



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 106 OF 2019

JOSEPHAT MVOI MWANG'OMBE & 8 OTHERS PLAINTIFFS

VERSUS

KENYA WILDLIFE SERVICESDEFENDANT

RULING

(Application to strike out suit and preliminary objection on locus of the 9th plaintiff; 9th plaintiff described as a community; suit having been filed by plaintiffs seeking to stop the defendant from erecting an electric fence on the basis that it interferes with their parcels of land; five parcels of land described in the plaint and no other land; there being a survey report at the hearing of an interlocutory application for injunction showing that the electric fence does not touch the 5 parcels of land thus the basis of the application to strike out suit as disclosing no cause of action; the five parcels having owners who are the 1st – 5th plaintiffs; no basis to have the 6th – 9th plaintiffs in the case as they have no locus; suit by 6th – 9th plaintiffs struck out; application to strike out suit however dismissed; issue of encroachment of the fence best suited to be heard on merits as plaintiffs contest the survey report; fair for them to be given a chance to ventilate their case)

1. The application before me is that dated 8 March 2021. It seeks orders that the plaint herein be struck out for not disclosing any cause of action. The application is brought pursuant to the provisions of Order 2 Rule 15 (1) (a) of the Civil Procedure Rules, and Sections 3 and 19 of the Environment and Land Court Act. There is also a preliminary objection that the 9th plaintiff lacks locus standi. The application is opposed by the plaintiffs.

2. To put matters into context, the plaintiffs commenced this suit through a plaint filed on 17 June 2019. The 1st to 8th plaintiffs are individuals with names disclosed whereas the 9th defendant is described as “the Alia Community.” It is pleaded that the 1st, 2nd, 3rd, 4th and 5th plaintiffs are respectively the registered proprietors of the land parcels Taita Taveta/Mwachabo Scheme/973, Taita Taveta/Mwachabo Scheme/1113, Taita Taveta/Mwachabo Scheme/1159, Taita Taveta/Mwachabo Scheme/1111, and Taita Taveta/Mwatate Wananchi/111. It is further pleaded that the 9th plaintiff (the Alia Community) avers that the land is ancestral land and have a right to use the land. It is pleaded that the defendant is illegally erecting an electric fence without the authority of the plaintiffs, consent, or public participation. It is contended that the defendant has wrongfully entered and taken possession of the plaintiffs’ land without authority and is preventing the plaintiffs from accessing and enjoying use of their ancestral land. In the suit, the plaintiffs seek a declaration of ownership of the mentioned parcels of land and further that the defendant has no legitimate right to erect an electric fence on the said land. They wish to have a permanent injunction restraining the defendant from fencing or interfering with their land and general damages for trespass and loss of income. Together with the plaint, the plaintiffs filed an application for injunction seeking to restrain the defendant from putting up the intended electric fence or further interference with the land until the suit is heard and determined.

3. The defendant filed defence and opposed the application for injunction. Its position is that it has not trespassed into the land of the plaintiffs and was instead erecting a 30 kilometre electric fence for purposes of reducing human/wildlife conflict along the Taita Hills/Salt Lick area.

4. Before hearing the application for injunction, I directed the parties to have a survey conducted by the District Surveyor, Taita-Taveta, so that it may be revealed whether or not the electric fence actually passes through the parcels of land mentioned by the plaintiffs. The survey was duly done and a report filed. The conclusion was that the fence does not pass through the land of the applicants. Despite the report, the plaintiffs still wished to have their application for injunction heard. I heard it but did not find merit in it and dismissed it in my ruling of 9 March 2021. This application was filed immediately thereafter.

5. The application is based on the grounds that the survey report filed concludes that the fence does not pass through any of the land of the plaintiffs and that this settles the question whether the defendant has trespassed into the plaintiffs’ land. It is the view of the defendant that it is not proper to use judicial time and resources to go to trial to determine an issue which can be decided summarily.

