REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MAKUENI

ELC CASE NO. E015. OF 2020

MICHAEL KALANI MUATHA.....PLAINTIFF/RESPONDENT

VERSUS

KYALO MWIKYA.....1ST DEFENDANT/APPLICANT

KENNEDY MWIKYA.....2ND DEFENDANT/APPLICANT

RULING

1. The Notice of Motion application before me is dated 21st January, 2021 brought under **Order 51 Rule 1 and 13, and Order 2 Rule 15 (1) of the Civil Procedure Rules** seeking the following orders: -

> **a. That the honourable court be pleased to strike out the suit with costs to the applicants for failure to disclose a reasonable cause of action, being scandalous, frivolous and vexatious and an abuse of the court process.**
>
> **b. That the costs of this application be granted.**

2. The application is premised on the grounds on the face of it and more particularly in the supporting affidavit of the 1st applicant.

3. The application is supported by the affidavit of Kyalo Mwikya, the 1st defendant/applicant herein sworn on 2nd February, 2021. The defendant/applicant has deposed that the suit discloses no reasonable cause for action and is purely made to delay the fruits of the defendant's/applicants' as per the finding in the Minister's Tribunal Case Number 287 of 2010 dated 12th September, 2018.That the suit is an appeal against the finding of the Minister which is not tenable in law and should be struck out. That the Minister's findings cannot be challenged in court through a normal suit and that the absence of the letters of administration during the land adjudication process cannot be a basis for a cause of action under **Section 12** of the Land Adjudication Act and the Minister is not bound by the **Order 24 of the Civil Procedure Rules**. That the suit does not disclose the illegalities committed by the Minister and the decision of the Minister are not impugned at all. That the suit is so weak and is beyond redemption and incurable by amendment and no amendment can inject life to it.

4. The plaintiff/respondent herein, Michael Kalani Muatha, filed his replying affidavit sworn on 3rd June, 2021. The respondent deposed that **Order 51** of the **Civil Procedure Rules** cannot be invoked when seeking to dismiss a suit. That a party must state in particular the reasons for striking out the suit and not to lump them up as the applicants have done. The respondent avers that it is not true that the suit does not disclose a reasonable cause of action and he maintains that the defendants participated in proceedings whereas they lacked capacity to do so and it is for these reasons that the application should be dismissed.

5. The defendants/applicants filed their written submissions dated 25th May, 2021.The applicants submit that the suit ought to have been filed as judicial review proceedings under **Order 53** of the **Civil Procedure Rules** and **Section 9 (2)** of the Law Reform act for the reason that the Minister's decision is final as provided in Section 29 of the Land Adjudication Act. Defendants/applicants submit that the Minister's actions are administrative and therefore subject to the Fair Administrative Action Act under **Sections 2** and **3**. They rely on the case of **Ngari Kiranga versus Jerusha Mucongo Kiura & Others [2020] eKLR**.

6. The defendants/applicants further submit that the suit is an appeal against the decision of the Minister and that the respondent filed the suit as he could not file for judicial review six months after lapse of the decision rendered on 12th September, 2018.

7. The defendants/applicants submit that letters of administration are not necessary in prosecuting claims under the Land Adjudication Act as was the decision in the case cited above. The defendants/applicants also rely on the court's decision in the case of **Timotheo Mako versus Manunga Ngochi 91976-80) KLR 1136** and submit that the plaintiff/respondent never objected to the defendant's/applicant's capacity at the

earliest opportunity before the Minister and that the plaintiff/respondent fully participated in the appeal proceedings without any protest. The defendant/applicant further submits that there is no evidence to demonstrate that the respondent suffered prejudice for reason of the omission by the defendants/applicants to obtain grant letters of administration.

8. The defendants/applicants submit that the suit having emanated from administrative actions, a declaratory order would not be available to the respondent as per the decision in **Ngari Kiranga** Case. In conclusion, the applicants submit that it is unfair to drag a person to the seat of justice when the case brought against him is clearly a non-starter. They rely on the case of **Kivanga Estates Limited versus National Bank of Kenya Limited [2017] eKLR**.

9. The plaintiff/respondent filed his written submissions dated 6th July, 2021.The plaintiff/respondent submits that the law providing for striking out of any pleadings is found in **Order 2 Rule 15** of the **Civil Procedure Rules** and provides grounds for striking out of pleadings. The plaintiff/respondent submits that the judgment which he seeks judicial review was obtained unlawfully. That the applicants represented their deceased father in the absence of letters of administration. It is the plaintiff's/respondent's submission that proceedings under the Land Adjudication Act are quasi-judicial in nature and that the outcome therefrom conveys or dispossesses property to the litigants.

10. Finally, the plaintiff/respondent submits that striking out pleadings without hearing the parties is a very drastic measure which should be exercised sparingly and with caution. The plaintiff/respondent rely on the case of **Devsurinder Kumar Bij versus Agility Logistics Limited [2014] eKLR** and **Grace Wairimu Gakio versus Emily Chelagat Kargat & 2Others [2019] eKLR.**

11. I have read and analysed the notice of motion application, replying affidavit and the written submissions together with the authorities filed by both parties. The issue for determination is:-

whether the suit as filed ought to be struck out.

12. The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In **Yaya Towers Limited v Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000)** the 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".**

13. Order 2 Rule 15 (1) of **Civil Procedure Rules, 2010** provides as follows: -

> **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.**
>
> **(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made.**
>
> **(3) So far as applicable this rule shall apply to an originating summons and a petition.**

14. The court must be cognisant of the fact that judicial time is precious and must not be wasted in engaging itself in academic exercises by hearing cases in a full trial where it is plain and obvious that a plaint discloses no reasonable cause of action or defence in law, where a plaint is scandalous, frivolous, vexatious, where a plaint may prejudice, embarrass or delay the full trial of the action or where the plaint is otherwise an abuse of the court process.

15. It cannot be gainsaid that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in **Blue Shield Insurance Company Ltd vs. Joseph MboyaOguttu [2009] eKLR** restated these principle thus:

> **"The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of D.T. Dobie and Company (Kenya) Ltd vs 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."**

We too would not express our opinion on certain aspects of the matter before us. In that judgment, the learned Judge quoted Dankwerts L.J in the case of Cail Zeiss Stiftung vs Ranjuer & Keeler Ltd and others (No.3) (1970) ChpD 506, where the Lord Justice said:-

> "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 the quality and all the circumstances relating to the offending pleading."

We may add that like Madan J.A, said, the power to strike out a pleading which ends 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. This court carefully considered the written submissions filed by both parties and I have noted that analysing the suit has the potential of this court combing through the evidence which the defendants/applicants wish to rely upon to determine whether or not they had disclosed a reasonable cause of action.

17. For the reasons stated above, I find that the notice of motion application dated 21st January, 2021 lacks merit and the same is dismissed with costs to the plaintiff/respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL ON THIS 8TH DAY OF FEBRUARY, 2022

MBOGO C.G

JUDGE

8/2/2022

In the presence of: -

CA: T.Chuma