



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC. NO. 43 OF 2017**

**(FORMERLY KERUGOYA ELC NO. 84 OF 2016)**

**JOHN MUIKAMBI GITAU ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**THE TRUSTEES CARITAS MARIANA HOLY FAMILY**

**CHILDREN'S HOME, THIKA ..... 1<sup>ST</sup> DEFENDANT/APPLICANT**

**REV. FR BATHRAND NWACHUKWU ..... 2<sup>ND</sup> DEFENDANT/APPLICANT**

**RULING**

This suit was filed by the Plaintiff herein **John Muikambi Gitau** on **14<sup>th</sup> June 2016**, and sought the various prayers among them a Declaration be issued to the effect that the land parcel **No. Block 23/1108**, situated within **Thika Municipality** belongs to him absolutely and he is consequently entitled to vacant possession. He alleged in his claim that on or about **10<sup>th</sup> May 2002**, he purchased the suit property from one **Daniel Wainaina Kang'onga** (now deceased) after paying the agreed consideration of **20,000/=**. He has attached a copy of an executed agreement by the parties. He further averred that he took vacant possession, but since he was not intending to utilize the suit property immediately, he entered into a licence agreement with the **1<sup>st</sup> Defendant**, the said licence agreement was executed on **29<sup>th</sup> May 2004**. Further that the **1<sup>st</sup> Defendant** encroached on the suit property by erecting illegal development and in **2005**, he issued the **1<sup>st</sup> Defendant** with a demand letter for vacant possession. However, the Defendant did not cease the said development and thus this suit.

The Defendant did not enter appearance nor file a Notice of Appointment. However, the law firm of **Ham Lagat & Associates Advocates** on behalf of the Defendant filed a Notice of Preliminary Objection dated **30<sup>th</sup> June 2016**. The said preliminary objection was canvassed by way of written submissions and dismissed on **18<sup>th</sup> December 2017**, vide a Ruling even dated.

Further, the Defendant did not file any Defence nor regularize their appearance in court. Instead on **22<sup>nd</sup> March 2018**, they filed the instant Notice of Motion which is the subject of the Ruling herein. This application was filed after the matter had been set for pre-trial directions.

In the instant application, the Applicants have sought for:

- 1) Time of filing Defence and/or hearing be suspended forthwith.**
- 2) The court be pleased to visit the site and/or locus in quo.**
- 3) The court be pleased to call for retrieval of the file in the matter of Nairobi Succession Cause No. 2592 of 2005 in order to acquaint with the facts of the matter.**
- 4) The Complaint filed herein be struck out and the suit be dismissed.**
- 5) The 1<sup>st</sup> and 2<sup>nd</sup> Defendant's costs of the suit and of this application be borne by the Plaintiff.**

The Application is premised on the following grounds:-

- a) The legal owner of the interest of the suit property is the Estate of Daniel Wainaina Kang'onga.**
- b) The Administratrix of the said Estate by powers emanating from the certificate of confirmation of grant sold the interest of the**

*said land to the Defendants.*

*c) Vide a court order issued by the then Hon Justice David Maraga in Nairobi Succession cause No. 2592 of 2005 on 22<sup>nd</sup> February 2011 the court gave the Administratrix leave to sell and/or transfer the suit land to the first Defendant.*

*d) The Plaintiff has been engaging in illegal activities to unlawfully acquire the suit land and is currently charged in a court of law.*

*e) The Plaintiff concealed material information on the Plaintiff.*

*f) The Plaintiff's claim discloses no reasonable cause of action in law.*

*g) The suit is scandalous and abuse of the process of the court.*

*h) It is fair, just and equitable that the Plaintiff be struck out and the suit be dismissed.*

The Application is further supported by the Affidavit of **Rev Fr Bethrand Nwachukwu**, who is a trustee of the 1<sup>st</sup> Defendant. He reiterates the contents of the above grounds, and urged the court to dismiss the suit in the interest of justice as the suit does not assist in achieving the overriding objective of justice.

The Application is opposed and **John Muikamba Gitau**, filed a Replying Affidavit dated **20<sup>th</sup> June 2018**, and averred that the instant application is an abuse of the court process which lacks merit and ought to be struck out with costs. Further, that the application is meant to scuttle issues and is an attempt by the Defendants to delay the prosecution of this suit since the Applicant has not yet filed their defence.

