



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT ELDORET**

**E & L CASE NO. 354 OF 2015**

**MICHAEL KIPKORIR MAINA.....1<sup>ST</sup> PLAINTIFF**

**KIPKEMBOI KIPSOS MALEL.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**STEPHEN KIPKORIR RUTO.....DEFENDANT**

**RULING**

**[NOTICE OF MOTION DATED 19<sup>TH</sup> NOVEMBER 2020]**

1. The defendant filed the notice of motion dated 19<sup>th</sup> November, 2020 based on the six (6) grounds on its face, and supported by the affidavit sworn by **STEPHEN KIPKORIR RUTO** of even date, seeking the following orders *inter alia*:

- i. THAT the Plaintiffs suit be struck with costs for the basis that:
  - a . It discloses no reasonable cause of action against the defendants;
  - b. It is scandalous, frivolous or vexatious;
  - c. It may prejudice, embarrass the fair trial of the action;
  - d. It is otherwise an abuse of the process of the court;
  - e. It is time barred.
- ii. THAT the costs of the application be borne by the Plaintiffs in any event.

It is the defendant's case that the suit land was allotted to **Rose Jepkosgei**, his mother, in 1975. That they moved onto the land in 1990, and have been in exclusive possession since then. That his mother gifted him the land, and have developed it, including erecting semi-permanent structures. That the adjudication register for Tingwa Chesubet Adjudication Section has not been closed, and the suit land has been renumbered 426 instead of 2018. That as no consent of the Land Adjudication officer has been obtained and annexed, no civil proceedings concerning an interest on the suit land can be sustained. That the suit is statute time barred, bad in law, scandalous, frivolous or vexatious and an abuse of the process of the court.

2. The application is opposed by the plaintiffs through the replying affidavit sworn by **KIPKEMBOI KIPSOS MALEL**, the 2<sup>nd</sup> plaintiff, on the 11<sup>th</sup> December, 2020. That it is the plaintiffs' case that the suit land was in 1990 allocated to the 1<sup>st</sup> plaintiff, who then sold it to the 2<sup>nd</sup> plaintiff in 2011. That the 2<sup>nd</sup> plaintiff moved onto the land upon purchase in 2011, but the 1<sup>st</sup> defendant forcibly moved onto it in the same year, and has remained thereon. That, as no title deed in respect of the suit land has been issued, the Limitation of Action Act and or adverse possession is inapplicable. That the plaintiffs filed this suit four (4) years after 1<sup>st</sup> defendant moved onto the land. That the 1<sup>st</sup> defendant had stated in his defence filed on the 27<sup>th</sup> June, 2016 that he had moved onto a separate land in 2004, and the later defence filed on either 12<sup>th</sup> or 13<sup>th</sup> September, 2019 should be struck out. That the firm of M/s Tororei and Company Advocates is not properly on record and should be struck out. That the suit land is not within an adjudication area, and as the suit raises triable issues, the application should be dismissed with costs.

3. The learned counsel for the defendant and that for the plaintiffs filed their written submissions dated the 12<sup>th</sup> April, 2021 and 15<sup>th</sup> February, 2021 respectively.

4. The following are the issues for the court's determination;

**i. Whether the Tingwa/Chesubet/208, the suit land, is within an ongoing adjudication area;**

**ii. Whether consent of the land adjudication officer was required before filing this suit, and**

**iii. Whether the suit is time barred.**

5. That I have considered the grounds on the motion, the affidavit evidence by both sides, the written submissions by both learned counsel, the law and superior courts decisions cited thereon, and come to the following conclusions;

(a) That the plaintiffs commenced this suit against one defendant namely, Stephen Kipkorir Ruto, through the plaint dated 9<sup>th</sup> September, 2016 and filed on 10<sup>th</sup> September, 2016. That the plaintiffs later filed the notice of motion dated the 10<sup>th</sup> August, 2016 seeking for leave to amend the plaint and costs to be provided for. That annexed to the supporting affidavit was a copy of the proposed Amended plaint with three (3) additional defendants. That though the record shows that the said application to amend the plaint was granted on the 24<sup>th</sup> November 2016, there is no evidence that an amended plaint was ever formally filed and served upon the existing and or additional defendants. That for that reason, I will in this ruling take it that the suit has only one defendant as per the plaint and defence filed.

