



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC SUIT NO. 113 OF 2019**

**ALI ABDI ALI (Chairman, suing on Behalf of**

**Kaloleni Welfare Society).....PLAINTIFF/RESPONDENT**

**VERSUS**

**RHINE FORWARDERS LTD .....1<sup>ST</sup> DEFENDANT/APPLICANT**

**SAMY MUTHUSI (Chairman, Makime Self-help Group).....2<sup>ND</sup> DEFENDANT**

**RULING**

1. In the Notice of Motion application dated 2<sup>nd</sup> July 2021, the 1<sup>st</sup> Defendant sought the following orders:

- a) That the Plaint dated 18<sup>th</sup> October 2019 and filed in court on even date be and is hereby struck out.*
- b) That in the result, the Plaintiff's suit against the 1<sup>st</sup> Defendant/Applicant be and is hereby dismissed with costs.*
- c) That the costs of this Application and the entire suit be awarded to the 1<sup>st</sup> Defendant/Applicant.*

**1<sup>st</sup> Defendant/Applicant's Case**

2. The Application was supported by an Affidavit sworn by the 1<sup>st</sup> Defendant's Director who deponed that the dispute pertained to L.R. No. 24625 (a sub-divided portion of Uns. Agricultural Plot No. 'D'- Athi River) ('suit the property'); that the suit property belongs to the Applicant as was held by this court in its Ruling of 29<sup>th</sup> January 2021; that the Plaintiff is not registered as a Society under the Societies Act and that the Plaintiff does not exist as a legal person and does not have legal capacity to institute this suit against the Applicant.

3. The 1<sup>st</sup> Defendant's Director deponed that the following Plaintiff's documents were not genuine and were in fact forgeries: the property's Certificate of Registration No. 16343 dated 12<sup>th</sup> February 1997; the Letter of Allotment dated 24<sup>th</sup> February 1997; the copy of receipt dated 14<sup>th</sup> May 2018 allegedly being proof of payment of stand premium to the land's registry of Kshs. 250,200 in respect of the suit property and the Certificate of Title dated 17<sup>th</sup> October 2018.

4. It was the deposition of the 1<sup>st</sup> Defendant's Director that his advocate made inquiries to the Registrar of Societies who informed him that the Plaintiff does not exist in its database; that the certificate of registration number 16343 belongs to Musanda Holy Ghost Church of E.A. South Nairobi Branch and that the Plaintiff does not exist as a legal entity.

5. In addition, the 1<sup>st</sup> Defendant's Director deponed that the Lands Registry had indicated that the receipt for the alleged payment dated 14<sup>th</sup> May 2018 does not appear in its records book, and is not from the lands department and that the serial number in the said receipt does not match the serial numbers of the receipts used by the lands registry during the period in question.

6. The 1<sup>st</sup> Defendant's Director deponed that the actions by the Plaintiff together with officials in the Lands Registry demonstrate a concerted effort to fraudulently deprive the applicant of his property by falsifying documents and records and that the Plaint be struck out with costs to the Applicant.

**Plaintiff/ Respondent's case**

7. The Plaintiff/Respondent opposed the application by way of a Replying Affidavit dated 23<sup>rd</sup> July 2021 in which he deponed that the

application was a frivolous attempt by the Applicant to evade the trial and that this court in paragraph 27 of its Ruling dated 29<sup>th</sup> January 2021 had found and directed that the issue of registration of the Plaintiff should be determined at the hearing.

8. The Plaintiff deponed that Kaloleni Welfare Society is a duly registered society under the Societies Act and holds a valid and genuine registration certificate, which is prima facie proof of registration; that the certificate of registration was confirmed by the Office of the Attorney General in a letter dated 24<sup>th</sup> February 2020 to the Director of Criminal Investigations and that Kaloleni Welfare Society is a duly registered taxpayer under the Kenya Revenue Authority with a valid PIN number, which would not be possible if its registration status was doubtful.

9. According to the Plaintiff, Kaloleni Welfare Society has been paying rates to the County Government of Machakos as the owner of the suit land and had received a rates clearance certificate for the year 2021; that the Defendant/ Applicant was relying on correspondence between their advocate and the Registrar of Societies and that the correspondence had made no reference to the official register recognized under the Societies Act.

10. The Plaintiff deponed that all the documents he had tabled, including the Society's certificate of registration, the letter of allotment, receipts and the certificate of title, were genuine documents and that fact will be demonstrated at trial.