He further asserted that he had been informed by his advocate that the Plaintiff should not be struck out and the Plaintiff driven from the Judgment seat as the court should at all times look towards sustaining a suit rather than dismissing it even if the suit will not be successful. That calling out for striking out the suit for not disclosing a cause of action while engaging in a protracted examination of documents amount to conducting a trial based on an affidavit only, thus the application lacks merit and is an abuse of the Court process. He further averred that this application is a ploy by the Respondents, meant to frustrate the progress of the suit and the issues raised in the application are issues that can be raised in their Defence and main trial. Further that the application is an attempt by the Defendants to shield themselves from scrutiny by the court and a total abuse of process which should not be entertained by the court. He also averred that the application is a disguised second attempt to challenge the jurisdiction of this court after the first attempt failed via dismissal of the Preliminary Objection on **18<sup>th</sup> December 2017**. It was his contention that his Plaintiff shows cause of action as he has averred that he purchased the suit property on **10<sup>th</sup> May 2002**, from one **Wainaina Kang'onga (deceased)** who was the original owner and that was way before he passed on and before the Succession proceedings came into fruition. Therefore, the suit cannot be dismissed for not disclosing a reasonable cause of action as that would be turning a blind eye to any evidence available and also conduct a preliminary hearing at this stage.

He also deposed that a site visit does not lie as the issue before Court is not who is in possession but who is the rightful owner of the suit property. That the 1<sup>st</sup> Defendant is in possession via a license agreement with the Plaintiff which possession was acquired before Succession Cause commenced. Further that he did not participate in **Succession Cause No. 2592 of 2005**, and therefore the said succession proceedings cannot be used to determine who among the parties herein is the rightful owner of the suit property. He implores the court to dismiss the instant application with costs.

The Application was canvassed by way of written submissions which the court has carefully read and considered.

The court took too has considered the relevant provisions of the law and the cited authorities and makes the following finds.

As the court observed earlier, after the Defendants were served with Summons to Enter Appearance, they did not enter such appearance as provided by **Order 5 Rule 1(1)** of the Civil Procedure Rules. Further, there was no Notice of Appointment that was filed by **Ham Lagat Advocates**. Instead the Advocate filed a Notice of Preliminary Objection. The court is doubtful whether the said Law Firm of **Ham Lagat** is properly on record for the Defendants.

This Application is premised under **Section 1B (1) and 3A** of the Civil Procedure Act. **Section 1B** requires the court to further the overriding objective of the Act as set out in **Section 1A** and the Overriding objective is for the Court to facilitate the **just, expeditious and affordable** resolution of the civil disputes.

As the court determines the Application, it will have to consider whether the above overriding objective is met.

Further, the Application is anchored Under **Section 3A** of same Act which grants the Court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process. The court will take into account the above provisions in determining this application.

The Application is also premised under **Order 2 Rule 15** which grants the court discretion to strike out pleadings at any stage of the proceedings. It states as follows :

***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.*

**(2) No evidence shall be admissible on an application under subrule (1)(a) but the application shall state concisely the grounds on which it is made. (3) So far as applicable this r. shall apply to an originating summons and a petition.**

The Defendants/Applicants have sought for five major prayers in the Application.

In prayer Number 3, the Applicants have sought for an order that the court do visit the site and/or *locus in quo*. The Applicants have not fully explained why the court should visit the *locus in quo*. The Plaintiff has not denied that the 1<sup>st</sup> Defendant is in possession. The Plaintiff has only sought that he be declared the rightful owner of the suit property. There is no dispute on who is in possession. There is also no dispute on where the suit property is located at the moment. The Defendants have not filed their defence and the court finds that there is no justification in this prayer. It is premature and the court can only make such a finding of visit of *locus in quo* after hearing the evidence and after the basis of such visit has been laid down. Consequently, the court finds this prayer premature and will have no option but to disallow it.

In prayer **Number 4**, the Applicants have asked the court to call for the retrieval of **Nairobi Succession Cause No. 2592 of 2005** in order to acquaint itself with the fact of the matter. Though the Applicants have alleged that the suit property was sold to the Defendants under an Order made in the aforementioned Succession Cause, that averment should be contained in their Defence. By calling for retrieval of the above file at this juncture, the court will be involved in collection of the Defendants Defence and exhibits. The Defendants should have the proceedings therein as part of their list of documents and in the event in future the Court would need to look at the original file, then it would call for the same. The court finds this prayer too being premature and disallow the same.

