REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO 1 OF 2020

DICKSON MAINA.....PLAINTIFF/RESPONDENT

VERSUS

KENYA ELECTRICITY

GENERATING COMPANY.....1ST DEFENDANT/APPLICANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion dated 16th March 2020, the 1st Defendant/Applicant herein has approached the court seeking the following orders:-

(i) That the Plaintiff suit against the 1st Defendant be struck out;

(ii) That the costs of this Application and of the suit be borne by the Plaintiff.

2. The 1st Defendant/Applicant furnishes the following grounds in support of the orders sought:

a) That the suit discloses no reasonable cause of action against the 1st Defendant/Applicant;

b) That the Plaintiff has no proper and or valid claim against the 1st Defendant in light of the Plaint as drawn and the 1st Defendant's statement of defence and the supporting documentation thereto clearly revealing that the Upper Tana Reservoir Land Acquisition had been acquired by Tana and Arthi Rivers Development Authority (TARDA) and not the 1st Defendant;

c) The 1st Defendant/Applicant is not in any way interested in the suit property whether pecuniary or otherwise and neither is the 1st Defendant/Applicant in occupation, possession or ownership of the same;

d) The 1st Defendant/Applicant is neither responsible for the actions, commissions and omissions of the Second Defendant nor is the 1st Defendant/Applicant vicariously liable for the actions, omissions and commissions of the 2nd Defendant;

e) The 1st Defendant/Applicant is not in any way responsible for any alleged land acquisition and or compensation for any reasons or at all and is not in any way indebted to the Plaintiff and bearing in mind that the 1st Defendant/Applicant has no control or any mandate over the title vesting process and states that it has been wrongly dragged into the suit.

3. The Plaintiff/ Respondent filed its replying affidavit in opposition of the application on 4th November 2020. The Plaintiff avers that it is not true the suit does reveal a cause of action against the 1st Defendant/Applicant. He avers that he is the registered proprietor of KIINE/RUKANGA/1224 (hereinafter referred to as the suit land), title thereof having been issued to him on 11th December 2009. He further avers that on 2nd January 2018, he noted that a restriction had been registered over the suit land, restraining any dealings thereon until acquisition by the 1st Defendant/Applicant was ascertained. He has annexed a copy of the green card, marked DM1. He submits that one of the prayers contained in the plaint is for the removal of the restriction and that therefore the 1st Defendant/Applicant is a necessary party to the proceedings. He thus urged the court to dismiss the application by the 1st Defendant.

4. The issue for determination by the court is whether or not the Plaintiff's suit should be struck out for failing to disclose a reasonable cause of action. The application is brought under ***Order 2 Rule 15(1)(a) of the Civil Procedure Rules, 2010***.

Order 2 Rule 15(1)(a) of the Civil Procedure Rules, 2010 provides as follows:

> *'15. (1) 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.'*

An application to strike out pleadings has been found to be one of a delicate balancing act. On the one hand, the Plaintiff has a right to approach the court, seeking a judicial resolution of his issues. On the other hand, the court's time being precious ought not to be wasted in engaging in fruitless academic exercises where the plaint is obviously utterly hopeless. See the Court of Appeal dicta in ***Yaya Towers Limited Vs Trade Bank Limited (In Liquidation) Civil Appeal No. 35 of 2000*** *:*

> *"A plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant 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."*

Even where the provisions ***of Order 2 Rule 15***, captured above avail to the court discretion to strike out pleadings, it has been held that that discretion ought to be exercised very sparingly. This is because, applications for striking out are usually made very early in the case, before the court has fully been appraised of the contentious matters, which usually come out through discovery and oral evidence. See ***Alumark Investments Limited Vs Tom Otieno Anyango & 4 others [2018] e K.L.R:-***

> *'It is settled law that the court's power to strike out pleadings is to be exercised sparingly and cautiously, because the court exercises the power without being fully informed on the merits of the case through discovery and oral evidence.'*

The Court of Appeal decision of **D.T. Dobie & Company (Kenya)** ***Ltd. Vs Muchina (1982) KLR 1 at page 9*** *provides useful guidance in navigating applications of the present nature.*

> *"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way." (Sellers LJ supra)). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks is right…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 lawsuit 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.**' (Bold, mine)*

The court has carefully considered the 1st Defendant/Applicant's application, the Plaintiff's reply and the plaint in general. It is not contested that the Plaintiff is the registered proprietor of the suit land. A search conducted over the suit land on 11th December 2019 reveals an entry made on 2nd January 2018 in the nature of a restriction. The restriction reads as follows:

> *"2.1.18 Restriction. No dealings until acquisition claimed by Kengen is ascertained Ref. NLC 8/20/4/1 of 20.12.17 by NLC".*

The mentioning of the 1st Defendant in the Restriction would have raised eye brows that they would be involved in one way or the other or know something relating to the restriction. It is not clear whether the plaintiff reached out to the 1st defendant to enquire before filing this suit. Be that as it may, I find it inappropriate to use a draconian means of striking suit at this stage when the 1st defendant could be compensated by an award of costs should it turn out that they have nothing to do with the alleged actions. In any event, this Court is aware that the plaintiff is allowed to make any amendments to the plaint to breathe new life before the hearing of the suit.

In the upshot, I find the application at this stage not a candidate to be struck out. I therefore find the Notice of Motion dated 16th March 2020 lacking merit and the same is hereby dismissed with costs to be in the cause.

Ruling READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 7th day of May, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:-

1. *Mundia Murimi holding brief for Ann Thungu for Plaintiff*

2. *1st Defendant – absent*

3. *Kabuta - Court clerk.*