REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ELC CASE NO. 7 OF 2020.

SALOME WAKHOME..1ST PLAINTIFF

JULIANA WAKHOME..2ND PLAINTIFF

VERSUS

TAFROZA MUHONJA ALUNGA......................1ST DEFENDANT

WAMALWA WANYAMA CHIMBANGA.........2ND DEFENDANT

PAUL MWELEZA..3RD DEFENDANT

ERASTUS BARASA..4TH DEFENDANT

MOSES ASICHELE..5TH DEFENDANT

R U L I N G

Whereas Courts have the power to strike out pleadings in appropriate cases, it is generally the practice that the power to do so should be exercised cautiously and sparingly.**MADAN J A** (as he then was) captured it as follows in the case of **D. T. DOBIE & COMPANY (KENYA) LTD .V. MUCHINA 1982 KLR 1**: -

> ***"The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court.At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross – examination in the ordinary way."*** Emphasis added.

The Courts have continued to follow that path.In **CRESCENT CONSTRUCTION COMPANY LTD .V. DELPHIS BANK LTD 2007**, the Court of Appeal stated thus: -

> ***"However, one thing remains clear and that is the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution.This comes from the realization that the rules of natural justice require that the Court must not drive away any litigant, however week his case may be, from the seat of justice.This is a time honoured legal principle.At the same time, it is unfair to drug (sic) a person to the seat of justice when the case purportedly brought against him is a non – starter."***

In **FREMAR CONSTRUCTION COMPANY LTD .V. MINAKASH N. SHAH C.A CIVIL APPEAL No 85 of 2002 (NBI)** the Court said: -

> ***"This Court has stated many times before, and the learned Judge of the superior Court was conscious of it, that striking out a pleading is a drastic remedy and the powers of the Court are to be exercised with great caution and only in clear case.But the power is clearly donated in the rules and exists inherently for the Court in the interest of justice, to reject manifestly frivolous and vexatious pleadings or suits and to protect itself from abuse of it's process."***

The relevant provision is **Order 2 Rule 15(1)** of the **Civil Procedure Rules** which provides that: -

> ***15(1) "At any stage of the proceedings the Court may order to be struck out or amended any pleading on the grounds 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."

By a plaint dated 13th February 2020 and filed herein on 19th February 2020, the plaintiffs sought Judgment against the defendants in the following terms: -

(a) An order of eviction of the defendants, their relatives or anyone claiming through the defendants from title NO BUNGOMA/NDALU/41 or any resultant sub – division of the suit premises.

(b) That the Deputy County Commissioner Tongaren Sub – County to provide security and oversee the forcible eviction of the defendants, their families and/or relatives.

(c) Costs.

The basis of the plaintiff's claim is that at all material times, the land parcel **NO BUNGOMA/NDALU/41** (the suit land) was registered in the names of the deceased since 10th January 2017 having been transferred from the Settlement Fund Trustees where it had been registered from 14th December 1979.The deceased is not identified in the plaint but it is clear from the other documents filed herein that the deceased was one **JOSEPHAT WAKHOME NABISWA** and the plaintiffs are the Administrators of his Estate and that the defendants' application to revoke the grant issued to the plaintiffs in respect to that Estate was dismissed vide a ruling delivered on 3rd April 2019 at **KITALE HIGH COURT SUCCESSION CAUSE No 13 of 2014**.That some of the defendants thereafter filed **BUNGOMA ELC CASES No 9**, **10** and **11 of 2019** seeking to be declared the owners of the suit land but that case was withdrawn.The defendants have without any colour of right or lawful excuse trespassed into parts of the suit land and occupied 8 acres thereof hence this suit.

By a joint statement of defence dated 18th March 2020, the 1st, 2nd and 4th defendants pleaded that they are not trespassers but are bona fide purchasers for valuable consideration.That they have been in exclusive open and notorious occupation of portions of the suit land measuring 8 acres and that the plaintiffs' suit is time barred.They therefore denied being trespassers on the suit land and sought to enjoin in this case one **GILBERT KISIANG'ANI** one of the beneficiaries of the Estate of **JOSEPHAT WAKHOME NABISWA**.They therefore sought the dismissal of the plaintiffs' suit.

By an application dated 10th September 2020, the defendants sought to enjoin **GILBERT KISIANG'ANI** as a third party in these proceedings.That application was allowed on 6th October 2020.

The Third Party filed his defence in which he pleaded that he was granted 5 acres out of the suit land for his and his sibling's benefit following orders issued in **KITALE HIGH COURT SUCCESSION CAUSE No 13 of 2014** and he has no privity with the defendant.He denied having been a trustee or agent of **PATRICK JUMA WAKHOME**.He also denied that his father owned any part of the suit land and added that any purported sale to the defendants was null and void ab initio.