11. The Plaintiff also filed Grounds of Opposition dated 24<sup>th</sup> July 2021 in which he averred that the 1<sup>st</sup> Defendant's Application was scandalous, frivolous and vexatious; that the application raises issues of registration, which the court had ruled would be addressed at the hearing of the suit and that the application will prejudice, embarrass and delay the fair trial of the suit as it seeks to waste the court's time on matters it has already addressed.

### **Submissions**

12. The 1<sup>st</sup> Defendant's/Applicant's Advocate chose not to file submissions. The Plaintiff's/Respondent's Advocate filed submissions in which he submitted that the Application constitutes a gross abuse of judicial process; that the court had already indicated in its Ruling that it would deal with the registration status of Kaloleni Welfare Society during the hearing of the main suit and that the application is a malicious attempt by the Applicant to take a second bite at the cherry.

13. Counsel relied on the case of **Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No. 25 of 2002 [2009] KLR 229** where the Court of Appeal considered the definition of abuse of court process and **Stephen Somek Takwenyi & Another vs. David Mbutia Githare & 2 others Nairobi (Milimani) HCCC No. 363 of 2009**, wherein Kimaru J articulated the court's power to prevent abuse of its process.

14. Counsel argued that in requiring the Court to interrogate the registration status of a society, the Applicant had ignored mechanisms of redress existing under the Societies Act, thus constituting the wrong process. Counsel referred to the case of **Media Owners Association v Attorney General & 5 others [2013] eKLR**, wherein Lenaola J (as he was then) considered the issue of registration of a society as follows:

***“18. According to its long title, the Societies Act is, “An Act of Parliament to make provision for the registration and control of societies.” Section 38 of the Act gives investigatory powers over alleged offences under the Act to the Registrar of Societies, an administrative officer or any police of above the rank of the Inspector of Police. While it is obvious that in the circumstances of the present case the issue of legal capacity cannot be completely divorced from the question of registration of MOA, I will quickly point out that the two are severable and the business of this court is to confine itself to the question as to whether the Petitioner has the legal capacity to sue.***

***19. Part II of the Act deals with unlawful societies. An unregistered society is an unlawful society by dint of section 4(1) to the Act which states that, “(1) Every society which is not a registered society or an exempted society is an unlawful society.” Part III of the Act deals with the registration of societies.”***

15. Counsel further submitted that the production of the certificate of registration by the Applicant/1<sup>st</sup> Defendant ought to be considered as prima facie proof of registration; that there have been no known actions by the Registrar of Societies to cancel the registration of Kaloleni Welfare Society nor are there any pending investigations on the registration status of the Respondent and that the courts ought to treat the Respondent as a lawfully registered society under the Societies Act until the contrary is proven.

16. Counsel submitted that they have denied the allegations of fraud raised by the 1<sup>st</sup> Defendant and that the allegations of fraud are grave and ought to be interrogated further in a full trial. Counsel relied on the case of **Central Kenya Ltd vs Trust Bank Ltd & 4 others [1996] eKLR** where the Court of Appeal held that fraud and conspiracy to defraud are very serious allegations, with the onus of prima facie proof being heavier on the appellant in that case than in an ordinary civil case.

17. Counsel finally submitted that the court ought not to invoke its drastic power of dismissing the suit but should instead allow the matter to proceed to full trial. Counsel relied on the case of **D.T Dobie Company (K) Ltd vs Muchina & Another [1980] eKLR**, where Madan JA (as he then was) stated as follows with respect to summary dismissal of a suit:

***“If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.***

***No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause***

***of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”***

### **Analysis and Determination**

18. This suit was commenced by way of a Plaint. In the Plaint, the Plaintiff averred that Kaloleni Welfare Society is a duly registered society under the **Societies Act**; that at all material times, the Society was allocated plot number 31990 by the Ministry of Lands on 24<sup>th</sup> February, 1997 and that the society has been paying the requisite land rates to the Machakos County Government.

19. According to the Plaintiff, in the year 2019, the Plaintiff’s members sub divided the suit property. However, the agents of the Defendants attacked them and threatened to demolish their existing structures. The Plaintiff are praying for an order of permanent injunction against the Defendants in respect of the suit property.

20. In response to the Plaintiff, the 1<sup>st</sup> Defendant filed a Notice of Preliminary Objection in which it averred that it will raise a preliminary objection and apply that the Plaintiff’s suit be struck out on the ground that there is no society known as Kaloleni Welfare Society.

