



**Kibuange v County Government of Mombasa (Environment & Land
Case 69 of 2020) [2022] KEELC 3005 (KLR) (4 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3005 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 69 OF 2020**

M SILA, J

MAY 4, 2022

BETWEEN

ZAKAYO MICHUBU KIBUANGE PLAINTIFF

AND

COUNTY GOVERNMENT OF MOMBASA DEFENDANT

RULING

(Application to strike out defence; plaintiff pleading in plaint that he had an agreement with the defendant allowing him to develop a stall in Kongowea market; plaintiff pleading that the defendant illegally destroyed part of the premises that he developed and inter alia seeking orders to stop any further demolition and damages; defendant filing defence which denies the averments in the plaint; whether in the circumstances the defence should be struck out; court not persuaded; not in all instances that a bare denial would be the equivalent of a frivolous or vexatious defence; application dismissed)

1. The application before me is that dated 15 May 2021 filed by the plaintiff. It is brought pursuant to the provisions of Sections 1A, 1B, 3A of the *Civil Procedure Act*, and Order 11 Rule 3(2) of the *Civil Procedure Rules*. The substantive prayer is that the defence of the defendant be struck out. The application is based on grounds that the defence is a mere denial and that it is not sufficient to demur the plaintiff's claim. There is no supporting affidavit to the application and nothing was filed by the defendant to oppose the application.
2. By way of background, the plaintiff commenced this suit through a plaint filed on 18 June 2020. He pleaded that under a private public partnership process to upgrade Kongowea market, the plaintiff was on 13 February 2006, allocated for exclusive use, the space No. 59 Kongowea Mitumba market. He then erected a two storeyed structure comprising of 8 shops on the ground floor and a conference hall on the first floor. He averred that he lets out the premises to tenants for commercial use, fetching an annual rent of Kshs. 1,320,000/=, and he would pay Kshs. 1,000/= per month by way of rent to the defendant. He pleaded that on 12 June 2020, without warning, or notice, or a revocation or withdrawal



of licence, or even a resolution, the defendant partly demolished the plaintiff's premises. The plaintiff pleaded that this act was illegal and has led to him suffering loss. In the suit, the plaintiff seeks orders for a declaration that the defendant is not entitled to enter and demolish the building in the space No. 59 within Kongowea market; a preservative order to require the defendant to restore the building; exemplary and compensatory damages; and any further relief to effect a restitutio in integrum together with costs.

3. The defendant filed defence. It is more or less a denial of all that the plaintiff has pleaded. It is this defence that the plaintiff seeks to strike out.
4. I have considered the application alongside the written submissions of Mr. Kimani, learned counsel for the plaintiff. No submissions were made by counsel for the defendant.
5. So, does the plaintiff deserve the orders? At the outset, I must say that I am not persuaded.
6. It is correct that the law does allow the striking out of a defence if certain conditions are met. This is under Order 2 Rule 15 which provides as follows :-

Striking out pleadings [Order 2, 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.
 - (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.
7. It will be seen that a defence can be struck out if it discloses no reasonable cause of action; or it is scandalous, frivolous and vexatious; or it may prejudice, embarrass, or delay the fair trial of the action; or it is otherwise an abuse of the process of court. Although the applicant has cited Order 11, which relates to case management, I do not see its application in this instance. In fact, I think that the plaintiff bases his application on Order 2 Rule 15 (1) (a), because there was no affidavit filed, meaning that it is in conformity with Rule 15 (2), which provides that it is not necessary to offer evidence where the application contends that the pleading does not disclose a cause of action or defence. In our case, it must mean that the defence filed does not traverse the allegations of the plaintiff sufficiently to enable the matter proceed to full trial.
 8. The plaintiff bases his application on the ground that the defence is a bare denial. The mere fact that all that a defendant has done is to deny the pleadings in the plaint does not mean that the defence is a sham to warrant it to be struck out. One must assess the nature of the denial so as to affirm whether or not the denial is a sham. In this case, the defendant's denial means that it has denied the existence of any public-private partnership or the allocation of the space No. 59 to the plaintiff. It also means that it has denied that it is the entity that demolished the premises. In essence, liability is denied. In



fact, within the defence, the defendant puts the plaintiff to strict proof of its allegations. It follows that the plaintiff needs to prove all the claims in the plaint to the required standard. As far as I can see, in the circumstances of this suit, this is not a defence that does not sufficiently traverse the claims of the plaintiff. Neither is it scandalous, frivolous, or vexatious, so as to warrant it to be struck out.

9. I really see no need of saying much more. I find no merit in this application and it is hereby dismissed. The result is that the plaintiff must prove his case in the usual manner.
10. I make no orders as to costs since the defendant did not file anything to oppose it.
11. Orders accordingly.

DATED AND DELIVERED THIS 4 DAY OF MAY 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

