



**Mwenesi v Bunyali & 7 others (Environment & Land Case
E003 of 2023) [2023] KEELC 20611 (KLR) (12 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20611 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E003 OF 2023
EC CHERONO, J
OCTOBER 12, 2023**

BETWEEN

**ESTATE OF JOHN MWENESI ADULU (DECEASED) REPRESENTED BY EBBY
MUSIMBI MWENESI PLAINTIFF**

AND

**SAUL EGUNZA BUNYALI 1ST DEFENDANT
EBRAHIM OMWENYI AMBWERE 2ND DEFENDANT
HARRY CITY AMBWERE 3RD DEFENDANT
WEST KENTA SUGAR CO. LTD 4TH DEFENDANT
PASSELS SIMIYU WANYAMA 5TH DEFENDANT
SETTLEMENT FUND TRUSTEE 6TH DEFENDANT
DISTRICT LAND REGISTRAR BUNGOMA 7TH DEFENDANT
HON. ATTORNEY GENERAL 8TH DEFENDANT**

RULING

1. This application is dated March 17, 2023 and is brought under Section 2 of the *Civil Procedure Act*, Order 2 Rule 15 (1) (b) (c) and (d) and Order 36 (1) (b) of the *Civil Procedure Rule 2012*, seeking the following orders;
 1. Spent.
 2. The defences of the 1st, a joint one by the 2nd and 3rd, 4th, 5th and a joint one by the 6th, 7th and 8th defendants be struck out and judgment be entered for the plaintiff as prayed for in the plaint.



2. The application is grounded on the annexed affidavit of Ebby Musimbi Mwenesi sworn on March 17, 2023 and the grounds on the face of the application. The 1st, 4th and 5th respondents upon service filed their respective replying affidavit sworn by Priscilla Obwogo Odiala Were, Dancan Obwawo and Passels Simiyu Wanyama sworn on June 21, 2023, May 29, 2023 and May 26, 2023 respectively.

Applicants Case And Submissions

3. The applicant's case is that the defences on record does not disclose any issue warranting a full trial between the plaintiff and the defendants since the defence of time barred had been canvassed previously, the claim for adverse possession cannot arise and lastly that the transfer of the suit land from one John Mwenesi was deceitful and irregular. The gist of the plaintiff's claim as contained in the plaint is that since John Mwenesi died in 17.9.77 his estate was protected under the Law of Succession Act and the transfer of 10.1.95 was a nullity for lack of authorization through a grant of representation.
4. It is further contended that therefore the sale to the 1st respondents was untenable and so was the subsequent transfer to the 2nd, 3rd, 4th and 5th respondents. The applicant was of the view that the defence of innocent purchaser was not available to the 2nd, 3rd, 4th and 5th respondents and their counter-claims for reimbursement will remain for trial upon striking out of the defences thus no prejudice will be suffered.
5. The plaintiff that the defence of adverse possession as raised was irregular as the same can only be brought to court through an originating summons and not a plaint. It was the plaintiff's contention that the issue of the suit being time barred was resolved by the honourable court and the same was res judicata. As for the defence of the 2nd-8th defendant's it was submitted that the defence of an innocent purchaser cannot stand since the 1st defendant's title was acquired irregularly and as such no good title could pass to them.
6. The plaintiff relied on various cases among them DT Dobie & Co (K) Ltd v Muchina [1982] KLR and Arthi Highway Developers Limited v West End Butchery Limited & Others Civil Appeal No 246 of 2013

1st Respondents Case and Submissions

7. It was the 1st respondents' case that the late Saul Egunza Bunyali purchased the suit land from the late John Mwenesi for valuable consideration on or about July 20, 1975 and took possession on July 20, 1977 when the said John Mwenesi signed the transfer forms and the LCB consent application forms. It was his contention that at the time the late John Mwenesi had not cleared his loan with SFT and by consent off all parties the late Saul Egunza took over the said loan and settled it in 1995 when the property was discharged in the name of John Mwenesi and later transferred to Saul Egunza Bunyali by the SFT who certified the transaction as authentic, regular and proper. It was his contention that the family of John Mwenesi was aware of this transaction and that upon his death his widow Dorcus Imali Mwenesi ratified the transaction at the LCB.
8. In their submission the 1st respondents submitted that their defence cannot be said to be frivolous and/or vexatious or an abuse of the court process as alleged by the applicant under the provisions of Order 2 Rule 15 and as explained in the case of County Council of Nandi vs Ezekiel Kibet Rutto & 6 others [2013] eKLR. It was further their submission that the plaintiff's suit was incompetent for having been filed outside the required time without leave of court. It was averred that their defence cannot be said to be grossly hopeless and intended to delay the speedy disposal of this case. They contended the applicability of the provisions invoked since there were defences on record and asked the court to exercise its discretion in finding that the application is incompetent.