(b) That in the celebrated case of **G. B. M KARIUKI VS NATION MEDIA GROUP LTD & 4 OTHERS (2012) eKLR**, the court had this to say:

**“...In the exercise of its powers under the said provision there are certain well established principles that a court of law must adhere to. Whereas the essence of the said provisions is the striking out of a pleading, that is a jurisdiction that must be exercised sparingly and in clear and obvious cases and unless the matter is plain and obvious, a party to civil litigation is not to be deprived of his right to have his suit or defence tried by a proper trial. The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a mini-trial thereof before finding that a case or defence does not disclose a reasonable cause of action or defence or is otherwise an abuse of the process of the court. The power to strike out pleadings must be sparingly exercised and it can only be exercised in clearest of cases. If a pleading raises a triable issue even if at the end of the day it may not succeed then the suit ought to go to trial. However where the suit is without substance or groundless or fanciful and or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage, which the law does not recognise as a legitimate use of the process, the court will not allow its process to be used as a forum for such ventures. To do this would amount to opening a front for parties to ventilate vexatious litigation which lack bona fides with the sole intention of causing the opposite party unnecessary anxiety, trouble and expense at the expense of deserving cases contrary to the spirit of the overriding objective which requires the court to allot appropriate share of the court's resources, while taking into account the need to allot resources to other cases.”**

That the instant application is indicated on its heading to be **“under Order 2 Rule 15 of the Civil Procedure Rules, section 2A and 2B of the Civil Procedure Act”**. That **Order 2 Rule 15(1)** of the said 2010, Rules provides as follows:

**Striking out pleadings.**

**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; 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.**

**(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.**

**(3) So far as applicable this rule shall apply to an originating summons and a petition.**

That when making a determination as to whether a suit ought to be struck out for failing to disclose a reasonable cause of action against a defendant, the court must consider the edict at **Order 2 Rule 15(2)** that states that;

**“(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.”**

That I have read the plaint dated 9<sup>th</sup> September, 2015 and noted that the 1<sup>st</sup> Plaintiff avers that the suit land Tingwa/Chesubet/208, the suit land, was allotted to him, and that he was on it from 1993 to 2011 when he sold it to the 2<sup>nd</sup> plaintiff. That the plaintiffs aver that the defendant trespassed on the suit land in the year 2011, and they filed this suit after their efforts to have him vacate failed. That I have also perused the defendant's defence dated and filed on the 27<sup>th</sup> June 2016, and noted that the defendant alleges the suit land was part of Kipkabus forest and as it has never been degazetted, it could not have been alienated to the 1<sup>st</sup> plaintiff. That the plaintiffs were not in occupation of the said land from 1993 to 2011 or any other period. That it is not true that the defendant moved onto the land in 2011, as it was in 2004 that he moved onto Tingwa/Chesubet/426, which is his land, which the plaintiffs do not have any claim over. That as at this stage the court is not expected to receive and or consider any evidence but the pleadings, I find that the plaintiffs' plaint has raised a reasonable cause of action against the defendant that is worth going to trial for a determination on merit. That I am inclined to agree with the submission of the plaintiffs' learned counsel and find the application that the suit discloses no cause of action on the basis of **Order 2 Rule 15 (1)(a) of the Civil Procedure Rules** fails.

