



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND**

**AT KERICHO**

**CONSTITUTIONAL PETITION NO. 1 OF 2017**

**JOSPHAT LANGAT.....1<sup>ST</sup> PETITIONER/RESPONDENT**

**PETROLINER CHERONO.....2<sup>ND</sup> PETITIONER /RESPONDENT**

**BERNARD LANGAT.....3<sup>RD</sup> PETITIONER/RESPONDENT**

***(Suing as the officials of 343 Members of Koita Welfare Self Help Group)***

**VERSUS**

**KERICHO COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**NATIONAL LAND COMMISSION.....2<sup>ND</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....3<sup>RD</sup> RESPONDENT**

**ATTORNEY GENERAL.....4<sup>TH</sup> RESPONDENT**

**JAMES FINLAY KENYA LIMITED.....5<sup>TH</sup> RESPONDENT/APPLICANT**

**KOITA COMMUNITY WELFARE GROUP.....INTERESTED PARTY**

**RULING**

1. Before me for determination is a Notice of Motion application dated the 8<sup>th</sup> June 2021 filed pursuant to the provisions of Section 1A 1B and 3A of the Civil Procedure Act and Rule (5)(d) of the Constitution wherein the Applicant/5<sup>th</sup> Respondent herein seeks to be struck out from the proceedings for reasons that whereas the Petitioner's Constitutional Petition is premised on allegation of unlawful deprivation of property LR 5468/3/R by the 1<sup>st</sup> Respondent on the mistaken belief that it forms part of LR 5468/3 which is registered to the Applicant/5<sup>th</sup> Respondent, yet the same is not part of LR 5468/3, land registered to the Applicant.

2. The said application is supported by the grounds therein as well as the supporting and further affidavits of Evalyne Ngeno-Koko dated 8<sup>th</sup> June 2021 and 21<sup>st</sup> July 2021 respectively.

3. The said application was opposed by the Replying Affidavit dated the 14<sup>th</sup> May 2021 sworn by Petroliner Cherono on behalf of the 2<sup>nd</sup> Petitioner to the effect that it was full of half-truths, was bad in law, incompetent, a non-starter frivolous, vexatious, malicious, and the gross abuse of the court process. That the same did not meet the minimum legal threshold for grant of the orders sought and therefore must fail.

4. The application was disposed of by way of written submissions to which the Applicant/5<sup>th</sup> Respondent framed their issues for determination as follows:

- i. Whether the Petitioners served the 5<sup>th</sup> Respondent with mention notice, amended Petition dated 26<sup>th</sup> November 2020, the Respondents pleading in December 2020 and whether there has been delay by the 5<sup>th</sup> Respondent in filing the application dated 8<sup>th</sup> June 2021?

ii. Whether the 5<sup>th</sup> Respondent was improperly joined as a Respondent and whether the Petition against the 5<sup>th</sup> Respondent should be struck out?

5. On the first issue for determination, it was the Applicants' submission that neither of the documents were served upon them. That despite the Petitioners' lawyer receiving a notification that the e-mail message dated 4<sup>th</sup> December 2020 had not been delivered, no fresh attempt was made to serve the Applicant a fresh. That the affidavit of service therefore filed by the Petitioners' counsel was factually incorrect and misleading and therefore the 5<sup>th</sup> Respondent should not be penalized for the Petitioners' mistake in failing to serve the aforementioned documents.

6. That the amended Petition was only served upon the Applicants on 25<sup>th</sup> February 2021 together with the mention notice indicating that the matter would be mentioned on 22<sup>nd</sup> April 2021. The Petitioners' Counsel further failed to inform the Applicants of the directions issued by the court on the 8<sup>th</sup> February 2021 in respect of filing submissions. That it was therefore clear from the sequence of events that the Petitioners' sought to steal a march against the Applicants. Reliance was placed on the decided case in **Ahmed Ismael vs Kumba Ntamorus [2014] eKLR**.

7. The Applicants further submitted that service of the pleadings filed by the 1<sup>st</sup>, 2<sup>nd</sup> and the 3<sup>rd</sup> Respondent had also not been served upon them and no explanation had been given for such failure. That on the 8<sup>th</sup> May 2021 when the court directed the Applicants to file the current application, within 21 days, seeking to be struck out from the Petition, they had complied with the timelines set out by the court without delay. The Petitioners can therefore not purport to state that there was delay in filing the Application keeping in mind that they had never been served with any pleading on time nor informed of the proceedings in court.

