



REPUBLIC OF KENYA



KENYA LAW
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**Muthama v Wambua & 6 others (Environment & Land Case
2 of 2011) [2022] KEELC 3436 (KLR) (6 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3436 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 2 OF 2011**

**A NYUKURI, J
JULY 6, 2022**

BETWEEN

JOHNSON MUTHAMA APPLICANT

AND

NICHOLAS NGOMA WAMBUA 1ST DEFENDANT

MUNYWOKI WAMBUA 2ND DEFENDANT

MAITHYA WAMBUA 3RD DEFENDANT

NDUNDA WAMBUA 4TH DEFENDANT

KYENGO MAITHA 5TH DEFENDANT

CHARLES MUTINDA 6TH DEFENDANT

ANCIENT KIOKO 7TH DEFENDANT

RULING

Introduction

1. Vide a Notice of Motion application dated October 6, 2021, the plaintiff/applicant sought for the following orders;
 - a. Summary judgment be entered against the defendants for the prayers prayed for in the plaint.
 - b. In the alternative, that the defendants' Statement of defence filed herein be struck out and judgment be entered for the Plaintiff as prayed for in the Plaint.
 - c. The costs of this application and the suit be borne by the defendants and awarded to the Plaintiff.



2. The application is premised on the supporting affidavit sworn by the Plaintiff/Applicant on October 6, 2021. The applicant averred that he purchased parcel of land known as Title No. Matungulu/Katine/271 (Suit Property) from one Joseph Munyao Mutisya and was subsequently issued with a title deed thereof. He contended that the Defendant purported purchase of the suit property from one David Wambua Musila was not supported with sale agreements, payment of stamp duty, title deed or grant of letters of administration. Further that the plaintiff has three Expert Reports demonstrating that he is the rightful owner of the suit property as the trespass dispute was dealt with by the District Land Registrar Machakos on December 8, 2010. That the Defendants' claim of ownership over the suit property is a failed attempt at implying that the plaintiff obtained the suit property by fraud and that the defendants' counterclaim is in respect to ownership while the dispute herein is about trespass.
3. It was the plaintiff's assertion that the defence and counterclaim is an abuse of the court process and does not disclose any reasonable defence against the Plaintiff, as the Defendants are trespassers on the plaintiff's land.
4. The application is opposed. The 1st defendant filed a replying affidavit dated November 2, 2021 in opposition to the application. He averred that his deposition was on his own behalf and on behalf of his co-defendants. He stated that the defence and counterclaim raise triable issues which ought to go to trial. He further stated that the suit property belonged to their late father and they do not know and have never met the purported seller of the suit property. They averred that they were born and bred on the suit land and now in their old age and cannot be said to have trespassed on land belonging to their late father. It was their position that the 6th to 8th Defendants are innocent purchasers for value and therefore their defence raised triable issues.
5. The 1st Defendant further contended that what appears as parcel Matungulu/Katine/271 is part of their father's property being Title No. Matungulu/Katine/465 which was partly sold to four persons namely; Kyengo Maitha, Charles Mutinda Munyoli, Kioko Mulinge and the late Bernard Musau, and that the four purchasers had constructed permanent commercial buildings thereon.
6. On November 4, 2021, when the application came up for directions, the court directed that the same shall be canvassed by way of written submissions. On record are the Applicant's submissions filed on December 7, 2021. While the Defendants' submissions were filed on December 22, 2021.

Submissions

7. The applicant submitted that this court has jurisdiction to grant the orders sought. The applicant relied on article 162 of *the Constitution*, section 13 of the *Environment and Land Court Act* and section 3A of the *Civil Procedure Act* to argue that this court is bound by the law to exercise its jurisdiction to ensure fair and just trial and to make directions as the ends of justice may demand. On whether this court ought to strike out the defence and counterclaim, the Applicant argued that this court has power to strike out any pleading as provided for under order 2 rule 15 of the *Civil Procedure Rules* where it is shown that the pleading discloses no reasonable cause of action or defence or when such pleading is scandalous, frivolous or vexatious; could prejudice, embarrass or delay fair trial of an action or is an abuse of the court process.
8. Counsel relied on the case of *John Macharia t/a Machira & Co. Advocates vs Grace Wahu Njoroge* [2006] for the proposition that where a defence is frivolous, vexatious and an abuse of the court process, the court has an inherent power to strike out such a defence.
9. It was further submitted for the Applicant that the applicant had demonstrated sufficient grounds for summary judgment as he had furnished the court with evidence to show that he purchased the suit



property from Joseph Muniyao Mutisya and shown his ownership thereof by the title deed he obtained after purchase. He relied on Section 26 of the Land Registration Act to argue that the law is protective of title. Reliance was placed on the cases of Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & another; Eldoret ELC Case No. 609 B of 2012, Dennis Moya vs Virginia Wanjiku Ngunjiri & another [2019] and Dr. Joseph Arap Ngok vs. Justice Moji Ole Keiwa & 5 others [1997] for the proposition that a title owner is protected by the law as the registered proprietor is the absolute and indefeasible owner thereof.

