



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENTAL AND LAND COURT AT MOMBASA**

**ELC CASE NO 188 OF 2018**

**OMAR MUDUZA MUNGA**

**IDD NGALA ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**HON ELIUD MWAMUNGA**

**BULKON BUILDERS LIMITED**

**OCS BAMBURI POLICE STATION**

**DEPUTY COUNTY COMMISSIONER – KISAUNI**

**OCPD KISAUNI ..... DEFENDANT/APPLICANT**

**RULING**

The application is dated 18<sup>th</sup> November 2018 and is brought under Order 2 Rule 15 (a) and Section 1A, 1B and 3A of the Civil Procedure Act seeking the following orders;

1. That the Honourable Court does proceed and strike out the suit.
2. The costs of this suit be in the cause.

It is based on the grounds that in the alternative the names of the 3<sup>rd</sup>, 4<sup>th</sup>, and 5<sup>th</sup> defendants be struck out from the suit. That no cause of action is discernible from the plaint.

The applicant submitted that the plaint was filed and served upon the respondents on 17<sup>th</sup> August 2018. That a careful perusal of the plaint reveals no specific acts or omissions by the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants at all capable of crystalizing as a cause of action available to the plaintiff as against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants. That if the plaintiffs are aggrieved by actions of a third party they are free to seek remedies against them. That it is a waste of judicial time to continue entertaining a suit as it is against the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> defendants.

The respondent submitted that paragraph 6 of the plaint clearly sets out the main grievance the plaintiff has against the applicants and that from instructions by the 1<sup>st</sup> defendant they have been threatening to evict the plaintiffs from the suit premises. The harassment by the applicants has been so persistent to lead the plaintiff to commence contempt proceedings against the applicants. That the foregoing cause of action ought to be ventilated and explored through a trial before court. They relied on various authorities.

This court has considered the application and the submissions therein. The 1<sup>st</sup> applicant Bulkon Builders Limited did not oppose the same. In the case of *Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa (Civil Appeal No. 54 of 1999)* the Court of Appeal stated:

*“Striking 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 fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, 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”.*

This application has been brought under the provisions of order 2 rule 15 of the Civil Procedure Rules which provides as follows;

**“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. “**

Order 2 Rule 15(2) of the Civil Procedure Rules provides that no evidence is admissible on an application under sub rule (1) (a) and therefore, it should be evident from the pleadings sought to be struck out that no reasonable cause of action has been disclosed without reference to further evidence. In the case of *Yaya Towers Limited vs Trade Bank Limited (In Liquidation)* (**Civil Appeal No. 35 of 2000**) the court held that;

*“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”.*

Similarly, in the case of *D.T. Dobie & Company Kenya Limited vs Joseph Mbaria Muchina & Another* (1980)eKLR, **Madan JA**, the court held that;

*“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’.*

I have perused the plaint which states that the defendants/applicants are illegally demolishing the plaintiffs’ houses and threatening to evict them from plot No. 322/1/MN yet the defendants are not the legal owners of the said plot. Order 1 rule 3 provides for who may be joined as defendants as follows;

*“3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”*

I find that the plaint raises a reasonable cause of action subject to proof and the suit cannot be struck out at this stage. I find that the application is not merited and I dismiss it. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 9<sup>TH</sup> NOVEMBER 2021.**

**N.A. MATHEKA**

**JUDGE**