



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 574 OF 2017

(Formerly Nairobi ELC Case No. 1092 of 2015)

SAMUEL NGIGI GITUERE.....PLAINTIFF

VERSUS

BONIFACE KAROGO.....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 SAMUEL NGIGI GITUERE where he deposes that the Defendants wildly refers to suits to which they were never a party and claims therefore the suit herein is res judicata. He avers that the Defendant's Defence is hopeless as he has not attached documents to demonstrate what proprietary rights he has over the suit property. Further, that the Defence 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 as it does not advance the Defendant's case. Further, it must be dated and signed by a party or his advocate but in the current case it is not. He states that the Counterclaim does not bear a court stamp and hence it is not filed and does not exist in court records. He reiterates that Moses 'Kiruti's case No. 579 of 2017 is bound to fail completely as he is the one who subdivided land parcel number Kajiado/ Kitengela/ 1957 through Nairobi High Court Case No. 4861 of 1989. Further, that the Defendant's reliance on the decision of the Tribunal's Case is tenuous and intended to delay finalization of this suit.

The Defendant opposed the application by filing a Notice of Preliminary Objection dated the 2nd July, 2019 and replying affidavit sworn on 15th November, 2019 where deposes that his statement of defence raises triable issues as he has contested the Plaintiff's ownership rights over the suit land and the same should be subjected to full trial. He insists he filed a List of Witnesses, Witness Statement and Verifying affidavit in full compliance to dictates of procedure. Further, that his pleadings are signed, dated and Stamped received by the Honourable Court. He reiterates that his failure to comply with pre trial directions are as a result of the Plaintiff's failure to prosecute the matter for more than 2 years.

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 respective 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 in his submissions insisted that the Defence including the counterclaim does not raise a triable issue as it contains mere denials. Further, issues already dealt with in ELC 579 of 2017 are raised in the Defence and Counterclaim. He 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 his arguments. The Defendant in his submissions insisted his Defence and Counterclaim raise triable issues and the matter should proceed to trial. He contended that 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. He sought for leave for his replying affidavit filed out of time to be allowed 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 his averments. Further, that Order 51 Rule 14 of the Civil Procedure Rules is not couched in mandatory terms. 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 support his averments. He further reiterated that the Plaintiff had failed to set the suit down for hearing and this application seeks to derail the matter.

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 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.”

The Defendant had sought for leave to have his replying affidavit filed out of time to be deemed to have been duly filed. 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. To my mind, I find that the preliminary objection indeed demonstrated his objection to the instant application and cannot be wished away. From a perusal of Order 51 Rule 14 of the Civil Procedure Rules, I note it is not couched in mandatory terms and in the interests of justice, I will exercise my discretion and allow the Defendant’s replying affidavit to have been deemed to be duly filed. As to the striking out of the Defence and Counterclaim as the same does not raise any triable issue, I note in the Defence, the Defendant has disputed the Plaintiff’s proprietary rights over the suit land. The Defendant has further made reference to ELC 579 of 2017 where the Plaintiffs therein have sought for a vesting order. The Defendant has provided a history of the suit land and claims to own 1.5 acres out of land parcel number Kajiado/ Kitengela/ 1957 which he purchased from Moses Kirruti Lempaso and Grace Waitheera Kirruti. He claims to have developed the suit land by putting up a concrete residence thereon. From the averments in the Defence and prayers sought in the Counterclaim, I opine that the said Defence indeed raises triable issues which cannot be determined at an interlocutory stage. Striking out of pleadings is a draconian measure which has to be exercised cautiously so as not to deny a party his Constitutional right to be heard. I am of the considered view that this matter should proceed to full trial to enable the court make a determination of the same on its merits.

In relying on the two Court of Appeal decisions 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 18th Day of May, 2020.

CHRISTINE OCHIENG

JUDGE