c. That when considering whether the plaintiffs' claim ought to be struck out on the basis of **Order 2 Rule 15(1)(b) and (c) of the Civil Procedure Rules**, I am guided by the extensive quote from Bullen and Leake and Jacob's Precedents of Pleadings 12<sup>th</sup> Edition as regards to frivolous and vexatious pleadings, as well as the intention to prejudice, embarrass or delay the fair trial quoted with approval in **CABRO EAST AFRICA LTD V ROSOGA INVESTMENTS LTD (2013) eKLR** and endorsed in **MOHAMMAD HASSIM PONDOR & ANOTHER V FALCON TRAVEL SERVICES LIMITED & 3 OTHERS [2014] e KLR** that;

**“Any pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or oppressive and tends to cause the opposite party unnecessary anxiety, trouble and expense. Thus a proceeding may be said to be frivolous when a party is trifling with the court or when to put it forward would be wasting the time of the court or when it is not capable of reasonable argument. Again a proceeding may be said to be vexatious when it is or is shown to be without foundation or where it cannot possibly succeed or where the action is brought or the defence is raised only for annoyance or to gain some forceful advantage or when it can really lead to no possible good”.**

And

**“Any pleadings or indorsement of writ which may prejudice, embarrass or delay the fair trial of the actions may be ordered to be struck out or amended. The power is designed to prevent the pleadings from being evasive or from concealing or obscuring the real questions in controversy between the parties, and to ensure as far as the pleadings are concerned, a trial on fair terms between the parties in order to obtain a decision which is the legitimate object of the action”.**

That a claim is said to be frivolous when it is groundless and incapable of reasonable argument. That the pleading is said to be vexatious when it lacks *bona fide* as it causes unnecessary anxiety and expense; it's oppressive to the opposing party and is brought purely for purposes of annoying the opposing party. That from the pleadings filed in this claim, I find that the plaintiffs' seek to safeguard their proprietary interests in the suit land from exploitation by the defendant through their prayer for a declaration of their exclusive rights over the suit land to the exclusion of all others. That such a claim cannot be said to be scandalous, frivolous and vexatious as it is based on the averments in the pleadings. That in the circumstances, I find the application is not scandalous, frivolous and vexatious.

d. That it is also clear that the Plaintiffs' claim is not intended to prejudice, embarrass or delay the fair trial. That the suit is not evasive as the real issue in controversy, being the ownership of the suit land, has been expressed in concise terms in the pleadings. That the application does not therefore meet the threshold in **Order 2 Rule 15(1)(c) of the Civil Procedure Rules**, that must be established to succeed.

e. That on the issue of whether the Plaintiffs' claim amounts to an abuse of the process of court, I refer to the following quotation in the case of **SATYA BHAMA GANDHI V DIRECTOR OF PUBLIC PROSECUTIONS & 3 OTHERS [2018] eKLR**, where the phrase abuse of the process of court is discussed at length as follows:

**“It is trite law that the Court has an inherent jurisdiction to protect itself from abuse or to see that its process is not abused. The Black Law Dictionary defines abuse as “Everything which is contrary to good order established by usage that is a complete departure from reasonable use "An abuse is done when one makes an excessive or improper use of a thing or to employ such thing in a manner contrary to the natural legal rules for its use".[11]**

**22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]**

**23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-**

**(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.**

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

24. In the words of Oputa J.SC (as he then was) [15] abuse of judicial process is:-

**“A term generally applied to a proceeding which is wanting in bona fides and is frivolous, vexatious and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process.”**

That having considered the foregoing, I find that the defendant has failed to demonstrate that the plaintiffs' claim amounts to an abuse of the process of the court. That there is nothing before the court to reasonably infer that the motive behind the filing of the instant claim is ill will or bad faith, and I am inclined to conclude that the plaintiffs brought their claim before court because they perceived that their interests in the suit land is being threatened by the defendants' occupation thereof. The defendant's claim under **Order 2 Rule 15 (1) (d) of the Civil Procedure Rules** therefore, also fails.