21. The 1<sup>st</sup> Defendant/ Applicant’s Application is seeking to strike out the suit for being scandalous, frivolous and vexatious or otherwise an abuse of the court. The Application is premised on the ground that the Plaintiff/Respondent is not an entity known in law, and specifically under the Societies Act and that some of the documents the Plaintiff is relying on to prove its case are forgeries and not authentic.

22. In support of the Applicant’s Application, the Applicant has annexed a copy of the letter from the Registrar of Society in which the Registrar has stated that Kaloleni Welfare Society does not exist in their data base.

23. The 1<sup>st</sup> Defendant/Applicant has also exhibited copies of letters from the Ministry of Lands denying the authenticity of a receipt number 4627379 for Kshs. 250,205 purportedly issued by the Ministry in respect to the suit property. The Plaintiff has also annexed a letter from the Director of Physical Planning purportedly recalling a Deed Plan which the Plaintiff was using to process a title for the suit property.

24. The Plaintiff has denied that the documents they are relying on are forgeries. According to the Plaintiff, the Attorney General did confirm in writing that indeed Kaloleni Welfare Society is duly registered; that they were validly issued with a letter of allotment by the government and that they having been paying rates to the County Government of Machakos.

25. It is the 1<sup>st</sup> Defendant’s case that the production of the certificate of registration by the 1<sup>st</sup> Defendant ought to be considered as prima facie proof of registration; that there have been no known actions by the Registrar of Societies to cancel the registration of Kaloleni Welfare Society nor are there any pending investigations on the registration status of the Respondent and that the courts ought to treat the Respondent as a lawfully registered society under the Societies Act until the contrary is proven.

26. The Court of Appeal discussed the issue of striking out pleadings in the case of ***Kivanga Estates Limited vs National Bank of***

***Kenya Limited [2017] eKLR*** as follows:

***“Striking out a pleading, though draconian, the court will, in its discretion resort to it, where, for instance, the court is satisfied that the pleading has been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious. Where the court below has properly addressed itself on these principles, and is satisfied, upon assessment of the material before it that any of the grounds enumerated under order 2 rule 15 exists, as an appellate court, this Court will not interfere with the exercise of the former’s discretionary power to strike out the pleading.”***

27. The same issue was also addressed in the case of ***Geminia Insurance Co Limited vs Kennedy Otieno Onyango [2005] eKLR*** where Musinga J (as he then was) held as follows:-

***“It is trite law that striking out pleadings is a draconian step which ought to be employed in the clearest of cases and particularly where it is evident that the suit is beyond redemption.”***

28. In ***D.T Dobie Company (K) Ltd vs Muchina & Another [1980] eKLR***, Madan JA stated as follows with respect to summary dismissal of a suit:

***“If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.***

***No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”***

29. The 1<sup>st</sup> Defendant/Applicant raised their concerns about the registration status of the Plaintiff in their submissions to the Plaintiff’s

application for temporary injunction dated 18<sup>th</sup> October 2019. In its Ruling of 29<sup>th</sup> January 2021, this court observed that the issue of the existence of the Plaintiff's Society or otherwise can only be determined at the hearing of this suit.

30. The parties in this suit have presented conflicting and competing evidence in respect to the *locus standi* of the Plaintiff and the ownership documents relating to the suit property. Both parties are alleging that the documents held by the opposing party are forgeries. In ***Gladys Wanjiru Ngacha vs Theresa Chepsaat & 4 Others (2013) eKLR***, the Court of Appeal considered the standard of proof where fraud allegations are raised as follows:

***“allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require a proof beyond reasonable doubt, something more than a mere balance of probabilities is required and that it is not enough for the appellant to have pleaded fraud. The appellant ought to have tendered evidence that proved the particulars of fraud to the satisfaction of the trial court.”***

31. The 1<sup>st</sup> Defendant is asking the court to determine the validity of the documents tabled by the Plaintiff in this suit at this stage. This would amount to conducting a mini-trial without giving the Plaintiff the opportunity to challenge these assertions in cross-examination. These are grave allegations which need to be investigated fully. The veracity of the 1<sup>st</sup> Defendant's documents can only be tested at a trial and not summarily.

32. For those reasons, the Notice of Motion dated 2<sup>nd</sup> July 2021 is dismissed with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 1ST DAY OF NOVEMBER, 2021.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

**MR. KARERA FOR THE PLAINTIFF/RESPONDENT**

**MS NYAGA FOR THE 1ST DEFENDANT/APPLICANT**

**COURT ASSISTANT – JOHN OKUMU**