



**Luka & 4 others v Taloi & 9 others (Environment & Land Case  
E002 of 2021) [2023] KEELC 18481 (KLR) (4 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18481 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE E002 OF 2021**

**CG MBOGO, J**

**JULY 4, 2023**

**BETWEEN**

**BEN OLOISHORUA LUKA ..... 1<sup>ST</sup> PLAINTIFF  
JOSEPH MEITAMEI MPAAYEI ..... 2<sup>ND</sup> PLAINTIFF  
SANE LUKE MPAYEEI ..... 3<sup>RD</sup> PLAINTIFF  
EMMANUEL TOIKAN MPAYEEI ..... 4<sup>TH</sup> PLAINTIFF  
MEITEIKINI LUKA ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**RAITA TALOI ..... 1<sup>ST</sup> DEFENDANT  
SUYIANKA NKOORA ..... 2<sup>ND</sup> DEFENDANT  
TINTI SUYANKA ..... 3<sup>RD</sup> DEFENDANT  
KULAL TALOI ..... 4<sup>TH</sup> DEFENDANT  
MEISIASHI SAOLI ..... 5<sup>TH</sup> DEFENDANT  
MOITALEL LETOLUO ..... 6<sup>TH</sup> DEFENDANT  
MAKILI LETOLUO ..... 7<sup>TH</sup> DEFENDANT**

**AND**

**OLOLKIONOR ..... RESPONDENT**

**AND**

**REUBEN NCHOE ..... 1<sup>ST</sup> DEFENDANT  
SALANKAT NCHOE ..... 2<sup>ND</sup> DEFENDANT**



## RULING

1. Before this court for determination is a notice of motion application dated May 24, 2021 filed by the plaintiffs/applicants and is expressed to be brought under Order 51 Rule 1, Order 2 Rule 15 of the Civil Procedure Rules, Sections 1A,1B and 3A of the Civil Procedure Act seeking the following orders: -
  1. That the honourable court be pleased to strike out the defendants' statement of defence dated March 3, 2021.
  2. That upon grant of prayer 1, judgment be entered in favour of the plaintiff as prayed in the plaint.
  3. That costs of the application and suit be awarded to the plaintiff.
2. The application is premised on the grounds on its face and more particularly as set out in the affidavit in support thereof.
3. The application is supported by the joint affidavit of Ben Oloishorua Luka and Joseph Metamei Mpaayei which was sworn on even date. In their affidavit, the applicants deposed that they filed a plaint dated July 14, 2021 seeking orders of permanent injunction, eviction among other prayers. That the respondents entered appearance through the firm of Muriithi Kireria & Associates and filed a statement of defence dated March 4, 2021.
4. The applicants further deposed that the defence is scandalous, frivolous and only contains mere denials. In addition, that the defendants/respondents have failed to act in good faith as they continue to occupy the suit land to the exclusion and detriment of the applicants/plaintiffs.
5. Further that the defendants/respondents are intent on depriving the plaintiffs/applicants from the use of their suit land as insinuated in paragraph 5 of their statement of defence. That the defence does not object to the prayers and is devoid of raising any plausible triable issues and ought to be struck out.
6. The respondents/defendants did not file a response. This court directed that the application be canvassed by way of written submissions. The plaintiffs/applicants filed written submissions dated July 14, 2021. The plaintiffs/applicants raised three issues for determination as listed below:-
  1. Does the plaintiffs' application demonstrate that the defence is scandalous, frivolous, vexatious or an abuse of the court process.
  2. Is the plaintiff entitled to the orders sought?
  3. Who is entitled to costs?
7. On the first issue, the plaintiffs/applicants submitted that this court has inherent jurisdiction to dismiss an action which is an abuse of the court process as has been done to it by Order 2 Rule 15 of the Civil Procedure Rules. The plaintiffs/applicants submitted that the defence is shallow, shoddily drafted and does not in any way put any favourable response to the issues raised by the plaintiffs/applicants. Further that it does not put forward any argument in support of the defendants'/respondents' ownership or reason of trespass upon the suit land. Reliance was placed in the case of Three Rivers DC v Bank of England [2001] 2 ALL ER 513.