8. On the second issue for determination, the 5<sup>th</sup> Respondent submitted that they were the registered proprietors and holders of an indivisible title to property known as LR No. 5468/3. That initially parcel LR No.5468 had been subdivided giving rise to LR No.5468/1 and LR No.5468/2 with the remainder being LR No.5468/3 as per the cadastral plan annexed as JF-1. That they had been registered as proprietors to LR 5468/3.

9. That the Petitioners were not in occupation of any portion of the Applicants' land No. LR No.5468/3, but were in occupation of an adjacent independent un-surveyed and un-registered piece of land. That the Petitioners had not produced any title deed, survey/or cadastral Plan for the portion they claim to be LR No.5468/3/R. That the Applicants were not the proprietors of LR No.5468/3/R and therefore had no interest in the unmarked property occupied by the Petitioners and should not be a party to the Petition and therefore ought to be struck out.

10. That although the Petitioners had made reference to the land registrar's affidavit filed on 9<sup>th</sup> July 2021 on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Respondents, the assertion of the said Land Registrar was factually and legally erroneous as there was no registered land reference Known as 'unsurveyed land parcel LR 5468/3/R' registered to the Applicants.

11. That the Land Registrar ought to have carried out sufficient due diligence by inviting a Government surveyor to physically ascertain the land that the Petitioners were currently in occupation and thereafter to obtain the land records for the same if any. That further the Land Registrar ought to have obtained the cadastral plan for the plots that the Petitioners were occupying to ascertain whether the suit property had been surveyed and registered.

12. That the cadastral plan annexed as JF-1 was clear to the effect that land parcel LR No.5468/3/R did not exist. That initially at the end of the year 2004, the Applicants sought to excise a small portion of land out of LR No.5468/3 for its tea factory, the process was however not completed and as such, the said subdivision was not registered and therefore is none existent.

13. The Applicants took issue with regard to the surveyor's report marked as 'PC VII' and annexed to the 2<sup>nd</sup> Respondent's affidavit sworn on 14<sup>th</sup> July 2021, in that the maker neither identified him/herself nor were there his/her credentials stated. That the report made no reference to the Applicants' parcel of land LR No.5468/3, and did not indicate how the surveyor went about his survey in order to arrive at the conclusion that the suit property was related to LR No.5468 or that it had been hived off LR No.5468/3 or was part of LR No.5468/3. That the report also lacked boundary coordinates and the fact that it had been indicated that the impugned suit land was adjacent to Kimungu River was neither here nor there as the river was a long river and the suit land could be anywhere along the length of the said river and not necessarily in relation to LR No.5468/3. Finally that no maps/cadastral maps had been attached to the report.

14. The Applicants further submitted that the amended Petition had sought no orders to be enforced against them and no allegations had been made specifically against land LR No.5468/3 and therefore the Applicants were not a necessary party to the proceedings. That since the unmarked property in respect of the suit was public land that had not been registered nor surveyed the proper parties in respect of the suit ought to be the 2<sup>nd</sup> Respondent. That in accordance to the decided case in **Mungania Tea Factory Company Limited & 50 Others vs AG (sic)**, there was no cause of action against the Applicants and their application should be allowed with costs.

#### **Respondent/Petitioner's submissions.**

15. The Petitioners' submission in opposition of the Applicants' application to be struck out of the proceedings, was to the effect that pursuant to their application to amend their Petition seeking to join the Applicants as a party to the proceedings, therein, and upon failure by the Applicants to file the response to the same, the application had been allowed by the court on 29<sup>th</sup> September 2020 to which the Applicants had been joined to the proceedings and subsequently served with the amended Petition on 4<sup>th</sup> December 2020.

16. That notwithstanding service, the Applicants failed and/or ignored to file a response to the amended Petition until the 10<sup>th</sup> June 2021 when they approached the court with the instant application for orders already enumerated herein above.

17. That the instant application was full of half-truths, was bad in law, incompetent, a non-starter frivolous, vexatious, malicious, and the gross abuse of the court process. That the Applicants did not meet the minimum legal threshold for grant of the orders sought and therefore must fail.

18. The Respondent Petitioner framed their issues for determination as follows;

i. Whether the 5<sup>th</sup> Respondent/Applicant is entitled to the orders sought.

ii. Who should bear the cost of this application?

19. On the first issue for determination, the Respondent submitted that the answer was in negative. That it was evident that the said Applicants' application was predicated on amongst others, the provisions of rule 5(d) of the Constitution of Kenya Practice and Procedure Rules 2013 and Order 1 Rule 10(2) of the Civil Procedure Rules where the power of the court to strike out the Applicants from the proceedings herein is discretionary.

