



Teleposta Pension Scheme Registered Trustees v Opiyo & 123 others (Environment & Land Case E013 of 2022) [2023] KEELC 18700 (KLR) (3 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18700 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E013 OF 2022**

OA ANGOTE, J

JULY 3, 2023

BETWEEN

TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES PLAINTIFF

AND

THOMAS OPIYO & 123 OTHERS DEFENDANT

RULING

1. Before this Court for determination is the Plaintiff/Applicant's Notice of Motion application dated 21st June, 2022 brought pursuant to the provisions of Sections 1A and 1B of the *Civil Procedure Act*, Orders 2 Rule 15(1)(a), Order 36 Rule 1 and Order 51 Rule 1 of the *Civil Procedure Rules* seeking the following orders:
 - i. That the Defendants Defence filed herein be struck out and Judgement be entered for the Plaintiff/Applicant against the Defendants for the prayers pleaded in the Plaint.
 - ii. That costs of this Application be borne by Defendant/Respondents
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Peter K Rotich, the chairperson of the Plaintiff who deponed that the City County of Nairobi issued a notice declaring that the houses erected on Jogoo Road Plots, the Plaintiff's houses herein are uninhabitable and unfit for human occupation and that the premises were condemned and earmarked for demolition.
3. It was deposed by the Plaintiff's Chairperson that the Plaintiff thereafter issued the requisite notices to the Defendants asking them to vacate the houses to pave way for the demolition exercise; that the Defendants then presented their interest in purchasing the suit plots but were unable to meet the requirements and that subsequently, the properties were sold to third parties and transfers effected.



4. It was deponed that the Defendants, unhappy with the aforesaid decision, filed a suit against the scheme being ELC 1348 of 2013-(Thomas Opiyo & 123 Others v Teleposta Pension Scheme Registered Trustees) claiming inter-alia first priority rights over the purchase of the houses, which suit was struck out by the Court for failure by the Defendants (Plaintiffs therein) to extract and serve summons upon the Defendant.
5. Mr Rotich deponed that following the striking out of the said suit, the Defendants filed a fresh suit being ELC 629 of 2016-(Thomas Opiyo & 123 Others vs Teleposta Pension Scheme Registered Trustees) seeking similar orders as those struck out in the suit and that on 14th December, 2021, the Court delivered its Judgement wherein it found no merit in the case and proceeded to dismiss it.
6. It is the Plaintiff's case that subsequent to the delivery of the Judgement, the Plaintiff filed the present suit seeking that the Defendants be directed to give vacant possession of the suit premises within 60 days and in default an eviction order to issue; that the Defendants lodged an Appeal against the Judgement which Appeal does not relate to this suit which purely seeks eviction orders which was not in issue in ELC 629 of 2019 and that the continual occupation of the premises by the Defendants is a hindrance to the Plaintiff who is obligated to hand over vacant possession of the same to the buyers of the plots.
7. According to the Plaintiff's Chairman, the Defendants' defence contains mere denials and restates prayers sought in their dismissed suit and that the Defendants have not raised any Defence capable of mounting the Plaintiff's claim for eviction and vacant possession.
8. In response to the application, the 1st Defendant, Thomas Ochieng Opiyo, deponed that contrary to the Plaintiffs' assertion, the houses are not uninhabitable and unsafe for human occupation and the same is a ploy to evict them; that they have been in continuous occupation of the suit property with their families for over two decades and that they have continuously maintained the premises and as such they are fit for occupation.
9. It is the Defendants' case that by virtue of being employees of Telkom Kenya, they were allocated houses for occupation and given first priority to purchase the suit premises; that after the offer of the intended sale by the Plaintiff, they made arrangements to secure financing but the Plaintiff abandoned the course sometime in 2008 and sought to condemn the houses and that they have filed an Appeal at the Court of Appeal against the decision of 14th December, 2014.
10. According to the Defendants, due to the pendency of the Appeal in ELC 629 of 2016, this application if allowed will render the Appeal nugatory; that the Defence raises triable issues which merits full hearing and that the application is made in bad faith and is aimed at rendering them homeless.
11. The Plaintiff's counsel submitted that as expressed by the Court in Kenya Commercial Bank v Suntra Investment Bank Limited[2015]eKLR, the Plaintiff should not be kept away from his Judgement by an unscrupulous Defendants who have filed a sham Defence.
12. It was submitted that in the present case, the Defence does not raise any triable issue because it is based on matters already adjudicated upon; that the court may pursuant to Order 2 Rule 15 of the [Civil Procedure Rules](#) proceed to strike out the same and that in the case of *ASL Credit Limited v Limuru Hills Limited & 2 Others*[2020]eKLR, the Court was faced by a similar application and found the Defence to be a sham and struck it out.
13. It was submitted that summary judgement should be entered in favour of the Plaintiff/Applicant; that as stated by the Court of Appeal in *Gupta v Continental Builders Limited* [1978]KLR 83, where no triable issue has been put forward against the claim of the Plaintiff, it is the duty of the Court to



forthwith enter summary judgement and that in as much as it is against natural justice to shut out a litigant from defending himself, it is equally unjust to keep a Plaintiff out of his dues in a proper case.