The 1st, 2nd and 4th defendants filed a reply to the Third Party's defence and pleaded, inter – alia, that the Third Party was allocated a share of the suit land which was legally and lawfully bought by the 1st, 2nd and 4th defendants from **PATRICK JUMA WAKHOME** (deceased) who was entitled to 7 acres from the said Estate.The 1st, 2nd and 4th defendants pleaded further that there were more than 20 such purchasers of portions of the suit land yet only the defendants have been left out.That the Third Party and the plaintiffs have been aware of the shares of the 1st, 2nd and 4th defendants in the suit land but are ow colluding to defeat the said defendants' legal interest therein.

The 3rd and 5th defendants appear not to have filed any defence yet.

I now have for my determination, the Notice of Motion dated 28th November 2020 and filed by the plaintiffs as well as the Third Party seeking the following orders: -

1. Spent

2. That this Honourable Court be pleased to strike out the 1st, 2nd and 4th defendants statement of defence dated 18th March 2020.

3. That this Honourable Court be pleased to enter summary Judgment against the defendants.

4. That costs of the application be provided for.

The application is premised under **Section 7** of the **Civil Procedure Act**, **Order 2 Rule 15 (1) (b)** and **Order 36 Rule 1 (1) (b)** as well as **Order 51 Rule 1** of the **Civil Procedure Rules**.The application is also based on the grounds set out therein and supported by the affidavit of

JULIANA WAKHOME the 2nd plaintiff herein and his Counsel **JEREMIAH ONGERI SAMBA**.

The gravamen of the application is that the defendants were objectors in **KITALE HIGH COURT SUCCESSION CAUSE No 13 of 2014** claiming as beneficiaries entitled to 7.5 acres of the suit land but their objection was dismissed vide a ruling delivered by **CHEMITEI J** on 3rd April 2019.No appeal was filed against that ruling.They later filed **BUNGOMA ELC CASES No 9**, **10** and **11 of 2019** claiming a share in the suit land.Those cases were however withdrawn after the defendants realized that they could not claim the suit land through adverse possession when it was still registered in the names of the **SETTLEMENT FUND TRUSTEES**.That the plaintiffs are in the process of administering the Estate of **JOSEPHAT WAKHOME NABISWA** yet the defendants, in complete disregard of the ruling by **CHEMITEI J**, have continued to occupy the suit land hence this suit seeking orders for their eviction.

The application is opposed and both **TAFROZA MUHONJA ALUNGA** and **WAMALWA WANYAMA CHIBANGA** (the 1st and 4th defendants) as well as their Counsel **HENRY KEPHA ONYANDO** have sworn replying affidavits dated 8th March 2021 in opposition to the application.It is the defendants' case that this suit is not res – judicata and that **CHEMITEI J** in his ruling delivered on 3rd April 2019 observed inter – alia, that: -

> ***"In my humble view therefore, the applicants should therefore deal with the Estate of the late PATRICK JUMA WAKHOME and not the Estate of the deceased herein."***

That the said **PATRICK JUMA WAKHOME** who is the father to the Third Party sold land to the 1st and 4th defendants.That the said **JOSEPHAT WAKHOME NABISWA** had asked purchasers, including them, to contribute towards the payment of the **SETTLEMENT FUND TRUSTEE** loan.That the defence raises issues and to strike it out would be premature.That the 1st, 2nd and 4th defendants are in occupation of their respective parcels which they purchased from **PATRICK JUMA WAKHOME** in 1994 and triable issues are raised in their defences.

When the application was placed before me on 3rd February 2021, I directed that it be canvassed by way of written submissions.The same were to be filed on or before 10th March 2021.However, it was not until 31st March 2021 that all the submissions were filed.

I have considered the application, the rival affidavits and annextures thereto as well as the submissions by both **MR SAMBA** instructed by the firm of **SAMBA & COMPANY ADVOCATES** for the plaintiffs and Third Party as well as those by **MR ONYANDO** instructed by the firm of **ONYANDO & COMPANY ADVOCATES** for the 1st, 2nd and 4th defendants.

Before I delve into the merits or otherwise of the application, I must point out that both **MR SAMBA** and **MR ONYANDO** swore affidavits in support of their respective client's cases.Ordinarily, where the clients are available, like in this case, and can depone to matters of fact within their knowledge touching on the dispute, it is desirable that Counsel stays out of the arena of litigation.While there would be no harm in Counsel deponing to issues of pure law, it is within the domain of the parties to depone to issues of fact.In the circumstances of this case, the parties were present and indeed deponed to those issues.I shall therefore expunge from the record both the affidavits of **MR HENRY KEPHA ONYANDO** dated 8th March 2021 and by **MR JEREMIAH ONGERI SAMBA** dated 28th November 2020.

Although not elegantly drafted, it is clear to me that the 1st, 2nd and 4th defendants are raising the defence of adverse possession with respect to the 8 acres of the suit land which they occupy.This is what is pleaded in paragraph 6 of their defence dated 8th March 2020: -

> ***6 "The 1st, 2nd and 4th defendants further state that they have in (sic) exclusive, open and notorious occupation of the portion of land measuring to eight (8) acres with permission of the plaintiffs and other beneficiaries for more than 26 years without any interruption or query from the plaintiff and the 1st, 2nd and 4th defendants invites the plaintiff to strict proof as to their change of heart as to their occupation."***

The 1st, 2nd and 4th defendants have also pleaded in paragraph 10 that they are bona fide purchasers for valuable consideration and in any event, the prayer to evict them from the suit land is statute barred.