10. The applicant's counsel further submitted that the defence and counterclaim were mere denials as the same were frivolous, uncorroborated and failed to raise any triable issues. Counsel argued that the defence failed to respond to the issue of trespass raised in the plaint. Counsel referred to the cases of Simon Kirima Muraguri & Another vs Equity Bank (Kenya) Limited & another [2021] eKLR, Equatorial Commercial Bank Ltd vs Jodam Engineering Works Ltd & 2 others [2014] and Diamond Trust Bank (K) Ltd vs. Martin Ngombo & 8 others [2005] eKLR for the proposition that where the defence is a sham, the court should avail a quick remedy to the Plaintiff by striking it out.
11. Counsel further argued that the boundary dispute was settled by the Registrar of Lands who has prepared his Expert Report. In addition, counsel argued that the Plaintiff had provided a Surveyors Report as well as a certified Area Aerial Map from Machakos Lands Office dated May 5, 2021 confirming the lay and disposition of the suit property. Counsel contended that the plaint had provided evidence to demonstrate ownership of the suit property and had also attached a certified Adjudication Map from Machakos Lands Office dated May 5, 2021 in respect of the suit property. In conclusion, counsel submitted that although the power to strike out pleadings ought to be exercised judicially and sparingly, in view of the mere denial in the defence and the overwhelming evidence of ownership by the Plaintiff, this was a proper case for striking out the defence and counterclaim.
12. On the other hand, the Defendants/Respondents counsel submitted that the 1st, 2nd, 3rd and 4th Defendants are brothers who were all born on land parcel Matungulu/Katine/465 whereof part of it has been referred to as Matungulu/Katine/271. Counsel argued that the Defendants had not trespassed on the suit property as they had lived thereon for over 50 years.
13. Further, counsel contended that the 5th to 7th Defendants were innocent purchasers for value and ought to be heard both on their defence and counterclaim. It was argued for the Defendants that although they live on the suit property, they have never met the seller thereof and that the Plaintiff's documents were obtained by fraud to deprive them of their father's estate. Counsel argued that the defence and counterclaim raised triable issues and therefore ought to be heard at trial.

Analysis and Determination

14. I have considered the application, the supporting affidavit, the replying affidavit, the submissions of parties, authorities relied upon and the pleadings on record. The issue that arise for determination is whether the Plaintiff has met the threshold to have the defence and counterclaim struck out and summary judgment entered as prayed in the plaint.
15. Order 2 Rule 15 of the Civil Procedure Rules 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 and grounds on which it is made.
 3. So far as applicable this rule shall apply to an originating summons and a petition.
16. It is clear under order 2 rule 15 that the court can strike out a pleading which does not disclose a reasonable cause of action or defence in law, is scandalous, frivolous or vexatious or it may embarrass or delay the fair trial of the action or is otherwise an abuse of the court process. In exercising its jurisdiction under order 2 rule 15 (1) (a), the court does not consider evidence because, it ought to be clear from the pleadings only that it will not serve any purpose to have the action/defence tried as the same does not demonstrate a cause of action or defence as the case may be. In my view therefore, where a party has to avail all the available evidence to show that the pleading in issue does not raise a reasonable cause of action or defence, cannot be said to have met the threshold in order 2 rule 15 (1) of the [Civil Procedure Rules](#).
17. In the case of *Cooperative Merchant Bank Ltd vs George Fredrick Wekesa*, Civil Appeal No. 54 of 1999, the court stated as follows;
- The power of the court to strike out a pleading under Order 6 Rule 13(1) (b) (c) and (d) is discretionary and an appellate court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial judge was plainly wrongstriking 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 factsince oral evidence would be necessary to prove what either of the parties says, the appellant’s defence cannot be said to present a plain case of frivolous, 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. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the respondent, a question which, cannot possibly be answered at the stage of an application for striking outA court may not strike out pleadings when they disclose no semblance of a cause of action or defence and are incurable by amendment.
18. However, in the case of *Yaya Towers Limited vs. Trade Bank Limited (In liquidation)* Court of Appeal No. 35 of 2000, the Court of Appeal stated as follows;
- “A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the Defendant 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 trialIt 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”.
19. It is clear from the long list of decided cases, that the inherent jurisdiction of the court is to determine matters on merit upon full trial of the action/defence, and only in exceptional circumstances will



the court strike out a pleading and enter summary judgment. This ought only be done where it is demonstrated that it will not serve the interests of justice to try the matter. Striking out a pleading is basically sending away a party from the judgment seat before granting them opportunity to clarify by evidence or otherwise what their claim or defence is all about. That being draconian, flies in the face of article 50 (1) of *the Constitution* of Kenya that enshrines the right to a fair hearing, which protects the right to be heard. Therefore beyond the pleading, the court should always strive to have each party, have their day in court because parties come to court to be heard on merit and simply have their day in court. Unless it is plain, obvious and necessary in law to deny a party this right, it is the duty of the court to facilitate this right, and hear the matter on merit.

