



**REPUBLIC OF KENYA**

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

**ELC No. E004 OF 2020 (O.S)**

**CLEOPHAS CHEPKWONY.....PLAINTIFF**

**VERSUS**

**WILSON KIPSANG BOIT.....1<sup>ST</sup> DEFENDANT**

**ALIZEN CHEPCHIRCHIR.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of the defendants' Notice of Motion dated 26<sup>th</sup> January 2021. The application seeks the following orders:
  1. *THAT this Application be struck out for improperly enjoining the Defendants herein.*
  2. *THAT the pleadings be struck out for failure to disclose any cause of action against the Defendants.*
  3. *THAT the costs of this Application be borne by the Plaintiff/Respondent.*
2. The application is supported by an affidavit sworn by the second defendant. She deposed that she and the first defendant have no interest in the parcel of land known as Nakuru/Baraget Settlement Scheme/304 (the suit property) and that the plaintiff's pleadings indicate that the registered owner of the suit property is Samuel Chumo.
3. The plaintiff responded to the application through a replying affidavit in which he deposed that the plot number of the suit property was changed by the surveyor to read Nakuru/Baraget Settlement Scheme/1612 and that he has applied for a green card in respect of the new parcel.
4. The application was canvassed through oral submissions. Counsel for the applicants reiterated that the applicants are not registered proprietors of the suit property and that they are wrongly sued.
5. In turn, counsel for the respondent submitted that the applicants are properly sued and that the respondent will amend the originating summons to reflect the new property number.
6. I have considered the application, the affidavits and the submissions.
7. Proceedings herein were commenced through originating summons dated 10<sup>th</sup> November 2020. The plaintiff seeks a declaration that he has acquired the parcel of land known as Nakuru/Baraget Settlement Scheme/304 (the suit property) by adverse possession and an order that he be registered as proprietor of the said property.
8. A claim for adverse possession must be brought against the registered proprietor since it seeks a declaration that the proprietor's title has been extinguished by prescription. It follows therefore that the proceedings must be in respect of the correct parcel of land and whose ownership is verified by an annexed extract of title in terms of Order 37 rule 7 of the **Civil Procedure Rules**.
9. The copy of extract of title that the respondent annexed to the affidavit in support of the originating summons shows the registered owner of the suit property as Samuel C. Chumo and that title deed was issued to him on 12<sup>th</sup> October 2005. The said Samuel C. Chumo is not a defendant in this case. The plaintiff has not explained in what other way he seeks to maintain a claim for adverse possession against the defendants herein to the extent that they have no proprietorship interest over the suit property. The two defendants sued are right in maintaining that the suit discloses no cause of action against them.
10. The plaintiff has argued that he intends to amend his claim to join the registered proprietor. The present application was filed on 2<sup>nd</sup>

February 2021. The plaintiff filed a replying affidavit on 1<sup>st</sup> March 2021. Despite the proclaimed intention to amend, no amendment had been effected as at the date of inter parte hearing.

11. Even if the plaintiff were to effect such amendment as is suggested, there is no way that he will maintain a cause of action against the defendants who are not the registered proprietors. The amendment will probably bring in a new defendant and make reference to another parcel of land. What then happens to the current defendants? The plaintiff has not offered any explanation on that or even indicated what claim he has against the defendants.

12. The plaintiff has not shown how the claim against the present defendants can be salvaged. I am alive to the draconian nature of an order for striking out and that it must be resorted to in the clearest of cases. I am persuaded that this is a clear case where striking out ought to issue.

13. I find merit in the application. I strike out this suit with costs to the defendants. The defendants shall also have costs of the application.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 13TH DAY OF MAY 2021.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the plaintiff

Mr Oumo for the defendants

Court Assistants: B. Jelimo & J. Lotkomoi