Order 2 Rule 15 (1) (b) (c) and **(d)** of the **Civil Procedure Rules** upon which the application is predicated donates to the Court the power to strike out any pleading which is scandalous, frivolous vexatious or which may prejudice embarrass or delay the fair trial of the action or which is otherwise an abuse of the process of the Court.The view I take of the application is that a party should elect either to cite **sub – rule 1 (a) (b) (c)** or **(d)** but not a combination of all.That is why **Order 15 Rule 1** of the **Civil Procedure Rules** uses the word ***"or"*** between **Sub – rule (a)** to **(d)**.And that explains why there is a clear embargo on the admission of evidence where the application is predicated under sub – rule 1 (a).That notwithstanding, and having elected to approach the Court in the manner in which they did, the onus was on the plaintiffs to satisfy the Court that the defence by the 1st, 2nd and 4th defendants was plainly scandalous, frivolous, vexatious or one which may embarrass or delay the fair trial of the action or that it is an abuse of the process of the Court.I have already referred to some paragraphs of the said defence and they raise serious triable issues of adverse possession and limitation.Those are not issues that could be raised in the succession cause in **KITALE** because that Court was primarily concerned with the distribution of the Estate of a deceased person among the beneficiaries.It must also be remembered that a defence which raises a triable issues is not synonymous with a defence which must succeed – **PATEL .V. E.A CARGO HANDLING SERVICES LTD 1974 E.A 75** and also **KENYA TRADE COMBINE LTD .V. SHAH C.A CIVIL APPEAL No 193 of 1999**.

The plaintiffs similarly seek an order for summary Judgment to be entered in their favour.The power to enter summary Judgment is donated by **Order 36 Rule 1** of **the Civil Procedure Rules** as follows: -

"In all suits where a plaintiff seeks Judgment for –

(a) – liquidated demand with or without interest; or

(b) The recovery of land, with or without a claim for rent or mesne profits, by a landlord from a tenant whose term has expired or been determined by notice to quit or been forfeited for non – payment of rent or for breach of covenant, or against persons claiming under such tenant or against a trespasser,

where the defendant has appeared but not filed a defence the plaintiff may apply for Judgment for the amount claimed, or part thereof, and interest, or for recovery of the land and mesne profits."

It is immediately clear that **Order 36 Rule 1** of the **Civil Procedure Rules** is inapplicable in the circumstances of this case.Firstly, the plaintiffs have not filed this suit seeking any liquidated demand.Secondly, there is no landlord – tenant relationship between the parties and lastly, the 1st 2nd and 4th defendants herein have infact filed a defence.

In **LALJI t/a VAKKED BUILDING CONTRACTORS .V. CASOUSEL LTD 1989 KLR 386**, the Court stated the following with regard to the power to enter summary Judgment: -

"Summary Judgment is a draconian measure and should be given in only the clearest of cases.A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist."

That decision has been followed in many cases and in **JOB KILACH .V. NATION MEDIA GROPU C.A CIVIL APPEAL No 94 of 2006 [2015 eKLR]**, the Court stated that: -

"Summary Judgment has far reaching consequences.It must therefore be granted only in the clearest of cases ……"

The Court went on to add as follows: -

"Before the grant of summary Judgment, the Court must satisfy itself that there are no triable issues raised by the defendant either in his statement of defence or in the affidavit in opposition to the application for summary Judgment or in any other manner.What then is a defence that raises no bona fide triable issue?A bona fide triable issue is any matter raised by the defendant that would require further interrogation by the Court during a full trial.The BLACK'S LAW DICTIONARY defines the term "triable" as "subject or liable to judicial examination and trial" It therefore does not need to be an issue that would succeed, but just one that warrants further intervention by the Court."

As I have already stated above, not only is this a proper case for the entry of summary Judgment but further, the 1st, 2nd and 4th defendants have by their defence raised triable issues.To deny them the opportunity to defend the claim against them and also prosecute their own claim would be a clear violation of their rights as protected by **Article 50 (1)** of the **Constitution**.I am also reminded of the words of **AINLEY J** as adopted by **SHERIDAN J** in **SEBEI DISTRICT ADMINISTRATION .V. GASYALI 1968 E.A 300** that: -

"The nature of the action should be considered, the defence if one has been brought to the notice of the Court, however irregular, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally I think it should always be remembered that to deny the subject a hearing should be the last resort of a Court."Emphasis added.

Then there is the right to a fair hearing enshrined under **Article 50 (1)** of the **Constitution**.

Taking all the above into account, I do not consider this to be a proper case for striking out the defence or entry of summary Judgment.

The up – shot of the above is that the Notice of Motion dated 28th December 2020 is devoid of any merit.It is accordingly dismissed with costs to the 1st, 2nd and 4th defendants.

Boaz N. Olao.

J U D G E

1st July 2021.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 1ST DAY OF JULY 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

Boaz N. Olao.

J U D G E

1st July 2021