14. The Defendants' Counsel submitted that the Plaintiff's sole argument is that the issues raised in Defence in this matter are similar to those that were raised in ELC 629 of 2016, a case that involved the same parties and same subject matter; that the Plaintiff is aware that the Judgment they place reliance on is the subject of an appeal in Civil Appeal No. E276 of 2022 that was filed on 9th May 2022, and served upon the Plaintiff on 19th May, 2022 and that a matter can only be final when a party elects not to appeal.
15. It was submitted by counsel that the existence of the pending appeal legally deprives the said Judgment its finality and hence cannot be used in the manner in which the Plaintiff is attempting to do; that other than the appealed Judgment, the Plaintiff has not raised any other viable ground to warrant a summary dismissal of the suit and that the power to strike out a pleading which ends up in driving a party from the Judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable.
16. It was submitted by counsel that whereas triable issues need not succeed, the fact that the issue raised is triable warrants it going to trial and that the Plaintiff should bear the costs of the application. Reliance was placed on the cases of *Orix Oil (Kenya) Limited v Paul Kabeu & 2 Others* [2014] eKLR and *Solomon Odira Okello & Another vs Esther Laboso* [2019] eKLR.

Analysis & Determination

17. Having carefully considered the Motion, responses and submissions, the issue that arises for determination is whether the Defendants Defence should be struck out and Summary Judgement entered in favour of the Plaintiff.
18. Vide the present application, the Plaintiff is asking this Court to strike out the Defendants' Defence. The Plaintiffs' plea in this respect is premised on Order 2 Rule 15(1)(a) of the *Civil Procedure Rules* which provides as follows;

“ 15(1) At any stage of the proceedings the court may order to be struck out or amended any pleadings on the ground that:-

- (a) It discloses no reasonable cause of action or defence in law;
- (b) it is scandalous, frivolous or vexatious; or
- (c) it may prejudice, embarrass or delay the fair trial of the action; or
- (d) it is otherwise an abuse of the process of the court”

19. Indeed, under Order 2 Rule 15 (1), a pleading can be struck out if it discloses no reasonable cause of action or defence in law.
20. In *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another*, Civil Appeal 37 of 1978 [1980] eKLR, the Court of Appeal set out the principles that guide the court in determining whether or not to strike out a pleading as follows:

“ The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for



the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.

If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

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.”

21. More recently, the Court of Appeal in the case of *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR, expressed itself thus;

“It is not for nothing that the jurisdiction of the court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction, capable of bringing a suit to an end before it has even been heard on merit, yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the court must not drive away any litigant from the seat of justice, without a hearing, however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. The exercise of the power to strike out pleadings must balance these two rival considerations. Although the court exercises discretionary powers in striking out pleadings, because of its far reaching consequences.”

22. In the present case, the Plaintiff asserts that the Defendants’ Defence raises no defence in law. What constitutes a bona fide triable issue was discussed by the Court in *Olympic Escort International Co. Ltd & 2 Others v Parminder Singh Sandhu & Another* [2009] eKLR where the Court of Appeal held as follows:

“It is trite that, a triable issue is not necessarily one that the defendant would ultimately succeed on. It need only be bona fide”.

23. And in the case of *Job Kiloch v Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio* [2015] eKLR, cited by the Plaintiff, the court stated as follows;

“What then is a defence that raises no bona fide triable issue. A bona fide triable issue is any matter raised by the Defendant that would require further interrogation by the court during a full trial. The Black’s Law Dictionary defines the term “triable” as, subject or liable to judicial examination and trial”. It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court.