20. In this case, the plaintiff stated in his plaint that he was the registered proprietor of the parcel of land known as Title No. Matungulu/Katine/271 which he purchased from one Joseph Munyao Mutisya on 21st June 1994, and that the same was transferred to him on 3rd December 2002. He sought for a permanent injunction to bar the Defendants from trespassing on the suit property and for an order that the Land Registrar points out beacons of the suit land which exercise should be undertaken in the presence of the Defendants. He also sought for an order that the District Surveyor Machakos undertakes a boundary determination. A further claim for general damages for trespass and for costs was made.
21. The Defendants' defence filed by the 1st, 2nd, 3rd and 4th Defendants stated that Parcel Matungulu/Katine/271 exist in parcel Matungulu/Katine/465 as shown in the map from the Land Registrar's office. They also contended that they have lived on the suit land for over 40 years and that the same was acquired by their late father in the 1940's. They also contended that they were on the suit property by virtue of being sons of the registered owner thereof and that in the alternative, they had acquired the same by virtue of adverse possession having lived thereon for over 40 years. They made a counterclaim for orders of injunction against the Plaintiff, from interfering with maps of plots Matungulu/Katine/271 and Matungulu/Katine/465 and sought also for orders of inhibition against the Land Registrar from registering dealings on Matungulu/Katine/271. Further they sought for orders directing the Land Registrar to delete Matungulu/Katine/271 from the register and for a declaration that Matungulu/Katine/271 does not exist on the ground in Matungulu/Katine/465. They further sought in the alternative for a declaration that the Plaintiff holds parcel Matungulu/Katine/271 subject to the Defendants' claim for adverse possession.
22. While the Plaintiff argues that he is the owner of the suit property and that the dispute herein is about trespass, the 1st to 4th Defendants have responded that the suit land does not exist but on the map it is situated inside their late father's parcel Title No. Matungulu/Katine/465. The 1st to 4th Defendants have argued that they have been on this land for over 40 years and therefore their presence on the land does not amount to trespass as the same belongs to their late father. Further that the 5th to 7th Defendants' claim of innocent purchasers for value is a valid defence.
23. Having considered the defence raised by the Defendants, I am satisfied that the same has raised triable issues. Among the issues are;
 - a. Whether land parcel Number Matungulu/Katine/271 exists independently from parcel number Matungulu/Katine/465.
 - b. Whether the property occupied by the Defendants is land parcel Matungulu/Katine/271 or Matungulu/Katine/465.
 - c. Whether the Defendants have trespassed on the Plaintiff's land.
 - d. Whether the 5th to 7th Defendants are innocent purchasers for value.



24. It is a settled principle of law that where a defence raises even just one bonafide triable issue, then the defence ought not to be struck out. (See *Postal Corporation of Kenya vs I. T. Inamdar & 2 others* [2004] 1KLR 359.) It is also settled that a triable issue need not necessarily be one that the Defendant would ultimately succeed, but it only needs to be bonafide. (See *Olympic Escort International Co. Ltd & 2 Others vs. Parminder Singh Sandhu & Another* [2009] eKLR.)
25. In my considered view, the four issues I have stated above as arising from the pleadings in this case may not at this stage be ascertained as to whether they will ultimately succeed, but, they are bona fide issues that ought to be determined at the trial of this matter.
26. The Plaintiff has attached several exhibits including three Expert Reports, the adjudication map, the agreement and the title deed to show that he is the owner of the suit property. In view of the issues flowing from the pleadings as indicated above, in my humble opinion, it would be a travesty of justice to decide this matter summarily and deny the Defendants a chance to interrogate those documents when they have alleged that those documents were fraudulently obtained. I therefore find that the plaintiff/applicant has failed to meet the threshold for striking out the defence and counterclaim and therefore is not entitled to an order for summary judgment in his favour.
27. In the premises, the application dated October 6, 2021 lacks merit and the same is dismissed with costs.
28. As this matter has been pending in court for over 11 years, the same ought to be determined expeditiously. In that regard, I make the following directions;
 - a. Parties are granted leave of 30 days of this ruling to file and serve consolidated paginated trial bundles which must contain their respective pleadings, witness statements, documents and all material they wish to rely on at the trial.
 - b. A hearing date to be fixed within 14 days of this ruling.
29. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 6TH DAY OF JULY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms Khaminwa holding brief for Dr. Khaminwa for Plaintiff/Applicant

Ms Kingoo for the Defendants

Ms Josephine Misigo – Court Assistant

