



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CASE NO. 183 OF 2015

KARISA KAHINDI KARISA & FAMILY AND 6 OTHERS.....PLAINTIFFS

VERSUS

MWALIMU HAMISI MWAHADZI.....1ST DEFENDANT

POPO ABDALLAH.....2ND DEFENDANT

SWAKA MBWANA.....3RD DEFENDANT

RULING

1. By this Notice of Motion application dated 7th May 2019, the three Defendants herein pray for orders:-

- a) That the Plaintiff's suit be struck out/dismissed as it discloses no cause of action against the Defendants;*
- b) That the suit is fatally defective, scandalous, frivolous and vexatious as against the Defendants and ought to be dismissed;*
- c) That the suit be struck out/dismissed as it is an abuse of the process of the Court;*
- d) That the Plaintiffs do pay the costs of this application to the Defendants.*

2. That application which is supported by an affidavit by Mwalimu Hamisi Mwachazi (the 1st Defendant/Applicant) is premised on the grounds that:-

- i) The Plaintiff lacks the capacity to sue the Defendants;*
- ii) The Plaintiff as drawn and filed lacks merit and is an abuse of the Court procedures and offends mandatory provisions of the law;*
- iii) The Plaintiffs have no claim of right or interest in the 1st Defendant's property being Plot No. 10468/III/MN which has not been mentioned anywhere in the Plaintiff's pleadings; and*
- iv) The Plaintiffs ought to have brought this suit by way of Originating Summons under Order 37 Rule 7 of the Civil Procedure Rules.*

3. The application is opposed. By a Replying Affidavit sworn by the 1st Plaintiff-Karisa Kahindi Karisa and filed herein on 28th June 2015, the Plaintiffs aver that a land matter such as this one cannot summarily be determined through striking out and as such it would be prudent to have the matter determined on merit.

4. The Plaintiffs further aver that the land was owned by their forefathers and that the cause of action is clearly pleaded in the Plaintiff. They further aver that when they filed the case, the suit property had not been sub-divided and that if it was, the same was illegally done while the matter was pending in Court.

5. I have carefully considered the application and the response thereto. I have similarly perused the submissions and authorities to which I was referred by the Learned Advocates for the parties.

6. The application before me is expressed to be brought inter alia, pursuant to the provisions of Order 2 Rule 15(1) of the Civil Procedure Rules. That Rule provides that:-

“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.

7. Under Order 2 Rule 15(2) of the Civil Procedure Rules, no evidence is admissible on an application under sub-rule 1(a) and therefore it should be evident from the pleadings sought to be struck out that no reasonable cause of action has been disclosed without reference to further evidence.

8. In the matter before me, the Defendants appear to have brought an omnibus application in which they fault the Plaintiff's claim herein as offending all the provisions under Order 2 Rule 15(1) of the Civil Procedure Rules. That then Counts for the affidavit sworn by the 1st Defendant in support of their application.

9. As was stated in ***D.T. Dobie & Co. Ltd –vs- Muchina (1982) 1KLR 1:-***

“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.”

10. Thus the overriding principle to be considered in an application such as this is whether triable issues have been raised. In the instant case the Plaintiff filed a Plaint dated 28th September 2015 in which they set out what they consider to be the cause of action at paragraphs 3 and 4 thereof as follows:-

“3. That I the Plaintiff herein claims that we lived in the land for many years with vendor Alii Mkoma Mwachadzi the uncle of the Defendant herein Mwalimu Hamis Mwachadzi, the said Mwalimu Hamisi Mwachadzi only arrived in the land in the year 1998 by the time he came Mr. I the Plaintiff was already covered by law protecting an adverse possessor having resided for many years, the said Mwalim Hamis Mwachadzi started to claim that land, the I resided with my family belongs to him and started to harass us and reporting us to the Police Station where most of the time Police Officer picked me and the my family that we are trespassing to his land when his land was far from ours. His land only measures 1.344 Ha Plot Registration No. 1665/III/MN CR No. 25460 copy of the same is attached.

4. That on 27th July 2015 we referred our claims to the National Chairman-Residents Land Protection Organization of Kenya. He wrote to the Defendant on 28th July 2015 and asked him to bring the Surveyor to identify beacons of his boundary, but Mwalim Hamisi Mahadzi did not reply to the letter...”

11. According to the Defendants, the Plaintiffs lack capacity to sue them as they sue in a representative capacity yet they have not shown that they have the authority of those on whose behalf they purport to sue. The Defendants further submit that the suit as filed is scandalous, frivolous, vexatious and a waste of the Court's time.

12. In ***Trust Bank Ltd –vs- Amin Company Ltd & Another (2000) KLR 164***, it was held that:-

“A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expense. A pleading which tends to embarrass or delay fair trial is a pleading which is ambiguous or unintelligible or which states immaterial matters and raises irrelevant issues which may involve expenses which will prejudice the fair trial of the action.”

13. Similarly while considering what amounts to scandalous pleadings in ***Joseph Gitau & 2 Others –vs- Ukay Estate Ltd Nairobi HCCC No. 813 of 2004(Unreported)***, it was held that:-

“.....allegations in a pleading are scandalous if they state matters which are indecent or offensive or made for mere purpose of abusing or prejudicing the opposite party. Moreover, any unnecessary or immaterial allegations will be struck out as being scandalous if they contain any imputation on the opposite party, or make any charge of misconduct or bad faith against him or someone else.”

14. I have considered the Plaintiffs pleadings in light of the above determination and did not find the same to be either frivolous or scandalous in that regard. A perusal of the pleadings drafted in person by the 1st Plaintiff clearly reveals that they lack the precision, legal

clarity and specificity that could have been injected thereon by the input of an Advocate of this Court but they are not entirely without substance or groundless.

15. The Plaintiffs as it were engaged the services of an Advocate some two months after this suit was filed. They changed the said Advocates some three years down the line on 20th August 2018. As it were, their successive Advocates have, in their wisdom not deemed it necessary to amend the pleadings as originally filed and I wish to say no more in that regard.

16. I must however agree with the Defendants that there is no evidence that Karisa Kahindi Karisa who has overtime executed the pleadings herein on behalf of the six other Plaintiffs had any authority from those six others to institute these proceedings on their behalf. Indeed, the tenor and purport of the Plaintiffs' pleadings as filed herein reveals that the said Karisa was only acting for himself and hence the reference to the Plaintiffs in the singular form as shown in paragraphs 3 and 4 of the Plaint as cited hereinabove.

17. I did not however think that omission would be a ground to strike out and/or dismiss the suit more so considering the Plaintiff's pleadings and prayers which consistently refer to the 1st Defendant herein.

18. A perusal of that Plaint as filed however reveals that there is no claim whatsoever made against Popo Abdallah and Swak Mbwana (the 2nd and 3rd Defendants respectively). In that respect, I agree with the Defendants that there was no cause of action against and any reason for the joinder of the said 2nd and 3rd Defendants in these proceedings.

19. In the premises, the Defendants' application partially succeeds and I hereby strike out the suit with costs as against the 2nd and 3rd Defendants.

20. The suit shall hence accordingly proceed as against the 1st Plaintiff and the 1st Defendant whom he accuses of evicting his family from the suit property.

21. Orders accordingly.

Dated, signed and delivered at Malindi this 25th day of June, 2020.

J.O. OLOLA

JUDGE