On whether the Plaint should be struck out and the suit dismissed, the court finds that **Order 2 Rule 15** grants the court discretion to strike out pleadings. However, this is a discretion that must be exercised cautiously and judiciously. It is trite that no litigant should be removed from seeking justice prematurely. There are plethoras of authorities on the issue of striking out pleadings. In the case of **Dev Surinder Kumar Bij ...Vs...Agility Logistics Limited, Civil Suti No. 311 of 2013 (2014) eKLR** the court held:-

*“For a pleading to be dismissed pursuant to the provisions of Order 2 Rule 15 (1), it should be made clear and obvious that the issues raised by the Plaintiff can neither be substantiated, nor disclose any reasonable or justifiable action against the Defendant.*

*It is also evident that striking out pleadings is a drastic remedy that should only be resorted to when the pleading is plainly clear that court is a sham.*

See the case of **D.T. Dobie & Company (Kenya) Ltd...Vs... Muchina [1982] KLR 1** where the Court held that;

*“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”*

Further in the case of **Francis Kamande ...Vs... Vanguard Electrical Services Ltd (1998) eKLR** the Court of Appeal stated as follows:-

*“The summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable”.*

The Defendants have alleged that the Plaintiff claim is scandalous, frivolous and vexatious which may prejudice and delay fair trial of the case. However, it is noteworthy that the Defendants have not filed their Defence. The Plaintiff has alleged that he purchased the suit property from one Wainaina now deceased in the year **2002**. That he entered into an agreement with the Defendants in the year **2004** long before the said Wainaina passed on. Further, that the Defendants encroached on the Plaintiff’s land in the year **2005**, and the Plaintiff’s Advocate wrote a demand letter to the Defendants to cease development on the suit property and give vacant possession.

The Plaintiff therefore has a reasonable cause of action against the Defendants. The Plaintiff alleges that he entered into a license agreement with the Defendants long before the Succession proceedings of **2011**.

The court finds that the Plaintiff’s claim raises triable issues which need to be ventilated in a full trial and be determined on merit. This court will be persuaded in the findings in the case of **Letang –vs- Cooper (1965) 1 QB 232** where the court held:-

*“If a pleading raises triable issues, hence disclosing a cause of action, even if at the end of the day it may not succeed, then the suit ought to go to trial. However, where the suit is without substance or is groundless or fanciful and/or is brought or instituted with some ulterior motive or for some collateral one or to gain some collateral advantage which the law does not recognize as legitimate use of the*

*court process, the court will not allow its process to be used as a forum for such ventures.”*

Further, in the case of **Yaya Towers Ltd ...Vs...Trade Bank Ltd (in Liquidation) Court of Appeal No. 35 of 2000**, the court held:-

***“No suit should be summarily dismissed unless it appears hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment.”***

The court has considered the Plaintiff herein and it does not suit the above description as it raises a reasonable cause of action and has triable issues which the Defendants ought to have responded to. The court cannot engage in a preliminary trial through affidavit evidence and find that the Defendants averments are correct. Though the Applicants have alleged that the Plaintiff never produced documents to validate his position and that his documents are a forgery, the court finds that these are averments that can only be ascertained after calling of evidence and testing the same through cross-examination in a full trial. Therefore, the court finds the Plaintiff’s claim herein raises triable issues and has a reasonable cause of action and is not a candidate for striking out.

On whether the time of filing defence and a hearing should be suspended, the court finds that the Civil Procedure Act and Rules are very clear on the timelines of filing pleadings. No reasons as been given as to why the Defendants have not filed their Defence since **2016**. In fact the time of filing the statement of defence lapsed a long time and there is nothing to suspend. Even if the Defendants are keen on filing any Defence, it cannot be done without leave of the court.

On whether the Court should suspend hearing of this suit, the court is guided by the provisions of section **1A and 1B of the Civil Procedure Act** on the overriding objective of the Act. One such objective is for the court to facilitate **expedious disposal** of matters before it. This suit was filed on **2016**. The Defendants have not filed any Defence. They have engaged in delay of expedious disposal of the suit by filing interlocutory applications instead of their Defence. The court finds no reason to suspend hearing of this suit because a litigant should be assured of timely disposal of his/her matter in Court.

Having now carefully considered the instant **Notice of Motion** dated **22<sup>nd</sup> March 2018**, and the provisions of **Section 3A of the Civil Procedure Act 2010**, the Court finds it not merited and it is dismissed entirely with costs to the Plaintiff/ Respondent herein.

The Defendant is directed to cease filing numerous interlocutory applications which may act in delaying the prosecution of this matter which action goes against the spirit of the **Constitution** on fair trial and **Section 1A & 1B** of the **Civil Procedure Act**.

It is so ordered.

**Dated, issued and delivered at Thika on this 7<sup>th</sup> day of May 2020.**

**L. GACHERU**

**JUDGE**

**7/5/2020**

**Jackline - Court Assistant**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**By Consent of :**

**Mr. Mungai Kalande for Plaintiff/Respondent**

**Mr. Ham Lagat ) for 1<sup>st</sup> Defendant/Applicant**

**) for 2<sup>nd</sup> Defendant/Applicant**

**L. GACHERU**

**JUDGE**

**7/5/2020**