24. The Plaintiff instituted this suit seeking to have the Defendants give vacant possession of the suit properties to it. The Plaintiff's case is that it is the registered owner of the suit properties in which the Defendants reside on and that after the sale of the properties to third Parties, the Defendants filed a claim against them being ELC 629 of 2016 which was heard on merits and dismissed on 14th December, 2021.
25. It is the Plaintiff's case that pursuant to the dismissal order of the Defendants' case, the Defendants have no rights to be on the suit property and should vacate and hand over possession of the same.
26. Vide the statement of Defence, the Defendant's deny the assertions in the Plaint stating that they are lawfully on the suit property which is suitable for human occupation and the condemnation of the same was a ploy to have them evicted; that the Plaintiff deliberately frustrated their attempts to buy the suit premises and are intent on selling the same to third parties despite the fact that they have first priority and that they have filed an Appeal against the decision of the Court.
27. The Court has keenly considered the pleadings. As aforesaid, the Plaintiff is seeking to have the Defendants grant it vacant possession of the suit properties after the Judgement of the Court in ELC 629 of 2016 found that the Defendants had no rights over the suit property.
28. Considering the Defendants' averments vis a vis the decision of the Court in ELC 629 of 2016, it is evident that the Defendants are rehashing their case and attempting to lure this Court into a reconsideration of issues already decided by a competent Court. Indeed, the Court in ELC 629 of 2016 found, inter-alia, that no evidence had been adduced either authorizing the Defendants' continual stay on the suit property, or showing any entitlement to the suit property by the Defendant.
29. As to the pendency of the Appeal, the Court does not agree with the Defendants' position that an Appeal deprives a decision of its finality. On the contrary, a decision remains final until it is overturned by an order of the superior Court and it is with this in mind that the law provides for a stay pending appeal.
30. In the end, the Court is satisfied that the Defence raises no triable issues and the same is for dismissal.
31. The law with respect to summary judgements is found under Order 36, Rule 1 of the [Civil Procedure Rules](#) which provides as follows:
 - 1) In all suits where a plaintiff seeks judgment for -
 - (a) a liquidated demand with or without interest; or
 - (b) the recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non-payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser, where the defendant has appeared but not filed a defence the plaintiff may apply for judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and rent or mesne profits.
 - 2) The application shall be supported by an affidavit either of the plaintiff or of some other person who can swear positively to the facts verifying the cause of action and any amount claimed.



- (3) Sufficient notice of the application shall be given to the defendant which notice shall in no case be less than seven days.”

32. The Court of Appeal distilled the case law on summary judgment in *Irene Wangui Gitonga v Samuel Ndungu Gitau* [2018] eKLR as follows:

“The parameters for the exercise of jurisdiction under this provision have been crystalized by a long line of case law enunciated by the Court. In *ICDC v Deber Enterprises Ltd* [2006] IEA75, the Court stated-inter alia, as follows:-

“The purpose of the proceedings in an application for summary Judgment is to enable the plaintiff to obtain a quick Judgment where there is plainly no defence to the claim.”

In *Kenindia Assurance Co. Ltd versus Commercial Bank of Africa & 2 others Nairobi CA No. 11 of 2000*, the Court stated that the law on summary procedure is now well settled and that this is a procedure resorted to in the clearest of cases. In *Dhanjal Investments Ltd v Shabaha Investments Ltd Civil Appeal No. 232 of 1997* the Court went further and stated as follows on summary Judgment;

“The law on summary Judgment procedures has been settled for many years now. It was held as early as in 1952 in the case of *Kandalal Restaurant v Devsbi & Company* [1952] EACA77 and followed by the Court of Appeal for Eastern Africa in the case of *Sonza Figuerido & Company Ltd v Mooring Hotel Ltd* [1929] E.A 424, that if the defendant shows a - bona-fide-triable issue, he must be allowed to defend without conditions.....”

As to what constitutes a triable issue, the Court in *Kenya Trade Combine Ltd versus Shab* Civil Appeal No. 193 of 1991, had this to say:

“... all a defendant is supposed to show is that a defence on record raises triable issues which ought to go for trial. We should hasten to add that in this respect a defence which raises triable issues does not mean a defence that must succeed. The defendant is at liberty to show, by whatever means he chooses whether by defence, oral evidence, affidavits or otherwise that his defence raises bonafide triable issues.

Further in *Dedan King'ang'i Thiongo v Mbai Gatune Civil Appeal No. 292 of 2000* and *Bangue Indosuez versus DJ Lowe & Co. Ltd Civil Appeal No. 79 of 2002*, the Court was categorical that where bona-fide- triable issues have been disclosed, the Court has no discretion to exercise in regard to the defendant's right to defend the suit. Lastly, in *D.T. Dobie & Co. Ltd v Muchina & another* [1982] KLR 1, it was stated inter alia, that a pleading which does not disclose any reasonable cause of action or defence ought to be dismissed. Likewise, 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 by way of an amendment.”

33. Having found that the Defence raises no reasonable defence in law, and the Plaintiff's claim being for recovery of houses as a landlord from tenants whose terms have expired or been determined by notice to quit or been forfeited for non-payment of rent and for breach of covenant, the Court finds the prayer for Summary Judgment to be merited.

34. For those reasons, the court finds the application dated 21st June, 2022 to be merited. Consequently, the application is allowed as follows:

- a) The Defendants' Defence be and is hereby struck out.



b) Summary Judgement as prayed in the Plaintiff be and is hereby entered.

c) That costs of the application to be borne by Defendants.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 3RD DAY OF JULY, 2023

O. A. ANGOTE

JUDGE

In the presence of;

Ms Mathenge for Plaintiff/Applicant

Mr. Arori for Defendants

Court Assistant - Tracy