4th Respondents Case and Submissions

9. The 4th respondent's case is that the company purchased the suit land from the 2nd & 3rd respondents upon carrying out due diligence vide a sale agreement dated January 22, 2011. That they thereafter exchanged this parcel of land with the 5th defendant who was in possession of LR No 5740/18 and 5740/19 vide a memorandum of exchange dated October 16, 2016. It was their claim that the applicants claim over the suit property was baseless and the current application intends to defeat the cause of justice.
10. In her submission, the 4th respondent averred that her defence cannot be said to be frivolous and/or vexatious or an abuse of the court process as alleged by the applicant under the provisions of Order 2 Rule 15 and as explained in the case of *County Council of Nandi v Ezekiel Kibet Rutto & 6 others* [2013] eKLR. It was argued that the applicant has not demonstrated that the defendant's defence is bound to fail and cannot be remedied by way of an Amendment. It was further argued that the application lacks merit considering that there are defences in place and what the applicant seems to be praying for is a summary dismissal under the invoked sections. The 4th respondent contends that the issues raised were serious and complex issues that can only be determined upon a full trial. It was argued that the plaintiffs claim was time barred pursuant to Section 7 of the *Limitation of Actions Act* and in the absence of an application for extension under Section 26 thereof, this suit is incompetent.

5th Respondents Case and Submissions

11. The 5th respondents' case is that the application by the applicant is an attempt to obtain justice through the backdoor by denying the defendants an opportunity to be heard. It was their argument that the various defence's raise serious and triable issues of fraud, illegality and non-compliance with the law which can only be determined through evidence in a full trial. It was also contended that this suit is at an advanced stage with the court having heard two plaintiff witnesses and that the plaintiff is estopped from approbating that there are triable issues on her part and midstream reprobating that position. The 5th respondent averred that the issue of ownership which is in contention cannot be determined summarily as proposed by the applicant and allowing the application would leave his counter-claim hanging as it cannot be determined in isolation without hearing his defence.
12. The 5th respondent submitted that the applicant in his application invoked the wrong sections of the law which presuppose non-existence of defenses and thus the court has no jurisdiction to hear the current application. The court was referred to various case law amongst them *Vivo Energy Kenya Limited vs Maloba Petrol Station Limited & 3 others* [2015] eKLR, *Renom Agency Limited v Muthonga Gataru & Company Advocates & 3 others* [2016] eKLR, *William Korros (Legal Representative of Elijah CA Koross) v Hezekiah Kiptoo Komen & 4 others* [2015] eKLR, *Pashito Holdings Limited & Another v Paul Nderitu Ndungu & 2 others* [1997] Eklr.

Analysis and Determination

13. I have considered the Application, the responses filed thereto and submissions by the Applicants and the Respondents. I have also considered the decisions that were relied upon by the parties. The single issue which in my opinion arise for determination is whether the defence filed herein is a sham and raises no triable issue.



14. The Notice of motion is expressed to be brought under Order 2 Rule 15 (1) (b) (c) and (d) and Order 36 (1) (b) of the [Civil Procedure Rule 2012](#) which deals with striking out of pleadings and provides as follows;

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

- (a) It discloses no reasonable cause of action or defence in law; or
- (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, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

15. I am guided by the case of [Kenya Commercial Bank v Suntra Investment Bank Ltd](#) [2015] eKLR where the court found that the power to strike out pleadings is a drastic step that should be used sparingly and only in cases where the pleading is shown to be clearly untenable as it ends in driving a party from the judgment seat should be used very sparingly. A balance must be struck between this principle and the policy consideration that a plaintiff should not be kept away from his judgment by an unscrupulous defendant who files a defence which is a sham simply for the purpose of delaying the finalization of the case

16. The Court of Appeal in the case of [Blue Shield Insurance Company Ltd v Joseph Mboya Oguttu](#) [2009] eKLR restated these principles as follows:

“The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan JA (as he then was) in his judgment in the case of [DT Dobie and Company \(Kenya\) Ltd v Muchina](#) [1982] KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-

“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.”

16. A careful consideration of the facts placed before this court reveals that the defendant’s statement of defence does not only constitute specific denials to the claim but also contains various triable defences. The defendants raise the defence of the suit being time barred, bona fide purchasers for value and adverse possession. In [Postal Corporation of Kenya v 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.

In [Olympic Escort International Co Ltd & 2 Others v Parminder Singh Sandhu & Another](#) [2009] eKLR, the court opined that a triable issue is not necessarily one that the defendant would ultimately succeed on but it need only be bona fide.”



17. Further, the 4th defendant has equally filed a counter claim which the plaintiff argues that it shall remain for litigation once the defenses are struck out. However, it is trite law that a counterclaim cannot stand on its own as it is conjoined to a defence as per Order 8 Rule 7 of the Civil Procedure Rules.
18. In The Co-Operative Merchant Bank Ltd v 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."
19. 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.
20. It is my considered view that the respondents' defenses are not frivolous or vexatious as alleged. The defendants/respondents in their defence strive to explain the root of their title and wish away the allegations of fraud as alleged by the plaintiff. In my view that is a triable issue. Whether the respondents lawfully and procedurally obtained title of the suit land or not is an issue that will be determined in a full hearing. It would be unfair to condemn the respondents without hearing their side of the story. A hearing will afford both parties an opportunity to present their case and exercise their right to be heard. Further, this application is clearly an afterthought having been brought after the plaintiffs' case has substantially proceeded with two witnesses.
21. Applying the principles in the decisions cited above to the present circumstances and the application before this court, I come with the irresistible conclusion that the application lacks merit and is hereby dismissed with costs.

It is so ordered.

DATED AND SIGNED AT BUNGOMA THIS 12TH DAY OF OCTOBER, 2023.

HON.E.C CHERONO

ELC JUDGE

In the presence of;

- 1. Watti for the plaintiff/applicant**
- 2. Mr. Mario Jackson H/B for Olendo Olare.**
- 3. Mr. Wamalwa R H/B Wangila for 5th Defendant**



4. M/S Joy C/A

