



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 578 OF 2017

(Formerly Nairobi ELC Case No. 1090 of 2015)

ANDREW DANIEL MBOGO.....PLAINTIFF

VERSUS

EXCEL MWANGI.....DEFENDANT

RULING

By the Plaintiff's Notice of Motion Application dated the 8th May, 2019 brought pursuant to Order 2 Rule 15 (a), (b), (c) and (d); Order 51 Rules 1 and 2 of Civil Procedure Rules as well as section 3A of the Civil Procedure Act, the Plaintiff seeks for orders that the Defendant's Defence including Counterclaim should be struck off. The said application is premised on the summarized grounds that the Defence and Counterclaim discloses no reasonable cause of action or defence in law. Further, that the Defence is scandalous frivolous and vexatious as well as an abuse of the process of this court. He contends that the Defendant's success is premised on the outcome of another suit in this court to wit ELC No. 579 of 2017 to which he is not a party. The application is further supported by the affidavit of ANDREW DANIEL MBOGO where he reiterates his claim above and deposes that the Defendant's Defence is hopeless as he has failed to attach relevant documents confirming his proprietary rights over the suit land. Further, that it violates the rules of procedure as no witness statement and supporting documents have been filed with it. He contends that the Counterclaim is a nullity as it is not signed nor dated by a party or his advocate. Further, that the Counterclaim does not bear a court stamp and hence it is not filed and does not exist in court records. He further insists that ELC No. 579 of 2017 is bound to fail completely as Moses Kirruti is the one who subdivided land parcel number Kajiado/Kitengela/ 1957 through Nairobi High Court Case No. 4861 of 1989.

The Defendant EXCEL MWANGI opposed the application and filed a Notice of Preliminary Objection dated the 2nd July, 2019 and a replying affidavit sworn on 15th November, 2019 where he deposes that his statement of defence raises triable issues wherein, he contested the Plaintiff's ownership rights over the suit land. He confirms that he filed a List of Witnesses, Witness Statement and Verifying affidavit in full compliance to dictates of procedure. He insists his pleadings are signed, dated and received by the Stamp of the Honourable Court stamp. Further, that his failure to comply with pre-trial directions is as a result of the Plaintiff's failure to prosecute the matter for more than 2 years. Further, that it is evident that the Plaintiff is never interested in setting down this matter for hearing.

The Plaintiff and the Defendant filed their respective submissions to canvass the instant application.

Analysis and Determination

Upon consideration of the Plaintiff's Notice of Motion dated the 8th May, 2019 including the parties' affidavits and rivaling submissions, the only issue for determination is whether the Defendant's statement of Defence including the counterclaim should be struck out.

The Plaintiff submitted that the Defence including the counterclaim does not raise a triable issue and should hence be struck out. He relied on the decisions of **Kivanga Estate Limited V National Bank of Kenya Limited (2017) eKLR** and **Continental Butchery Limited V Samson Musila Nthiwa Civil Appeal No. 35 of 1977** to buttress his arguments. The Defendant in his submissions contended that his Defence and Counterclaim raise triable issues. He insisted that the instant application should not be treated as unopposed as he filed his Objection to it and sought for leave for his replying affidavit filed out of time to be admitted. He relied on following decisions: **Civil Application No. 26 of 2018 Gideon Sitelu Konchellah V Julius Lekakeny Ole Sunkuli & 2 Others; Raila Amolo Odinga & Another V Independent Election & Boundaries Commission Petition No. 1 of 2017 and Central Bank of Kenya V Uhuru Highway Development Ltd & Others Civil Appeal No. 75 of 1998** to support his arguments. He submitted that his pleadings are complete and the Defence raises triable issues and relied on following decisions: **the Cooperative Merchant Bank Ltd V George Fredrick Wekesa Civil Appeal No. 54 of 1999; Delphis Bank Limited V Caneland Limited (2014) eKLR; Civil Appeal No. 12 of 2018 UAP Insurance V Lameck Bororio Mwene; Job Kiloch V Nation Media Group Ltd, Salaba Agencies Ltd & Michael Riorio (2015) eKLR; and Desbro (Kenya) Ltd V Polypipes Limited & Trident Insurance Co. Ltd (2018) eKLR** to support these arguments.

In respect to the Defendant's request for leave to have his replying affidavit filed out of time to be admitted, I note he had initially filed a

Notice of Preliminary Objection to oppose the instant application. The Plaintiff claims the application should be deemed to be unopposed. In relying on Order 51 Rule 14 of the Civil Procedure Rules, which is not couched in mandatory terms as well as the decisions in **Civil Application No. 26 of 2018 Gideon Sitelu Konchellah V Julius Lekakeny Ole Sunkuli & 2 Others; Raila Amolo Odinga & Another V Independent Election & Boundaries Commission Petition No. 1 of 2017** I find that the preliminary objection indeed demonstrated the Defendant's opposition to the instant application and in the interests of justice, I will admit the Defendant's replying affidavit as duly filed.

As to whether the Defendant's Defence and Counterclaim should be struck out, I note in the said Defence, the Defendant has disputed the Plaintiff's proprietary rights over the suit land; made reference to ELC 579 of 2017 where the Plaintiffs therein have sought for a vesting order and contended that he purchased his land from Moses Kirruti Lempaso and Grace Waithera Kirruti.

Order 2 rule 15 of the Civil Procedure Rules provides as follows: **'(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.'**

In the case of **Delphis Bank Limited v Caneland Limited [2014] eKLR**, the Court of Appeal on striking out pleadings held that: **'The leading local case on interpretation of Rule 13 of Order VI of the Civil Procedure Rules on which the application striking the defences was based is perhaps D.T. Dobie & company (Kenya) Ltd vs Muchina which counsel for the appellant referred to us. In the case, Madan JA, as he then was, opined in an obiter dictum that; "The power to strike out should be exercised only after the court has considered all the 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 opinions should be expressed as this would prejudice the fair trial and would restrict the freedom of the trial judge in disposing the case."**

From the averments in the Defence and prayers sought in the Counterclaim, I find that the same indeed raises triable issues which cannot be determined at this interlocutory stage. I opine that this matter should proceed to full trial to enable the court make a determination on its merits.

In relying on the Court of Appeal decision and the legal provisions cited above as well as the facts as presented, I will decline to strike out the Defence and Counterclaim as sought by the Plaintiff.

In the circumstances, I will disallow the Plaintiff's application dated 8th May, 2019 and direct that all the parties do comply with Order 11 and set the suit down for hearing on its merits.

Costs will be in the cause.

Dated signed and delivered via email this 20th day of May, 2020

CHRISTINE OCHIENG

JUDGE