully canvassed. In arriving at that decision, I have taken into account several factors.
15. To begin with Omollo J had already granted the defendants leave to file an amended defence. That order was not vacated although it was complied with well beyond the timelines set. Invoking the provisions of article 159 (2) (d) of the Constitution which provides that justice be administered “without undue regard to procedural technicalities,” the inherent jurisdiction of the court under section 3A of the Civil Procedure Act, the right to a fair hearing under article 50(1) of the Constitution and also the powers granted to this court under section 19 on the Environment and Land Court to act “without undue regard to technicalities of procedure,” I am persuaded that it is in the interest of justice to consider the amended defence and counter-claim filed on March 21, 2022 as properly on record notwithstanding the defect of having been filed late.
16. I am also guided by the principle that striking out a pleading is a draconian act which should be resorted to only in clear and obvious cases – D. T. Dobie & Company Kenya Ltd v Joseph Mbaria Muchina & another 1980 KLR and also Yaya Towers Ltd v Trade Bank Ltd CA civil appeal No 35 of 2000, among other cases. There is also the decision of Sheridan J in the Ugandan case of Sebei District Administration v Gasyali 1968 EA 300 in which he adopted some wise words of Ainsley J (as he then was) in the case of JAmnadas v Sodha Gordandas Hemra 1952 7 Vlr II as follows:

“The nature of the action should be considered, the defence if one has been brought to the notice of the court however irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered and finally I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court.” emphasis added.
17. I have also considered if the plaintiffs will be prejudiced if the amended defence by the 1st, 2nd and 3rd defendants filed on March 21, 2022 remains on record. I find that the plaintiffs are yet to close their case. They will be able to file a reply to the said amended defence and re-call their witnesses if need be. The plaintiffs can also be adequately compensated with an award of costs.
18. Taking all the above into account and having made a finding that the defence which was struck out by Omollo J could only have been the 1st, 2nd and 3rd defendants defence dated March 28, 2017 and filed on the same day. I issue the following directions:
 1. The amended joint defence and counter-claim by the 1st, 2nd and 3rd defendants dated February 25, 2022 and filed on March 21, 2022 be deemed as duly filed subject to payment of relevant fees.
 2. The amended joint defence be served upon the plaintiffs within 7 days from to-day.
 3. The plaintiff will have 21 days from the date of service to file and serve their reply to defence and defence to counter-claim as well as any other documents they may want to file.



4. The matter shall be listed before the Deputy Registrar on June 13, 2023 to confirm compliance.
5. The matter shall thereafter be listed for hearing on one full day.
6. The 1st, 2nd and 3rd defendants shall pay to the plaintiffs throw away costs which I assess as Kshs 20,000 within 30 days from today.

RULING DATED, SIGNED AND DELIVERED ON THIS 10TH DAY OF MAY 2023 BY WAY OF ELECTRONIC MAIL AT BUSIA ELC.

BOAZ N. OLAO

JUDGE

10TH MAY 2023