20. That discretionary powers of the court ought to be exercised upon well-established legal principles and according to the circumstances of each case. That it was paramount for the courts to do real and substantive justice to the parties in a suit, as was held in the case of **Patriotic Guards Limited vs. James Kipchirchir Sambu [2018] eKLR**.

21. That whereas Order 2 Rule 15 of the Civil Procedure Rules set out the circumstances under which pleadings may be struck out, Section 107 of the Evidence Act is clear that he who alleges must prove. That it was therefore incumbent upon the Applicants to demonstrate to the required legal threshold that either of the grounds stated herein above were manifest in the Petitioners' Petition, which they failed to do.

22. That it was not true to submit that the Petition herein disclosed no reasonable cause of action in law against the Applicants, a reasonable cause of action having been defined in the decided case in **Susan Rokih vs Joyce Kandie & 6 Others [2018] eKLR quoted with approval in the case in DT Dobie & Co (K) Limited vs Muchinaa [1982] KLR**.

23. That since time immemorial the Petitioners' and occupied and developed a portion of LR No.5468/3 measuring approximately 1200 acres otherwise marked as LR No.5468/3/R. That although the Applicants are the registered proprietor of the suit property, the 1<sup>st</sup> Respondent had been threatening the Petitioners' with the aim of silencing them from protesting their (1<sup>st</sup> Respondent's) forcefully and arbitrary entry therein.

24. That the 3<sup>rd</sup> Respondent being the custodian of Government records in relation to land ownership in Kenya confirmed that the Applicants were the registered proprietors of the suit property, a fact which was confirmed by the Applicants. That the 5<sup>th</sup> Respondent was therefore a necessary party in the proceedings herein within the meaning of rule 5(d)(ii) of the Constitution of Kenya (Practice and Procedure Rules 2013.)

25. The Respondent/Petitioner further submitted that the Petition was not scandalous, frivolous or vexatious nor would it prejudice embarrass or delay the fair trial of the action nor was it an abuse of the Court process. That in the terms of the decided case in **Madison Insurance Company Limited vs Augustine Kamanda Gitau [2020] eKLR**, the Applicants had failed to discharge the legal burden requiring them to demonstrate, on a balance of probability, that the instant Petition was scandalous, frivolous or vexatious, would prejudice embarrass or delay the fair trial of the action or that it was an abuse of the Court process.

26. On the second issue as to whether the Applicant/5<sup>th</sup> Respondents were entitled to the orders sought, the Respondent/Petitioners submitted that the application had failed the legal test for such orders, as there had been no demonstration that the Petition did not disclose any reasonable cause of action or that it was scandalous, frivolous or vexatious, would prejudice embarrass or delay the fair trial of the action or that it was an abuse of the Court process.

27. The Respondent/Petitioners further submitted that the striking out of the case would be draconian and should only be resorted to in the clearest of the clear cases and not where the better facts ought to be established by evidence. That the Petition should be heard on merits the honorable court should not be invited to strike out the Petitioner's Petition as against the Applicants.

28. That parties were bound by their pleadings as was held in the case in **Independent Electoral and Boundaries Commission & Another vs Stephen Mutinda Mule & 3 Others [2014] eKLR**. That the present application was filed on the grounds that the Petitioners did not occupy the Applicants land whereas in paragraph 2(b) of their supporting affidavit, they had confirmed to be proprietors to land parcel LR No.5468/3.

29. The Respondent/Petitioners took issue with the fact that the Applicants had submitted in the current application that service had not been effected, which according to the Respondent/Petitioners was an ambush as they had not been given a chance to respond. Their submission therefore was that trial by ambush must be nipped at the bud by the court, but if the court was not persuaded, than lack of proper service, though denied, could not form the basis for striking out the Petition against the Applicants.

30. That the deponent of the Applicants' supporting affidavit did not possess the requisite expertise to assess with certainty the cadastral plan to LR No.5468 in order to persuade the court to strike out the Petitioners Petition against the 5<sup>th</sup> Respondent at this interim stage, without a full hearing and determination on merit. They sought for the Applicants' application to be dismissed with costs as they had made no case worth striking out of the instant Petition against them.

#### **Determination.**

36. I have considered the arguments for and against the Applicant/5<sup>th</sup> Respondents' application seeking to be struck out from the Respondent/Petitioner's Petition. I have further considered the submissions, and the authorities cited therein

37. With regard to joinder of parties, Order 1 rule 9 of the Civil Procedure Rules states that no suit shall be defeated for misjoinder or non-joinder of parties and requires that the court deals with the matter in controversy so far as regards the rights and interests of the parties actually before it. On the other hand, Order 1 Rule 10(2) of the Civil Procedure Rules also provides that:-

*“The court may at any stage of the proceedings, either upon or without the application of either part, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendants, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”*

37. It can be deduced from the above holding that a party whose presence in a suit cannot help the court determine the subject matter of the suit is an unnecessary party and should be struck out of the proceedings.

