



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MALINDI

ELC NO. 70 OF 2019

SAMUEL ALI NGUA.....PLAINTIFF/RESPONDENT

VERSUS

KALUME CHARO BAYA.....1ST DEFENDANT

ANNA WAIRIMU MWANGI.....2ND DEFENDANT/APPLICANT

RULING

This ruling is in respect of an application by the 2nd defendant/applicant dated 8th February 2021 seeking for the following orders:

- a) THAT this Honorable Court be pleased to issue an order striking out the pleadings herein as filed by the Plaintiff/ Respondent against the 2nd Defendant/Applicant.***
- b) THAT upon striking out the Plaintiff's/Respondent's suit as per prayer one (a) hereinabove, this Honorable Court be further pleased to condemn the Plaintiff/Respondent to pay the 2nd Defendant/Applicant costs of this Application.***

Counsel agreed to canvas the application vide written submissions which were duly filed. The plaintiff/respondent filed this suit on 23rd August 2019 against the defendants seeking for a declaration that the defendants have no claim over all that parcel of land at Sabaki (Moi area) within Kilifi county (the suit property); and a permanent injunction restraining the defendants, their agents and/or representatives from trespassing and or interfering with the suit property.

Counsel for the applicant submitted that the Plaintiff's claim is over an unknown land which she is a stranger to and that the applicant has demonstrated and exhibited an agreement between herself and the one RAPHAEL MWALUNGO BAYA dated 17th August, 2015 which specifically describes the parcel of land that the applicant purchased measuring approximated Two (2) acres situated at Veterinary Area Sabaki Bridge.

Counsel therefore urged the court to strike out the suit as the plaintiff has sued the wrong party.

PLAINTIFF'S RESPONDENT'S SUBMISSIONS

In response to the application the Plaintiff/respondent filed grounds of opposition and a replying affidavit both dated 5th March 2022 whereby the respondent contested the agreement between the 2nd defendant/applicant and one Raphael Thoya that it did not specifically describe the property being sold.

It was the plaintiff's averment that the respondent has continued to trespass on the suit land and urged the court to order that status quo be maintained pending the hearing and determination of the suit.

Counsel submitted that the 1st defendant who is also listed as a witness in the agreement of 17th August 2015, admitted at Gongoni Police Station that the Plaintiff/respondent was the owner of the suit property. Counsel urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

The issue for determination is whether the applicant's application for striking out of the plaint is merited. The principles guiding the striking

out of pleadings and cases are now well settled. These principles, as set out in **D T Dobie & Company (K) Ltd vs. Muchina [1982] KLR 1**, which are that 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.

The court has discretion to strike out pleadings but the same must be exercised judiciously as was held in the case of **The Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa (Civil Appeal No. 54 of 1999)** as follows:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.”

Similarly, in the case of **Yaya Towers Limited v Trade Bank Limited (In Liquidation) (Civil Appeal No. 35 of 2000)** the Court of Appeal stated that:

“A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) 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.”

Order 2 Rule 15 of the Civil Procedure Rules Sub rule (1) of the said provision provides as follows:

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.

The application has been brought prematurely as the issues raised in the application are actually what the court should be hearing from the parties during the main hearing. Counsel has submitted elaborately on facts which form part of the case which cannot be ascertained or be subjected to cross examination. A perusal of the documents filed by the Plaintiff/respondent in the main suit, it appears that the suit land has been subject of disputes as early as 2014. This can be inferred from the alleged settlement between the 1st defendant and the plaintiff/respondent at Gongoni Police Station.

The application as presented does not meet the threshold for striking out pleadings. The applicant wants to steal the show to the detriment of the plaintiff’s right to access justice. There will be no prejudice caused to any of the parties if all the issues are heard and determined after a full hearing.

The upshot is the application lacks merit and is dismissed with costs to the plaintiff/respondent.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 26TH DAY OF OCTOBER, 2021.

.....

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.