f. That while the plaintiffs' suit is over Land Reference No. Tingwa/Chesubet/208, which they claim the defendant has trespassed onto, the latter on his part alleges that the suit land is part of the adjudication area, which the former denies. That the letters dated 16<sup>th</sup> October, 1990 by the District Commissioner, 24<sup>th</sup> September, 2013 by the chief, 30<sup>th</sup> March, 2015 by the District surveyor, in the plaintiffs list of documents and the averments in the plaint, have not in any way indicated that land reference Tingwa/Chesubet/208, the suit land, was in ongoing adjudication area. That it is the defendant who has alleged that the suit land was in an adjudication section and the plaintiffs needed to obtain the written consent of the adjudication officer before filing the suit. That it is the cardinal law that he who alleges bears the responsibility to tender proof thereof under **section 106 of the Evidence Act Chapter 80 of Laws of Kenya**. That apart from the allegations in ground 3 to 5 of the motion and paragraphs 5 to 7 of the supporting affidavit, the defendant has not tendered any documentary evidence in support of his claim that the suit land was situated within an ongoing adjudication section, or that Tingwa Chesubet Section was gazetted and the adjudication register thereof is yet to be concluded or closed. That the fact that the plaintiffs have not obtained title to the suit land on its own is not proof that the adjudication register has not been concluded. That **Section 30(5) of the Land Adjudication Act** provides as follows;

**“A certificate signed by an adjudication officer certifying land to be, or to have become on a particular date, land within an adjudication section shall be conclusive evidence that the land is such land.”**

That the defendant did not obtain and file such an aforementioned signed certificate in support of his application that the suit land was within an adjudication section to enable the court make a finding in his favour and settle this matter with finality.

g. That had the defendant availed evidence to confirm that the suit land was within an adjudication section, then the plaintiffs would have been obligated to exhibit compliance with **section 30 of the Land Adjudication Act** provides as follows:

**“Except with the consent in writing of the adjudication officer, no person shall institute, and no court shall entertain, any civil proceedings concerning an interest in land in an adjudication section until the adjudication register for that adjudication section has become final in all respects under section 29(3) of this Act.”**

**Section 29(3) of the Land Adjudication Act** provides as follows:

**“When the appeals have been determined, the Director of Land Adjudication shall—**

**(a) alter the duplicate adjudication register to conform with the determinations; and**

**(b) certify on the duplicate adjudication register that it has become final in all respects, and send details of the alterations and a copy of the certificate to the Chief Land Registrar, who shall alter the adjudication register accordingly.”**

That the court in the case of **REUBEN MWONGELA M'ITELEKWA (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF M'ITELEKWA M'MUCHEKE NAITURI ALIAS M'ITELEKWA MUCHEKE) V PAUL KIGEA NABEA & 2 OTHERS [2019] eKLR**, cited with approval the decision in **Silverio Akubu & 4 Others vs. Charles Baariu Salasio & 3 others, Meru ELC Petition No. 29 of 2018**, where the court held as follows:

**“This court cannot apply judge craft to bypass the spirit and the letter of the law”. The spirit and the letter of the law on matters adjudication are clearly set out in black and white in the preamble of the two statutes, the Land Adjudication Act and The Land Consolidation Act. Thus the petitioner cannot litigate on issues of ascertainment of his rights and interest in the suit parcels before this court”.**

That in the case of **JUSTUS NTUITI v MWIRICHIA KAUMBUTHU [2004] eKLR**, the court made the following observation;

**“The way I understand it is that no person shall institute a civil case in court and no court shall entertain a case with an interest in a piece of land in a section which has been declared an adjudication section under section 5 of the Act except with the consent of the Adjudication Officer or until the adjudication record register has been declared finalized as per the provisions of section 29 of the Act. As I understand it, the records are declared finalized when the Director of Land Adjudication has received the Adjudication register that it has become final. That is when any appeals to Minister have been determined and rectifications resultant there from have been incorporated in the register received from the Land Adjudication Officer earlier. Copy of which was at the same time sent to the Chief Land Registrar.**