38. In **Pravin Bowry v John Ward & another [2015] eKLR** the Court of Appeal commenting on who is a necessary party referred to the Ugandan case in **Deported Asians Custodian Board v Jaffer Brothers Ltd [1999] 1 E.A. 55 (SCU)** where the court stated as follows:

*“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter... For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”*

It is therefore that the court may on its own motion or on application of any party to the proceedings order the striking out a party whose presence in a suit will not enable the court to effectually and completely adjudicate upon and settle all questions involved in the matter should be struck out. In the exercise of that discretion, the court must as a matter of cause, act according to reason and fairness and not according to its whims and caprice.

31. The issue that arises for determination is whether the Applicants are a necessary party to this Petition and if so, whether any cause of action is disclosed against them.

32. The provision of Order 2 Rule 15(1)(a) of the Civil Procedure Rules states that at any stage of the proceedings the court may order to be struck out or amend any pleading on the ground that it discloses no reasonable cause of action or defence in law. The said provision of the law provides:

***“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.”***

33. The application is related to the Respondent/Petitioners' Petition in which they seek to be declared the legitimate and bona fide owners of all that portion of un-surveyed land measuring approximately 1200 acres otherwise known as LR No. 5468/3/R which land is registered to the Applicants herein. The Respondent/Petitioners' contention is that since the 1<sup>st</sup> Respondents had violated their Constitutional rights to ownership of land and/or property by forcefully and illegally entering onto the suit land, an order of permanent injunction restraining the 1<sup>st</sup> Respondents from adversely dealing with all that un-surveyed land known as LR No. 5468/3/R should be issued

34. The Applicants' application in seeking to be struck from the Petition is founded on the fact that they were the registered proprietors and holders of an indivisible title to property known as LR No. 5468/3 and not suit land No. 5468/3/R to which the Respondent/Petitioners seek orders. That initially parcel LR No.5468 had been subdivided giving rise to LR No.5468/1, LR No.5468/2 and LR No.5468/3 to which they were registered as proprietors to the 3<sup>rd</sup> parcel of land being LR No.5468/3.

35. The applicant's contention is that the Petitioners are not in occupation of any portion of their land No. LR No.5468/3, but rather are in occupation of an independent, un-surveyed and un-registered piece of land to which they (Applicants) have no interest in.

36. It is trite law that the registration of a person and Certificate of title held by such a person as a proprietor of a property is conclusive proof that such person is the owner of the property. (See **Section 26 (1)** of the **Land Registration Act**). It also trite law and pursuant to the provisions of Section 107 of the Evidence Act that that he who alleges must prove.

37. The Applicants have proved ownership of land parcel LR No.5468/3 on the other hand, although the Respondent/Petitioner have alleged that the Applicants were the registered proprietors of LR No.5468/3/R, yet there has been no proof of such ownership. The cadastral plan annexed as JF-1 does not show the existence of such land, which the Respondent/Petitioner have referred to as 'un-surveyed' land.

38. **The general principles which guide a Court in exercising its discretion on whether or not to strike out a pleading is stated in DT Dobie & Co. (Kenya) Limited (supra)** Up to this point, the Court is lost as to why the Respondent/Petitioners herein would insist to have the Applicants joined in their Petition as proprietors of a large tract of land measuring 1200 acres known as LR No.5468/3/R, land which they are neither the registered proprietors nor have any interest or claim to. Such that in the event the court agrees with the Respondent/Petitioner, would there be any culpability ascribed to the Applicants that was capable of execution and secondly would joining the Applicants enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit?

39. Indeed if I may echo the words of Madan J.A. in **D.T. Dobbie Kenya Co. Ltd (supra)** '*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.*'

40. Parties are bound by their pleadings. The Respondents/Petitioners may have a claim over un-surveyed land No. 5468/3/R but since the Applicants have disowned the said land and have maintained to be proprietors of a distinguishable parcel of land LR No. 5468/3, in my opinion, and upon acting very cautiously and carefully and after considering all facts of the case without embarking upon the merits of the Petition, I find no 'semblance of a cause of action' as against the Applicants/5<sup>th</sup> Respondents herein. To this effect I allow their application dated the 8<sup>th</sup> June 2021 with costs.

**DATED AND DELIVERED VIA TEAMS MICROSOFT AT KERICHO THIS 11<sup>TH</sup> DAY OF NOVEMBER 2021.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**