



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 575 OF 2017

(Formerly Nairobi ELC Case No. 1088 of 2015)

GRACE WANGARI BUNYI.....PLAINTIFF

VERSUS

MOSES KIRRUTI LEPASO.....1ST DEFENDANT

GRACE WAITHERA GICHUHI.....2ND DEFENDANT

NGANGA GIKONYO.....3RD DEFENDANT

STEPHEN NJUGUNA KIMANI.....4TH DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion 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 Defendants' Defence and Counterclaim should be struck off. It is premised on the grounds on the face of it as well as the supporting affidavit of GRACE WANGARI BUNYI where she deposes that the Defendants wildly refers to suits to which they were never a party and claims therefore the suit herein is res judicata. She insists the Defendants' Defence is hopeless as they have not attached documents to demonstrate what proprietary rights they have over the suit land. She contends that the Defendants' Defence violates the rules of procedure as they failed to file along with their Defence statements and list of documents to support their case. Further, that the Defendants' Defence is incoherent and have no basis in law. She avers that the counterclaim is a nullity. Further, that a Counterclaim must be dated and signed by a party or his advocate. She states that the Counterclaim does not bear a court stamp and hence it is not filed and does not exist in court records. She reiterates that Moses 'Kirruti's case No. 579 of 2017 is bound to fail completely since he is the one who subdivided land parcel number Kajiado/ Kitengela/ 1957 through Nairobi High Court Case No. 4861 of 1989.

The Defendants opposed the application by filing their Notice of Preliminary Objection dated the 2nd July, 2019 and respective replying affidavits where they each depose that their statement of defence raises triable issues as they have contested the Plaintiff's ownership rights over the suit land and the same should be subjected to trial. They aver that they filed their list of witnesses, witness statements and verifying affidavits in full compliance to dictates of procedure. Further, that their list of documents will be availed at any time before the matter proceeds for hearing. They insist their pleadings are signed, dated and received with the Honourable Court stamp. They reiterate that the Plaintiff has never been interested in setting this suit down for hearing despite being served with a Notice of Dismissal.

The Plaintiff and the Defendants 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 respective affidavits and submissions, the only issue for determination is whether the Defendants' statement of Defence should be struck out.

The Plaintiff in her submissions reiterated her claim and contended that judgement should be entered in her favour. She averred that the issues raised in the Defence and Counterclaim are already dealt with in ELC 579 of 2017. She relied on the case 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 her arguments. The Defendants in their submissions insisted their Defence and Counterclaim raise triable issues. They contended that they filed Grounds of Opposition on points of law hence the instant application should not be deemed unopposed and relied on Civil Application No. 26 of 2018 **Gideon Sitelu Konchellah V Julius Lekakeny Ole Sunkuli & 2 Others** to support this argument. They sought for leave for their replying affidavits filed out of time to be allowed to form part of the record and relied on the case of **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 their averments. They insisted their pleadings are complete and their Defence raises triable issues as they have contested the ownership of the Plaintiff's right to the suit land. They aver that they also have proprietary rights over the suit land arising from a Decree of a court of competent jurisdiction, hence the matter should be subjected to full trial. They have relied on the decisions of **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 their averments.

Order 2 rule 15 of the Civil Procedure Rules provides thus: **'(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 Court of Appeal in the case of **RAMJI MEGJI GUDKA LTD –Vs- ALFRED MORFAT OMUNDI MICHIRA & 2 OTHERS** [2005] eKLR 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.”

First and foremost , I note the Defendants filed a Notice of Preliminary Objection to oppose the instant application and later filed a replying affidavit out of time. To my mind, I find that the preliminary objection indeed demonstrated their objection to the instant application and cannot be ignored. They have sought for leave to have their replying affidavits filed out of time, to be admitted as part of the record. It is my considered view that since Order 51 Rule 14 of the Civil Procedure Rules is not couched in mandatory terms, I will exercise my discretion and allow the same to be deemed to have been duly filed. In the current scenario, the Plaintiff has sought for the Defence and Counterclaim to be struck out contending that it does not raise any triable issue. Further, that the said Counterclaim was not filed and the Defendants failed to file witness statements in contravention of the rules. From the Court record, I note there are respective documents filed by the Defendants including Defence and Counterclaim and witness statements. In their Defence, the Defendants have disputed the Plaintiff's proprietary rights over the suit land, made reference to ELC 579 of 2017 where the Plaintiffs therein have made an application for a vesting order. The 2nd and 3rd Defendants have further denied being in wrongful possession of the suit land and claim they purchased 2.5 acres from Kajiado/ Kitengela/ 1957. From the averments in the Defence and prayers sought in the Counterclaim, I opine that the Defendants have indeed raised triable issues which cannot be determined at this interlocutory stage. Striking out of pleadings is a draconian measure which has to be exercised cautiously so as not to deny a party a right to be heard. I am of the considered view that this matter should proceed to full trial and not dispensed with at an interlocutory stage.

In relying on the two Court of Appeal decisions cited above as well as the facts as presented, I find that the Defence and Counterclaim indeed raise triable issues and it would be pertinent if the suit was heard on its merits.

In the circumstances, I will disallow the Plaintiff's application dated 8th May, 2019 to strike out the Defence 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 19th day of May, 2020.

CHRISTINE OCHIENG

JUDGE