



REPUBLIC OF KENYA



Nyaga v Ngari (Civil Case 3 of 2019) [2023] KEHC 858 (KLR) (15 February 2023) (Ruling)

Neutral citation: [2023] KEHC 858 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL CASE 3 OF 2019
LM NJUGUNA, J
FEBRUARY 15, 2023**

BETWEEN

MARY MUTHONI NYAGA PLAINTIFF

AND

LABAN NJAGI NGARI DEFENDANT

RULING

1. The matter for determination before the court is the application dated 10.11.2021 and brought under order 2 rule 15 (1) (a) (b) (c) of *Civil Procedure Rules* 2010 and wherein the applicant is seeking for orders that this court be pleased to strike out the plaintiff's suit on the grounds that:
 - i. It discloses no reasonable cause of action or defence in law against the defendant/applicant.
 - ii. It is scandalous, frivolous, vexatious, time wasting and defective under all circumstances.
 - iii. It may prejudice, embarrass and delay the fair trial of the action
 - iv. The same is an abuse of the court process
 - v. Cost of the application be provided for.
2. The application is premised on the grounds on its face and it's supported by the affidavit of the applicant.
3. The applicant has sought for the orders above citing reasons that the plaintiff/respondent caused herself to be registered as owner of the following parcels of land – Ngandori/Manyatta TY.6; Ngandori/Manyatta T.83;Ngandori/KirigiT.246;Ngandori/ManyattaT.139;Ngandori/Manyatta T142 - pursuant to the Land Dispute Tribunal Case Number 38 of 2003. That the Award in the said case was adopted as a judgment of the court in Embu Senior Principal Magistrate's Court at Embu being Award number 2 of 2006 and the same was quashed by the Embu High Court vide High Court Misc. Application No. 114 of 2006. That being well aware that the



Tribunal's award was a nullity, the plaintiff went ahead to cause the transfer of the said parcels of land in her name which was totally fraudulent. Further, the plaintiff went ahead to sell the subject parcels of land to other persons. It was his case that he was not aware of parcels of land Gaturi/Kithimu/6784 and Gaturi/Kithimu/7161 as the same are not in his names. That given that the Land Dispute Tribunal award was quashed, he is therefore not obliged to transfer some of the parcels of land which are in his names to the plaintiff. It was his prayer that the suit herein is defective, an abuse of court process and it discloses no action against him.

4. The plaintiff filed grounds of opposition stating that the application herein is fatally defective as it is premised on the [Civil Procedure Rules](#) yet the matter at hand is a matrimonial dispute. It was stated that the applicant is seeking to strike out the plaintiff's suit and at the same time prosecuting his defence. That if the suit herein were to subsist, the same would still offer an opportunity to the applicant to put across his defense. It was contended that there is no good reason fronted to support the prayers sought herein as there are strings of authorities that are well settled that the drastic measure of striking out suits can only be used sparingly and where there are cogent reasons to support such a drastic move. This court was therefore urged to dismiss the application herein as the same is fatally defective.
5. The court gave directions that the application be canvassed by way of written submissions and both parties complied with the directions.
6. The applicant has moved this court to strike out the respondent's suit on grounds that it does not disclose a reasonable cause of action. It was submitted that the properties herein as listed in the plaintiff's originating summons are not registered in the name of the defendant/applicant as alleged by the plaintiff as there is no evidence that has been produced before the court to prove so. That on the strength of the award and against the judgment of the high court, the plaintiff went ahead and sold the said parcels of land to third parties. He contended that even if the plaintiff obtains a judgment of the court in the case herein, he would not be in a position to comply with the decree as the said properties are not in his name. Reliance was placed on the case of *Fremar Construction Company Limited v Minikash N. Shab* in the Court of Appeal Civil Appeal No. 85 of 2002 Nairobi. That the suit herein is incurably defective as the same does not raise any triable issues. In the end, it was submitted that this court should take notice of the fact that for a period of one year, the plaintiff has failed to file a replying affidavit to the application herein and that is a clear sign that she is not interested in prosecuting the matter herein. This court was therefore implored to strike out the plaintiff's suit with costs to the defendant/ applicant.
7. The plaintiff/respondent submitted that in an application of this nature, the court ought to interrogate the grounds in support of the application to determine if the same is merited. Reliance was placed on order 2 rule 15 and Sub rule 2 and 3 of the [Civil Procedure Rules](#) to demonstrate that there was no clear evidence which would point to the fact that some of the land parcels herein are not registered in the name of the defendant. That the issues raised by the applicant can only be canvassed in a hearing in that the right to be heard is a basic natural justice concept and the same ought not to be taken away. It was contended that it is trite that parties must be given a reasonable opportunity to be heard. Reliance was placed on the cases of DT *Dobie & Co. (K) Ltd Vs Muchina* [1982] KLR and *Susan Rokih vs Joyce Kandie & 6 others* [2018] eKLR to buttress the point that the discretion of the court to strike out suits should be used sparingly. The plaintiff prayed that this application be dismissed and the suit be settled down for hearing.
8. I have considered the application herein, the grounds of opposition and the submissions by the parties.
9. Under order 2 rule 15 of the [Civil Procedure Rules](#), the court has power to strike out pleadings on several grounds which includes where the pleading in question does not disclose a reasonable cause of action



or defence in law. Further, under order 2 rule 15 (2), an application seeking to strike out a pleading for not disclosing a reasonable cause of action or defence should not be supported by any evidence. The court should only look at the pleadings in order to ascertain whether the impugned pleading raises a reasonable cause of action or defence.

10. In *DT Dobie & Co (K) Ltd v Muchina*, [1982] KLR, the Court of Appeal defined the term;
“reasonable cause of action” to mean “an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. ...” .
11. The Court of Appeal in *Crescent Construction Limited Vs Kenya Commercial Bank Limited* [2019] eKLR, stated as follows:
“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”
12. The one line that runs through the cases above is that the court should always allow a party the latitude to have his case heard and decided on merit unless it is so hopeless that even an amendment cannot salvage it.
13. A perusal of the respondent’s plaint and the reliefs she has sought cannot lead to a conclusion that it is hopeless, frivolous or vexatious. It seeks specific reliefs which are capable of being granted depending on the evidence to be placed before the court. In my view therefore, it raises triable issues.
14. The fact that the applicant has challenged the soundness of the suit is not on its own, a ground for striking out the suit as not raising a reasonable cause of action. The reasons given by the applicant in my honest view are not compelling to drive the respondent from the seat of justice and deny her an opportunity to be heard on the merits of her case. Further, even the defendant himself has raised issues that may call for evidence to enable the court reach a just determination. As a consequence, both parties herein deserve to be heard.
15. It cannot therefore be gainsaid that striking out of pleadings is a drastic measure that should only be resorted to, where a pleading is a complete sham. Guided by the Court of Appeal decision in the case of *Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu* [2009] eKLR wherein the court restated these principle thus:
“The principles guiding the court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of *D.T. Dobie and Company (Kenya) Ltd vs Muchina* (1982) KLR 1 discussed the issue at length and although what was before him was an application under order 6 rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought. It was held in that case inter alia as follows:-
“The power to strike out should be exercised after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial Judge.



On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial Judge in disposing the case.”

16. With the above principles in mind, and having considered the application herein, the orders that are commendable to me are thus:

- i. The application dated 10.11.2021 is hereby dismissed with costs.
- ii. The suit herein be prosecuted within a period of 60 days failing which it shall stand dismissed.

17. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 15TH DAY OF FEBRUARY, 2023.

L. NJUGUNA

JUDGE

.....Plaintiff/Respondent

.....Defendant/Applicant

