



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

E.L.C CASE NO. 284 OF 2014

PETER OMANI OBIRIA.....PLAINTIFF/RESPONDENT

VERSUS

HUDSON OKEMWA.....1ST DEFENDANT

JOHN NYANGERI.....2ND DEFENDANT

AGRICULTURAL SOCIETY OF KENYA.....3RD DEFENDANT

GUSII MWALIMU ACHWA ASSOCIATION...4TH DEFENDANT

RULING

INTRODUCTION

1. This ruling is in respect of the 2nd and 3rd defendant's Notice of Motion dated 29th April 2019 in which the applicants are seeking orders that this Honourable Court be pleased to strike out the Plaintiff's suit as it discloses no cause of action against the 2nd and 4th Defendants. The said notice of Motion is anchored on the grounds stated on the face of the Notice of Motion and the affidavit of John Nyangeri sworn on the 29th April 2019.

2. It is opposed by the plaintiff through his Replying Affidavit sworn on the 29th May 2019.

BACKGROUND

3. A brief background of the case is necessary in order to put the matter into perspective.

The Plaintiff filed suit against the defendants on 24th July 2014. The Plaintiff claims to be the registered owner of land parcel no. Kisii Municipality /Block 11/253. The plaintiff claims that the 1st, 2nd and 4th defendants are in unlawful occupation of the suit property. The plaintiff seeks judgment against the defendants jointly and severally for the following reliefs:

- a) A declaration that the portion of land under the occupation, possession and use of the 1st, 2nd and 4th Defendants and claimed by the 3rd defendant as its land legally and lawfully forms part of the leasehold interest in Kisii Municipality /Block 11/253 registered in the name of the Plaintiff
- b) An order of mandatory injunction directing the eviction of the defendants, their agents, servants or employees from and the demolition of all the structures on the leasehold interest in KISII MUNICIPALITY/BLOCK11/253 and after such eviction and demolition, the defendants, their agents or servants be restrained from trespassing therein to or in any way whatsoever interfering therewith.
- c) Costs of the suit.
- d) Interest on (c) at court rates.

4. The Agricultural Society of Kenya which was sued as the 3rd defendant filed a defence dated 2nd September 2014. It denied its description

under paragraph 3 of the Plaint and stated that it would at an appropriate time raise a Preliminary Objection for determination *in limine*. It also stated that the 2nd and 4th defendants were occupying the suit premises as tenants of the 3rd defendant.

5. On 7th May 2015 the 3rd defendant filed a Notice of Preliminary Objection stating inter alia that the suit herein was not maintainable against it in the manner canvassed and the orders sought were not available to the plaintiff in law. The Preliminary Objection was argued and the court ordered the Plaintiff to amend its plaint within 21 days to replace the 3rd defendant as currently constituted failing which the suit against the 3rd defendant would be struck out. The plaintiff failed to amend its Plaint as ordered with the result that the suit against the 3rd defendant was struck out from the suit on account of lack of capacity. A subsequent application filed by the plaintiff on 18th May 2016 seeking to review the said order was dismissed on 24th February 2017.

6. It is against the foregoing background that the 2nd and 4th defendants now seek to be struck out from the suit. The application was canvassed by way of written submissions and counsel for both parties filed their submissions.

7. In his submissions, counsel for the 2nd and 4th defendants argue that the substratum of the suit is the proprietary rights and ownership of the suit property between the plaintiff and the 3rd defendant and therefore the issue for consideration before the court was that of ownership, not possession. He contends that the 2nd and 4th defendants have no proprietary interest in the suit property and in the absence of the 3rd defendant, who is their landlord, they cannot be asked to respond to the question of ownership of the suit land nor can such a question be rightfully and legally put to them. He therefore submits that the suit in its present state is incurably defective as it discloses no reasonable cause of action against the 2nd and 4th defendants. He relied on the case of **Suraya Property Group Ltd & Another v W & K Estates & 2 Others (2014) eKLR** where the court held that the 1st defendant could not carry out the obligations of the 2nd defendant who was the land owner as the 1st defendant had no proprietary interest in the suit property. They further relied on **D.T Dobie v Muchina** for the proposition that where no reasonable cause of action arises against a defendant and the plaint is incurable even after amendment, the same should be struck out.

8. In their submissions counsel for the plaintiffs submitted that the application was founded on conscious and deliberate falsehoods which were meant to mislead the court into granting adverse orders without any lawful basis. He argued that the suit herein arises from the fact the 2nd and 4th defendants have trespassed onto the suit property and they have remained thereon without the plaintiff's consent. The suit that has been filed against the defendants is for eviction and the court will require to hear the evidence of both parties in order to determine the issues in dispute. Counsel referred to article 50 of the Constitution of Kenya which provides that every person has a right to have any dispute decided in a fair and public hearing before a court or if appropriate another independent and impartial tribunal or body.

9. It is counsel's submission that the right to be heard is a fundamental right which the court cannot wish away. He cited **Civil Appeal No. 18 of 2013 Richard Ncharpi Leiyagu v Independent Electoral and Boundaries Commission & 2 Others** where the Court of Appeal held as follows

"the right to a hearing has always been a well-protected right in our constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality"

10. Counsel further relied on the **Civil Appeal No. 291 of 2002 Balozi Housing Cooperative Society Limited v Samuel Waiganjo Thuo T/A Waiganjo & Associates** where the Court of Appeal commented on the case of **Trust Bank Limited v Amalo (2003) IEA 350** and stated as follows:

*"The principle which guides the court in the administration of justice in adjudicating on any dispute is that where possible disputes should be heard on their own merit. This was succinctly put a while ago by Geroges C.J (Tanzania) in the case of **Essanji & Another v Salanki (1968) EA** at 224 where the court said that "the administration of justice should normally require that the substance of all disputes should be investigated and decided on their merit and that errors should not necessarily deter a litigant from the pursuit of his rights"*.

11. In the instant suit the plaintiff is seeking eviction orders against the defendants who are occupying the suit property without the plaintiff's consent and the suit is not merely one of ownership. I therefore agree with counsel for the plaintiff that the suit ought to be heard on its merits.

12. The upshot is that I find no merit in the application and I dismiss it with costs to the Respondents.

Dated signed and delivered at Kisii this 28th day of February 2020.

J.M ONYANGO

JUDGE.