



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. E003 OF 2021**

**MUNGAI NGARUIYA.....PLAINTIFF**

**VERSUS**

**BONIFACE MUINDI MULLI.....1<sup>ST</sup> DEFENDANT**

**CHIEF LAND REGISTRAR.....2<sup>ND</sup> DEFENDANT**

**DIRECTOR OF SURVEY.....3<sup>RD</sup> DEFENDANT**

**COUNTY GOVERNMENT OF MACHAKOS.....4<sup>TH</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....5<sup>TH</sup> DEFENDANT**

**DIRECTOR, DIRECTORATE CRIMINAL**

**INVESTIGATION DEPARTMENT.....6<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the 4<sup>th</sup> Defendant's Chamber Summons application dated the 12<sup>th</sup> April, 2021 brought pursuant to Section 3A of the Civil Procedure Act, Order 2 Rule 15(1) & (2) and Order 1 Rule 10 (2) of the Civil Procedure Rules. The 4<sup>th</sup> Defendant seeks for the following orders:

1. The Plaintiff's suit as against the 4<sup>th</sup> Defendant herein be struck out.
2. Costs of this suit and the application be awarded to the 4<sup>th</sup> Defendant.

The application is premised on the summarized grounds that the 4<sup>th</sup> Defendant was wrongly enjoined in these proceedings and is not a necessary party herein. Further, the cause of action herein can be effectually and completely settled without it's involvement as the dispute herein involves ownership of land between the Plaintiff and 1<sup>st</sup> Defendant. It contends that it does not deal with issuance of title and the pleadings herein do not disclose any reasonable cause of action against it. Further, the application is supported by the affidavit of JAMES KATHILI where he reiterates the averments above.

The Plaintiff opposed the application by filing a replying affidavit where he contends that the 4<sup>th</sup> Defendant indeed admits the suit herein revolves around the ownership of all the land registered as LR No. 12715/134 hereinafter referred to as the 'suit land'. He avers that the 1<sup>st</sup> Defendant who is claiming ownership of the suit land and himself have both filed property rates demand notices and payment receipts with respect to the said land, which emanated from the 4<sup>th</sup> Defendant. He states that the 4<sup>th</sup> Defendant is a necessary party herein to enable the court effectively and completely adjudicate upon and settle all questions involving the ownership of the suit land. He sought for the instant application to be dismissed.

The application was canvassed by way of written submissions.

**Analysis and Determination**

Upon consideration of the Chamber Summons application dated the 12<sup>th</sup> April, 2021 including the respective affidavits and rivalling submissions, the following are the issues for determination:

- Whether the Plaintiff's suit against the 4<sup>th</sup> Defendant should be struck out.
- Who should bear the costs of the 4<sup>th</sup> Defendant.

The 4<sup>th</sup> Defendant in its submissions reiterated its claim and relied on the following decisions: **Temple Point Resort v. Accredo AG & 5 Others (2018) eKLR** and **Peter Irungu Wainaina v. Chefe Njihia & 2 Others (2018) eKLR**, to buttress its averments.

The Plaintiff in his submissions insist the 4<sup>th</sup> Defendant is a necessary party to these proceedings as there is a cause of action against it. Further, that it issued an approval for subdivision of suit land without his consent. He contends that there are records which emanated from the 4<sup>th</sup> Defendant's office, filed by both parties. To support his arguments, he has relied on the following decisions: **Civicon Limited v. Kivumatt Limited & 2 Others (2015) eKLR**; **Kenya Anti-Corruption Commission v. Lucy Kerubo Ogeto (2010) eKLR** and **County Government of Kwale vs. Kenya Airports Authority (2017) eKLR**.

The legal provisions governing striking out of pleadings is contained in Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010 which 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-**

**(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 an abuse of the process of the court.”**

In the case of **Civicon Limited V Kivumatt Limited & 2 Others (2015) eKLR**, the Court of Appeal observed as follows:

**“Under Order 1 of the Civil Procedure Rules, the trial court has wide discretionary powers to make necessary amendments as to the parties to a suit by adding, substituting or striking them out and to make all such changes in respect of parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute between them. The court has a separate, independent duty from the parties themselves to ensure that all necessary and proper parties, and no others, are before it so that it may effectually and completely determine and adjudicate upon all matters in dispute. For this reason, at any stage of the proceedings, the court may on such terms as it thinks just and either on its own motion or on application, order for the joinder of a party where the party is a person who ought to have been joined as a party or; whose presence before the court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon. the party is any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed which in the court's opinion it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.”**

While in the Court of Appeal decision of **Ramji Megji Gudka Ltd –Vs- Alfred Morfat Omundi Michira & 2 Others [2005] eKLR** it was held as follows:

**“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in **DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1** in which Madan J.A. at p. 9 said:-**

**“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”**

**In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham.”**

In the Plaintiff, the Plaintiff claims to be the owner of the suit land which the 1<sup>st</sup> Defendant also stakes claim to. Further, that the suit land was fraudulently transferred to the 1<sup>st</sup> Defendant. He avers that the 4<sup>th</sup> Defendant granted approval of the subdivision of the suit land without his consent and yet he has paid rates to it. The 4<sup>th</sup> Defendant on the other hand insists it is not a necessary party to the dispute herein which is over ownership of the suit land. Further, that the Plaintiff has not established a reasonable cause of action against it.

On perusal of all the pleadings including the respective documents, I note the 4<sup>th</sup> Defendant indeed granted approval for subdivision of the suit land. Further, the Plaintiff and 1<sup>st</sup> Defendant received demand notices from it for payments of rates which is evident were paid to it. Insofar as the dispute herein is in respect ownership of suit land, however based on the legal provisions cited above while relying on the two Court of Appeal decisions, and applying them to the circumstances at hand, I find that the Plaintiff has indeed disclosed a reasonable cause of action as against the 4<sup>th</sup> Defendant. Further, that the 4<sup>th</sup> Defendant is indeed a necessary and proper party to provide evidence of ownership

of suit land to enable the court effectually as well as completely determine including adjudicate upon all matters in dispute.

In the circumstance, I find the instant application unmerited and will disallow it.

Costs will be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20<sup>TH</sup> DAY OF DECEMBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**