**My interpretation of section 29 of the said Act therefore, is that until the register is declared final by the Director of Lands Adjudication after any appeals have been determined and results noted on the register by him, no person shall institute a civil case with an interest in land in court, and no court shall entertain such case, without the consent in writing if the Land Adjudication Officer presiding over the adjudication section in question.**

h. That the foregoing leaves no doubt that **section 30 of the Land Adjudication Act** is couched in mandatory terms and the same would eventually catch up with a party who simply decided to ignore its contents. That in the case of **KITISU JULIUS SILE & 60 OTHERS VS. CHAIRPERSON OLOIRIEN ADJUDICATION SECTION B COMMITTEE & 3 OTHERS (2016) eKLR**, the court held as follows:

**“... it is patently clear that the courts have held they have no jurisdiction to deal with a dispute where the process of adjudication is ongoing unless the adjudication officer has under section 30 (1) of the Act given his consent for the party to institute court proceedings. No such consent was granted by the Adjudication officer to the petitioners to enable these proceedings to be brought. In the present matter there is no doubt that the process of adjudication is ongoing and that the adjudication register has not been closed and/or published. The court in the premises cannot properly get seized of this matter. It lacks the jurisdiction to deal with the matter.”**

i. That on the issue of the suit being statute time barred, the plaintiffs' claim is that the defendant forcibly took possession in 2011. That the defendant defence dated the 27<sup>th</sup> June 2016, at paragraphs 5, 8, and 9 refutes that claim, averring that the suit land does not exist as it is part of the Kipkabus forest, and that he moved onto his own land **Tingwa/Chesubet/426 in 2004**. That as this suit was filed on 10<sup>th</sup> September, 2016, then it would require evidence to be tendered by the parties before the court could make a determination whether or not the suit over the suit land is statute time barred.

j. That I have further perused the record and noted that during the court appearance of the 19<sup>th</sup> November, 2020, M/s Moraa for Tororei for the defendant submitted as follows;

**“... I have discovered that we filed the application dated 12<sup>th</sup> September, 2019 before we came on record. I therefore pray that we be allowed to withdraw the application.”**

That the court allowed that oral application directing that **“the Notice of Motion dated the 12<sup>th</sup> September, 2019 is hereby marked withdrawn”**. That thereafter, the current application was filed. That the plaintiffs have taken issue with the defendant's defence dated 12<sup>th</sup> September, 2019 which was filed with the notice of motion of the same date that was withdrawn on 19<sup>th</sup> November, 2020. They have also questioned whether the firm of M/s Tororei and Company Advocates was properly on record. That what I understand the plaintiffs to be questioning is how the said firm could have filed the defence dated 12<sup>th</sup> September, 2019 when they only filed the Notice of Change of Advocate dated the 19<sup>th</sup> November, 2020 on the 20<sup>th</sup> November, 2020. That is indeed a valid concern and the defence ought to have been withdrawn with the notice of motion on the 19<sup>th</sup> November, 2020. I find that defence was filed by a counsel who was not on record for the defendant. That the defence dated the 12<sup>th</sup> September, 2019 is accordingly struck out with costs to the plaintiffs.

k. That the defendant, having failed in his application, should in accordance with **section 27 of the Civil Procedure Act Chapter 21 of Laws of Kenya**, pay the plaintiffs' costs.

6. That flowing from the foregoing, I find the defendant's Notice of Motion dated the 19<sup>th</sup> November, 2020 to be without merit and is hereby dismissed with costs to the plaintiffs.

Orders accordingly.

**DATED AND DELIVERED VIRTUALLY THIS 29<sup>TH</sup> DAY OF SEPTEMBER, 2021**

**S. M. KIBUNJA**

**ENVIRONMENT AND LAND COURT JUDGE**

**IN THE PRESENCE OF:**

PLAINTIFFS: ABSENT

DEFENDANT: ABSENT

COUNSEL: MR. MOMANYI FOR PLAINTIFFS ONLY

CHRISTINE: COURT ASSISTANT.