



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 32 OF 2017

ANTHONY WANJALA MILIMO.....PLAINTIFF

VERSUS

TIMOTHY WAFULA WALUKANA.....DEFENDANT

RULING

1. By an application dated **20/12/2018** and filed in court on **28/2/2019** the defendant sought for orders that the suit herein against the defendant be struck out with costs to the defendant and costs of this application be borne by the respondent.
2. The grounds relied upon are that the plaintiff suit does not disclose a reasonable cause of action against the defendant; that the ex-parte evidence has exonerated the applicant from the plaintiff's claim and that the pendency of this suit is prejudicial to the applicant.
3. The application is not opposed by the plaintiff. However there is a replying affidavit irregularly filed on 27/6/2019 by one John Ndiema who has not been formally made a party in these proceedings despite the court order dated **13/2/2019** that he be joined.
4. I have noted that on **6/5/2019** Mr. Wanyama for the respondent prayed for 7 days to respond to the application dated **20/12/2018** which leave was granted and mention of the matter scheduled for **13/5/2019**. On the latter date Ms. Mengich holding brief for Mr. Wanyama prayed for 2 days to file a response which the court granted. All parties were also on that date ordered to file submissions on the application.
5. I have compared the contents of the replying affidavit of John Ndiema dated 25/2/2019 and the contents of the County Surveyor's Report dated 24/9/2018 and I have also considered the mutation form whose copy is exhibited in that affidavit as well as the absence of any comment by the plaintiff on the matters contained in those documents and the application. If the plaintiff had a good rejoinder to the allegations in the application dated 20/12/2018 he would have utilized the two opportunities granted by this court to file the same. Further if John Ndiema has conceded in writing in this matter that he has not closed the road which serves the plaintiff's plot and his own plot then I do not think that the plaintiff has any good case against the defendant for the reason that that road must be serving John Ndiema's plot as well as the plaintiff's. I hereby strike out the plaintiff's suit against the defendant with costs.

Dated, signed and delivered at Kitale on this 8th day of July, 2019.

MWANGI NJOROGI

JUDGE

8/7/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Defendant - present

John Ndiema - present

N/A for plaintiff

COURT

Ruling read in open court.

MWANGI NJORGE

JUDGE

8/7/2019