6. The application is opposed by a joint affidavit sworn by Herman Mwangemi Righa and Dora Chao. They aver that the plaint raises triable issues and should be heard and determined. They contend that the survey report is not conclusive and that they will file their own report. They say that their case is not only on the issue of trespass but denial of access to their homes.

7. Counsel filed submissions to argue both the application and preliminary objection. On the preliminary objection, counsel for the defendant submitted that the 9th plaintiff is neither registered nor recognised as a legal person. Counsel further submitted that the joint affidavit is defective and relied on the case of *Duncan Gakuna Kionga & 2 Others vs Timboroa Hotels Limited (2008) eKLR*. On the merits of the case, he submitted that there is no reasonable cause of action as the survey report shows that the defendant has not encroached on any of the plaintiffs' land. For the plaintiff, counsel relied on the case of *DT Dobie Company Limited vs Muchina (1982) KLR 1* to argue that the suit should not be summarily dismissed.

8. I have considered the above. I will start with the preliminary point that the 9th plaintiff lacks locus standi. I agree. The 9th plaintiff is described as "Alia Community." This is not a registered body and cannot sue nor be sued in its name. If this description encompasses members of a community, then some individuals, with capacity, need to sue on behalf of the said community. Those individuals need to clearly identify themselves and also demonstrate that they have authority to sue from members of the community. I found so in the case of *Kipsiwo Community Self Help Group vs Attorney General & 6 Others (2013) eKLR* and I have seen nothing from the plaintiffs to persuade me otherwise. In fact, apart from the 9th plaintiff, I am also not persuaded by the locus of the 6th, 7th and 8th plaintiffs. Who they are in the suit is not disclosed. Why they are among the plaintiffs is not stated. The parcels of land mentioned are five and they belong to the 1st to 5th plaintiffs. I don't know why the 6th, 7th and 8th plaintiffs are in the case. If by any chance they are in the suit on behalf of what they refer to as Alia Community, they have not shown me any authority from the community and neither have they stated that they have advertised the suit so that it can be considered a representative suit on behalf of the Alia Community. In any event, there is not specified other land in the plaint other than the land parcels Taita Taveta/Mwachabo Scheme/973, Taita Taveta/Mwachabo Scheme/1113, Taita Taveta/Mwachabo Scheme/1159, Taita Taveta/Mwachabo Scheme/1111, and Taita Taveta/Mwatate Wananchi/111. There is no other land identified in the plaint as belonging to the Alia Community and which should be subjected to litigation. The cause of action before me can only therefore relate to the 5 parcels of land that have been identified and only the five owners of the said parcels of land have locus. Given that position, I proceed to strike out the names of the 6th, 7th, 8th and 9th plaintiffs. This suit will thus be restricted to the persons who have proprietary rights over the parcels of land Taita Taveta/Mwachabo Scheme/973, Taita Taveta/Mwachabo Scheme/1113, Taita Taveta/Mwachabo Scheme/1159, Taita Taveta/Mwachabo Scheme/1111, and Taita Taveta/Mwatate Wananchi/111, who are the 1st to 5th plaintiffs.

9. The other prayer is for the striking out of the whole suit. I am aware that striking out of a suit is a draconian measure. I am also alive to the case of *DT Dobie vs Muchina* cited by counsel for the plaintiff where the Court of Appeal held that no suit should be summarily dismissed unless it appears so hopeless, and plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. Why the defendant wants the case struck out is because of the survey report filed which states that the electric fence is away from the plaintiffs' parcels of land. The plaintiffs have themselves filed a survey report as part of their list of documents which has its own findings. I do not wish to go deeply into these as I will then end up conducting a mini-trial within an application. I think the best thing is to let the plaintiffs have their day in court and have them heard before a judgment on merits can be delivered.

10. Thus, save for striking out the names of the 6th, 7th, 8th and 9th defendants, and directing that this suit is limited to the five parcels of land disclosed in the plaint, the suit should proceed on merits.

11. The only issue left is costs. The defendant will have the costs of the preliminary objection but the costs of the application will be costs in the cause.

12. Orders accordingly.

DATED AND DELIVERED THIS 2ND DAY OF FEBRUARY 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA