



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 577 OF 2017 (Formerly Nairobi ELC Case No. 1091 of 2015)**

**BERNARD MUNGAI GATHIMBA.....PLAINTIFF**

**VERSUS**

**GODFREY OSIMBO.....DEFENDANT**

**RULING**

What is before Court for determination is the Plaintiff's Notice of Motion dated the 8<sup>th</sup> 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. In the said application, the Plaintiff seeks for orders that the Defendant's Defence and Counterclaim should be struck off. The 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 success of the Defendant's defence and counterclaim is premised on the outcome of another suit in this court to wit ELC No. 579 of 2017 to which the Defendant is not a party. The application is further supported by the affidavit of BERNARD MUNGAI GATHIMBA where he reiterates his claim above and deposes that the Defendant's Defence is hopeless as he has failed to attach documents to demonstrate 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 alongside it. He contends that the Counterclaim is a nullity and 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.

The Defendant GODFREY OSIMBO opposed the application and filed a Notice of Preliminary Objection dated the 2<sup>nd</sup> July, 2019 and a replying affidavit sworn on 15<sup>th</sup> November, 2019 where he deposes that his statement of defence raises triable issues as he has contested the Plaintiff's ownership rights over the suit land which should be subjected to full trial. 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. He reiterates 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 8<sup>th</sup> May, 2019 including the parties' affidavits and 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 averments. The Defendant in his submissions reiterated that his Defence and Counterclaim raise triable issues. He contended that the instant application should not be treated as unopposed 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 insisted that his pleadings are complete and the Defence raises triable issues as he has contested the ownership of the Plaintiff's right to the suit land. He relied on the following 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 buttress his arguments.

I would first deal with the Defendant's request for leave to have his replying affidavit filed out of time to be admitted. I note the Defendant 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 cases of **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 objection 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 provided a history of the suit land wherein he claims 1.5 acres out of land parcel number Kajiado/ Kitengela/1957 which he purchased from Moses Kirruti Lempasso and Grace Waithera Kirruti. He claims to have taken possession of the suit land and that this suit is an attempt at unfair enrichment by the Plaintiff at the Defendant's expense.

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 juncture. 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 dismiss the Plaintiff's application dated 8<sup>th</sup> 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 19<sup>th</sup> day of May, 2020.**

**CHRISTINE OCHIENG**

**JUDGE**