



**REPUBLIC OF KENYA**

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

**ELC NO. 247 OF 2017**

**(FORMERLY NAKURU ELC NO. 78 OF 2016)**

**PURITY MUTHONI PLEIN..... PLAINTIFF**

**VERSUS**

**NATIONAL OIL CORPORATION OF KENYA.....1<sup>ST</sup> DEFENDANT**

**COUNTY GOVERNMENT OF LAIKIPIA.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated 13<sup>th</sup> May, 2019 brought under **Order 2 Rule 15 (a) & (d), Order 51 Rule 1 of the Civil Procedure Rules, 2010 Section 3A of the Civil Procedure Act (Cap. 21) and all enabling provisions of the law**, the 1<sup>st</sup> Defendant applied for dismissal of the Plaintiff's suit for allegedly failing to disclose a reasonable cause of action against it and for being an abuse of the court process.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Pauline Kimotho on 13<sup>th</sup> May, 2019 and the exhibits thereto. It was contended that the suit was premature and speculative and that the 1<sup>st</sup> Defendant was still awaiting final approval from the **National Environment Management Authority (NEMA)** on its application for approval to construct a service station on its property.
3. The 1<sup>st</sup> Defendant further pleaded that the Plaintiff had not exhausted all available statutory dispute resolution avenues provided under the **Environmental Management and Co-ordination Act (EMCA)** and the physical and land use planning legislation hence the suit was an abuse of the court process.
4. The Plaintiff filed a replying affidavit sworn on 14<sup>th</sup> June, 2019 in opposition to the application. It was contended that the said application was frivolous, vexatious and an abuse of the court process. The Plaintiff disputed that she had no reasonable cause of action against the 1<sup>st</sup> Defendant and asserted that the Defendants were engaged in fraudulent dealings with respect to the intended project. It was further contended that the 2<sup>nd</sup> Defendant had illegally and fraudulently granted approval to the 1<sup>st</sup> Defendant's project without following due process.
5. The Plaintiff further disputed that the suit was an abuse of the court process or that the suit was so bad and hopeless that it ought to be struck out without according her a hearing on the merits. The Plaintiff contended that the 1<sup>st</sup> Defendant's application had not met the threshold for striking out a suit hence the same ought to be dismissed with costs.
6. When the said application was listed for *inter partes* hearing, it was directed that the same be canvassed through written submissions. The record shows that the 1<sup>st</sup> Defendant filed its submissions on 9<sup>th</sup> July, 2019 whereas the Plaintiff filed hers on 21<sup>st</sup> January, 2020.
7. The 1<sup>st</sup> Defendant submitted that the suit does not disclose a reasonable cause of action because it was a sham and based on events which had not yet happened. It was submitted that **NEMA** had not yet granted its licence for the intended project as alleged by the Plaintiff. It was further submitted that the 1<sup>st</sup> Defendant was legally entitled to own and utilize the suit property as it wished under **Article 40 of the Constitution** and that the Plaintiff had no right to interfere with such user.
8. The 1<sup>st</sup> Defendant further submitted that the Plaintiff had violated the doctrine of exhaustion in that she had failed to exhaust alternative dispute resolution mechanisms established under **EMCA** and the **Physical Planning Act (now repealed)** which was then in force. The court was consequently urged to strike out the suit with costs.
9. The court has considered the 1<sup>st</sup> Defendant's notice of motion dated 13<sup>th</sup> May, 2019, the Plaintiff's replying affidavit in opposition thereto

as well as the submissions on record. The court is of the opinion that the following 2 issues arise for determination herein:

- (a) *Whether the Plaintiff's suit against the 1<sup>st</sup> Defendant should be struck out for failing to disclose a reasonable cause of action.*
- (b) *Whether the suit is an abuse of the court process.*

10. The court has considered the material and submissions on record on the first issue. What constitutes a reasonable cause of action was considered by Madan CJ in the case of **D.T Dobie & Co (K) Ltd v Muchina [1982] KLR 1**. It was held, *inter alia*, that it means “an action with some chances of success when only the allegations in the plaint are considered.” It does not necessarily connote a strong case or one which must succeed at the trial.

11. In the said case, it was further held 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 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.”**

12. The court is not satisfied from the material on record that the Plaintiff’s suit does not disclose a reasonable cause of action as alleged by the 1<sup>st</sup> Defendant. The mere fact that the Plaintiff may have at her disposal alternative dispute resolution avenues does not necessarily mean that the suit does not disclose a reasonable cause of action once the allegations in the plaint are considered.

13. The court has also considered the submissions and material on record on the second issue. The court is not satisfied from the material on record that the Plaintiff is guilty of abuse of the court process. There is no evidence of malice, bad faith or dishonesty on the part of the Plaintiff in seeking to vindicate her perceived rights. There is no evidence on record to demonstrate that the Plaintiff is employing the court machinery for an improper or ulterior purpose.

See **Trust Bank Limited v H.S Amin & Company Ltd [2000] eKLR**. The mere fact that the Plaintiff may have alternative remedies before other statutory bodies is not necessarily evidence of abuse of court process.

14. The upshot of the foregoing is that the court is not satisfied that the Plaintiff’s suit ought to be struck out summarily. Accordingly, the 1<sup>st</sup> Defendant’s notice of motion dated 13<sup>th</sup> May, 2019 is hereby dismissed with no order as to costs. It is so ordered.

**RULING DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 18TH DAY OF NOVEMBER, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**IN THE PRESENCE OF:**

**MS. NJIRU FOR THE 1ST DEFENDANT**

**NO APPEARANCE FOR THE PLAINTIFF**

**NO APPEARANCE FOR THE 2ND DEFENDANT**

CA - Carol

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**Y. M. ANGIMA**

**JUDGE**