8. The plaintiffs/applicants further submitted that the defence by the defendants/respondents defies Order 7 Rule 5 of the Civil Procedure Rules as it has not been verified by an affidavit and as such, the defence lacks substance, is frivolous, vexatious and a total abuse of the procedures of the court.
9. On the second issue, the plaintiffs/applicants submitted that the defence filed lacks substance and cannot elicit a dismissal of the suit as it appears to support their claim and they urged the court to save on priceless judicial time and ensure that the process of the court is not abused. The plaintiffs/applicants relied on the cases of *Anglo Italian Bank versus Wells*, 38 LT at page 2012 Jessel, MR and *Carl Zeiss Stiffnung v Rayner* [1969] 2ALL ER 891 at 908.
10. On the third issue, the plaintiffs/applicants submitted that they are entitled to the orders sought and costs as well.
11. The defendants/respondents filed written submissions on August 22, 2022 the same being dated August 2, 2022. The defendants/respondents raised three issues for determination listed below: -
  - a. Whether the honourable court should strike out the respondents' statement of defence dated March 3, 2021.
  - b. Whether the applicants will incur any prejudice if their application is not allowed.
  - c. Who bears costs for the suit.
12. On the first issue, the defendants/respondents submitted that in dealing with triable issues, the court recognises that even one triable issue would be sufficient. That a court would be entitled to strike out a defence when satisfied that the defence has no merit and has not even one triable issue in its defence. The defendants/respondents relied on the cases of *DT Dobie & Company (K) Limited versus Muchina* [1982] KLR 1, *Bank of Africa Kenya Limited versus John Karanja* Civil Suit No 420 of 2015 and *Philip Chemwolo & Another versus Augustine Kubende* [1986] eKLR.
13. On the second issue, the defendants/ respondents submitted that the plaintiffs/applicants have not demonstrated any kind of loss that cannot be compensated by an award of damages and for this reason, the application should be dismissed with costs.
14. I have carefully analysed and considered the application, written submissions and the authorities relied upon by the parties and the issue for determination is whether this court ought to strike out the statement of defence.
15. The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In *Postal Corporation of Kenya versus I.T Inamdar & 2 Others* [2004] 1 KLR 359, the court stated that "the law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend."
16. Also, in *The Co-operative Merchant Bank Limited versus George Fredrick Wekesa* (Civil Appeal No 54 of 1999) the Court of Appeal stated:
 

"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...Since oral evidence would be necessary to disprove what either of the parties says, the appellant's defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice,



embarrass or delay the expeditious disposal of the respondent's action or which is otherwise an abuse of the process of the court.”

17. In *Yaya Towers Limited v Trade Bank Limited (In Liquidation)* (Civil Appeal No 35 of 2000) the same court expressed itself thus:

“A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

18. Similarly, in *DT Dobie & Company Kenya Limited v Joseph Mbaria Muchina & Another* [1980] eKLR, Madan, JA (as he then was) stated:

“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 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.”

19. I have read the written statement of defence dated March 3, 2021 filed by the firm of Muriithi Kireria & Associates. Paragraph 5 of the defence reads as “That the defendant herein have filed their plaint to deprive the plaintiffs herein of their legal property and to avert justice since the same is frivolous and trivial, meant to defeat justice to the plaintiff in this counterclaim.”

20. The defendants/respondents proceed to seek judgment against the plaintiffs for orders of a permanent injunction, costs and interests of the suit.

21. My analysis of the above paragraph shows that the defendants/respondents may have intended to have a counterclaim against the applicants/plaintiffs save for the use/choice of words which I would fault the drafter. There is total denial of the averments in the plaint save for paragraph 5 which the defendants/respondents contend that the plaint has been filed to deprive them of their legal right to property. This statement on its own is in my view a triable issue. Whether the applicants/plaintiffs are depriving the defendants/respondents their right to property will be determined after hearing the parties.

22. I have also noted that the said counter claim is not accompanied by a verifying affidavit. Order 7 rule 5(a) of the *Civil Procedure Rules* provides as follows:

“5. The defence and counter-claim filed under rule 1 and 2 shall be accompanied by –  
a) An affidavit under order 4 rule 1 (2) where there is a counter-claim.”

23. My understanding of the above proviso of the law is that, the filing of the counterclaim without a verifying affidavit renders the counterclaim as being defective. However, it is my view, that the said defect is not fatal.



24. I place reliance in the case of *Jefitha Muchai Mwai versus Peter Wangio Thuku* [2015] eKLR, where Justice Limo held:

“...If a party inadvertently leaves out a verifying affidavit or any other document like a statement, he/she could be given a chance to file one and the matter can proceed for determination on merit. If the other party is affected by the attendant delay appropriate costs should adequately address the problem...”

25. Arising from the above, I find that the notice of motion application dated May 24, 2021 lacks merit. It is hereby dismissed. Costs to be in the cause. The defendants/respondents to file a verifying affidavit within seven days from the date hereof. Mention on July 18, 2023 for further directions. It is so ordered.

**DATED, SIGNED and DELIVERED VIA EMAIL ON 4TH JULY, 2023.**

**Hon. Mbogo C.G**

**Judge**

**4/7/2023**

**In the presence of:-**

**C/A:T.Chuma**

