



**Kishare v Muriithi (Environment & Land Case 10 of 2023)  
[2023] KEELC 19049 (KLR) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19049 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 10 OF 2023**

**A OMBWAYO, J  
JULY 10, 2023**

**BETWEEN**

**CHARLES SAITONI KISHARE ..... PLAINTIFF**

**AND**

**ALFRED THEURI MURIITHI ..... DEFENDANT**

**RULING**

**A. Introduction**

1. By notice of motion dated May 23, 2023 and filed on July 6, 2023, Charles Saiton Kishare (hereinafter referred to as the plaintiff) sought orders that the defense be dismissed or struck out summarily and Alfred Theuri Muriithi (hereinafter referred to as the defendant) be condemned to meet costs of this application. The application is based on the grounds that the defense is devoid of any merits because it is based on a non-existent agreement for sale of land allegedly made in 1995. The plaintiff also claims that the defense raises no cause of action and is time-barred. The plaintiff also claims that the defendant is a trespasser and has no legitimate claim to the suit land. According to the plaintiff, the *Land Control Act* cap 302 laws of Kenya prohibits sale of land in the absence of the consent of the Land Control Board. In the supporting affidavit of Charles Saiton Kishare, it is deposed of facts and evidence that should not ordinarily be the case.

**Plaint**

2. The plaint is dated February 9, 2023 and filed on February 21, 2023. The plaintiff claims to be the legally registered proprietor of the parcel of land known as Nakuru/Rare/Gichobo/494 measuring about 2.2 hectares. That the defendant trespassed on the land by invading the suit land knowing it was not his land, erecting a permanent house on the land, failing to seek consent of the plaintiff when entering the land, under guise of being a brother-in-law, concealing that he entered the plaintiff's land and despite being given a demand letter to vacate the parcel of land, the defendant remained in defiance



hence the suit was deemed necessary. The plaintiff prays for a declaration that he is the registered legal owner of the land. He prays for mesne profits, general damages for the trespass and vacant possession against the defendant. Lastly, he prays for costs of the suit as well as any other relief that the court may deem necessary.

### **Defence**

3. On the April 3, 2023, the defendant filed a defense dated March 31, 2023 wherein he denied each and every allegation as contained in the plaint. The defendant admitted that the plaintiff is the registered owner of the suit land. He denied that he for any reason or right in law invaded or trespassed and erected a permanent stone house without knowledge and consent of the plaintiff. The defendant states that he is the owner of the parcel of land by virtue of purchase from the plaintiff and the plaintiff acknowledged the receipt by signing thereon. The defendant claimed that at the time of purchase the plaintiff refused to issue him with a title deed despite making a demand through a letter dated August 2, 2018. The defendant claimed he has been in occupation for 24 years since 1995 without any interruption, has developed and cultivated the land.
4. He prayed for a declaration that the land belonged to him by virtue of purchase. The defendant prayed that the suit against him be dismissed with costs and a declaration that the land belongs to him and the plaintiff to handover the original title deed and necessary transfer documents in his favor.

### **Analysis and Determination**

5. Having considered the application and the grounds for the application, the main issue for determination is whether the defense filed herein is a sham. The motion is brought under order 2, rule 15 of the [Civil Procedure Rules](#) which deals with striking out pleadings and it provides as follows;

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

- a. It discloses no reasonable cause of action or defense in law or
- b. It is scandalous, frivolous or vexatious; or
- c. It may prejudice, embarrass or delay fair trial of the action, or
- d. It is otherwise an abuse of the process of the court and may order the suit be stayed or dismissed or judgement be entered accordingly, as the case may be.’

6. This court is reluctant to strike out the defence by applying the wisdom of the learned judge Madan JA in [DT Dobie & Company Kenya Ltd v Joseph Mbaria Muchina & another](#) (1980), where he held:-

“No suit ought to be summarily dismissed unless it appears so hopeless that it 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 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 full facts of the case before it”

7. This because the defence discloses a plausible defence and that the same can be amended to strengthen the defence.



8. In the case of *Blue Sky Epz Limited v Natalia Polyakova & another* (2007) eKLR, the court held that;
- “The power to strike out pleadings is draconian and the court will exercise it only in clear cases where upon looking at the pleading concerned, there is no reasonable cause of action or defense disclosed. In the case of a defense, a mere denial or general traverse will not amount to a defense, a defense must raise triable issues.”
9. This defence raises triable issues such as possession for a long period of time and purchase of the property from the proprietor. The power to strike out any pleading or any part of a pleading under this rule is not mandatory; but permissive and confers a discretionary jurisdiction to be exercised having regard to quality and all circumstances relating to offending pleading.
10. In *Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu* [2009] eKLR, it was stated, and I do agree that,
- “The power to strike out should be exercised after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”
11. In, *Madison Insurance Company Limited v Augustine Kamanda Gitau* [2020] eKLR, it was stated that,
- “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 a case before it.”
12. In, *Prafulla Enterprises Ltd v Norlake Investments Ltd*, Kisumu High Court civil case No. 145 of 1997; LLR 7412 (HCK), it was also stated that;
- “Striking out of a pleading must be done with tremendous caution because a litigant should never be driven from the seat of justice without being heard.”

## Conclusion

13. Upon analyzing the application, I find that there is a triable issue before this court. The defendant has a plausible defense having entered the land and been in occupation since 1995 to date, a period of 28 years. It would, therefore, be prejudicial to the defendant to have his pleadings struck out yet there is a plausible defense. I find that the application is not merited and therefore not allowed as prayed. The defendant to regularize his position by amending the defence and file all necessary documents within 14 days on delivery of this ruling. Costs in the cause. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 10<sup>TH</sup> DAY OF JULY 2023.**

**A O OMBWAYO**

**JUDGE**

