



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT MAKUENI**  
**ELC CASE NO.34 OF 2017**

**ALPHONCE NGUGI WAMBUA.....PLAINTIFF**

**VERSUS**

**PATRICK NDUNDA WAMBUA.....1<sup>ST</sup> DEFENDANT**

**MUENDO MAWEU.....2<sup>ND</sup> DEFENDANT**

**JOSEPH MASA KU MBITHI.....3<sup>RD</sup> DEFENDANT**

**THE LANDS REGISTRAR, MAKUENI COUNTY.....4<sup>TH</sup> DEFENDANT**

**THE COUNTY SURVEYOR MAKUENI.....5<sup>TH</sup> DEFENDANT**

**RULING**

1. On the 20<sup>th</sup> March, 2018 the first Defendant/Applicant filed a notice of motion application expressed to be brought under order 2 Rule 15(1) (b), Order 50 Rule 10 of the Civil Procedure Rules, Section 3, 3A of the Civil Procedure Act and Sections 13(7) and 19 of the Environment and Court Act No. 19 of 2011 for orders;

**1) That the Plaintiff's suit be struck off for being frivolous, vexatious and an abuse of the process of the court.**

**2) That the caution registered against the Plaintiff's property being LR Ukia/Kilala/524 be removed.**

**3) That costs be in the cause.**

2. The application is dated the 16<sup>th</sup> March, 2018 and is predicated on the grounds on its face. It is supported by the affidavit of Patrick Ndunda Wambua, the Applicant herein sworn at Nairobi on the 16th March, 2018.

3. The Plaintiff/Respondent has opposed the application vide his replying affidavit sworn at Machakos on the 9th April, 2018 and filed in court on even date.

4. On the 7<sup>th</sup> May, 2018 the court directed that the application be disposed off by way of written

submissions.

5. The first, second and the third Defendants/Applicants filed their submissions on the 30<sup>th</sup> May, 2018 while the Plaintiff/Respondent filed his on the 3<sup>rd</sup> August, 2018.

6. Mr. Nzioki for the first, second and the third Defendants/Applicants submitted that the first Defendant/Applicant sold a portion of his land to the third Defendant/Applicant in which the Plaintiff/Respondent was a witness. That when the Plaintiff/Respondent learnt that first Defendant/Applicant was disposing more of his property to the third Defendant/Respondent, he placed a caution on the land in the year 2015 or thereabout while claiming that he had an interest in the land. Mr. Nzioki went on to submit that the caution was removed upon the objection by the first Defendant/Applicant due to the failure by the Plaintiff/Respondent to justify its existence. That in the year 2017, the Plaintiff/Respondent lodged a second caution on the strength that he had filed this suit.

7. Arising from the above, Mr. Nzioki submitted that it is clear that this suit is peppered with frivolous and vexatious issues. He termed the caution lodged against land parcel number Ukia/Kilala/524 as one that is intended to vex, annoy and frustrate the first Defendant/Applicant from dealing with his parcel of land in the way that he desires.

8. On the other hand, Mr. Mulei for the Plaintiff/Respondent submitted that the application is not founded on any legal basis.

9. The counsel went on to correctly submit that the discretion of the court to strike out a matter should only be exercised in the clearest of cases.

10. The counsel cited the case of *Lalji t/a Vakkep Building Contractors V Casousel Ltd (1989) KLR 386* which the authority counsel did not supply to the court. I will therefore say no more regarding the authority.

11. The counsel further submitted that a claim should not be struck out and a Plaintiff is driven out from the judgement seat unless his case is unarguable. He added that it is an established practice that courts should strive to maintain suits rather than dismiss them.

12. Having read the application, the supporting affidavit as well as the replying affidavit by the Plaintiff/Respondent including the submissions that were filed by the parties, my finding is as follows:- As to whether or not the pleadings by the Plaintiff/Respondent discloses no reasonable cause of action, it is clear from the plaint that the Plaintiff is questioning how subdivision of the suit land was carried out so that the first Defendant/Applicant acquired a larger share from their deceased father.

13. It therefore cannot be said that the pleadings disclose no reasonable cause of action and as such, it cannot be said that the plaint is scandalous, frivolous or vexatious.

14. In the circumstances, I hold that the application lacks merit and the same is dismissed with each party bearing their cost.

Signed, Dated and Delivered at **Makueni** this 2<sup>nd</sup> day of **October, 2018**.

**MBOGO C.G,**

**JUDGE**

**IN THE PRESENCE OF;**

Ms Kyalo for the Plaintiff/Applicant

No appearance for the Defendants/Respondents

1<sup>st</sup> Defendant/Respondent

2<sup>nd</sup> Defendant/Respondent

Mr. Muchuku Court Assistant

**MBOGO C.G, JUDGE**

**2/11/2018**