REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC. CASE NO. 226 OF 2013

SAMUEL NJENGA.....1ST PLAINTIFF

COSMUS NJOROGE KIBUE.....2ND PLAINTIFF

ANN WARURIE NJENGA.....3RD PLAINTIFF

VERSUS

JOMO KENYATTA UNIVERSITY OF AGRICULTURE & TECHNOLOGY (JKUAT)...DEFENDANT

RULING

Coming up before me for determination is the Notice of Motion dated 8th August 2014 in which the Defendant/Applicant seeks for orders that the Plaint dated 12th February 2013 be struck out, that summary judgment be entered in favour of the Defendant/Applicant as prayed in the Defence and Counterclaim dated 11th July 2013 and that the Plaintiffs/Respondents pay the costs of this Application and suit together with interest.

The Application is premised on the grounds appearing on the face of it together with the Supporting Affidavit of Vivian N. Waithaka, the Chief Legal Officer of the Defendant/Applicant, sworn on 8th August 2013 in which she averred that the Defendant/Applicant being a government institution, proceedings of adverse possession cannot be brought against it as stated in **section 41(a)(i) of the Limitation of Actions Act.** She further averred that the Defendant is the undisputed registered owner of all that piece of land known as Land Reference No. 9461/12 measuring 1.045 hectares (hereinafter referred to as the "suit property") and that the Defendant holds a valid certificate issued on 20th September 2005. She added that time for purposes of adverse action begins to run from the date when the paper title has been issued, i.e. 20th September 2005 in which case a period of 12 years and above have not lapsed for the Plaintiffs to make a claim for adverse possession over the suit property. She further averred that the Plaintiffs had admitted that they entered into the suit property with the consent and permission of the Defendant therefore their possession thereof was not adverse to the Defendant. She added that the Plaintiffs had been allowed by the Defendant to engage in tree nursery activities but that the Plaintiffs had gone ahead to breach the terms of their licence by subletting the suit property to other parties who are now running a car wash business and a bar. She also stated that the photos produced by the Plaintiffs as proof of their possession of the suit property date back to the year 2009, that the Plaintiffs

group was only registered in the year 2012 hence it was not possible for them to allege occupation of the suit property for over 12 years. She further highlighted the fact that the Plaintiffs had not filed any reply to defence and defence to their counterclaim. She further stated that in light of the foregoing, the plaint dated 12th February 2013 having been converted from an originating summons ought to be struck out because it is frivolous, vexatious and scandalous it is prejudicial, embarrassing and may delay the fair trial of this action it is a total abuse of the courts process and it discloses no reasonable cause of action. She further indicated that the suit property is ear marked for development of an industrial park being a vision 2030 project jointly implemented by the Defendant and the Ministry of Industrialization and that the Defendant is falling behind the implementation of the same due to the Plaintiffs' refusal to move out of the suit property.

The Application is contested. The Plaintiffs/Respondents filed their Grounds of Objection dated 15th September 2014 in which they relied on the following grounds:

1. That the Application is an after-thought was incurably defective, incompetent and unsustainable and lacks merit in law.
2. That the Application is frivolous, vexatious and an abuse of the court process and is only aimed at preempting the outcome of the Plaintiffs' application dated 15th August 2013.

Both the Defendant/Applicant and the Plaintiffs/Respondents filed their written submissions which have been read and taken into account in this ruling.

The issue that I am called upon to determine herein is whether to strike out the Plaint dated 12th February 2013 and enter summary judgment in favour of the Defendant/Applicant as prayed in the Defence and Counterclaim dated 11th July 2013. The applicable law is to be found in **Order 2 Rule 15(1)** of the **Civil Procedure Rules, 2010** which states as follows:

> **"At any stage of the proceedings the court may order to 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;**
> 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."**

From the foregoing legal provisions, there is no doubt that this court has the power at any stage of the proceedings to strike out a pleading including a plaint. However the courts have been asked to be slow in using their inherent and discretionary powers in striking out pleadings as it is a harsh and drastic move that can drive a litigant from the seat of justice. It is only granted in cases where it is clear that the pleadings objected to really disclose no arguable case and can only be granted where the case is plain, obvious and weak and one that cannot be redeemed by amendment. Madan, J.A in **D.T. Dobie & Company (Kenya) Ltd Vs Muchina [1982] KLR** stressed as follows,

> ***"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."***

He further added that,

> ***"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 is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by way of cross-examination in the ordinary way (Seller 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"

After considerable thought on this suit, I consider that the points raised by the Defendant/Applicant as to why this suit ought to be struck out are matters which go to the merits of this suit. These include whether or not time can run against the Defendant/Applicant as a government institution, what period of occupation of the suit property the Plaintiffs can claim considering the date of issue of the Defendant's title deed thereto, whether or not the Plaintiffs had the permission or consent of the Defendant to occupy the suit property are all issues to be determined after a full hearing of this case. These are not issues that can be determined at this interlocutory stage of the proceedings. In my view, the Plaintiffs' claim for adverse possession of the suit property is a triable issue. This issue remains to be determined after a full hearing has been conducted and evidence tendered and tested in the normal way. I am therefore of the considered opinion that this suit should proceed for full hearing and I so hold.

Accordingly, I hereby dismiss this Application. Costs shall be in the cause.

DATED AND DELIVERED IN NAIROBI THIS 5TH DAY OF JUNE 2015.

MARY M. GITUMBI

JUDGE