



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO. 63 OF 2005

PETER KIPKEMBOI CHERUIYOT.....1ST PLAINTIFF
CHARLES ARAP MAIYWA 2ND PLAINTIFF
CHERUIYOT ARAP CHEPKWONY 3RD PLAINTIFF
ESTHER CHELANG'AT 4TH PLAINTIFF
JONATHAN MIBEI 5TH PLAINTIFF
CHEPCHILAT ARAP MAINA 6TH PLAINTIFF
PHILIP RUGUT7TH PLAINTIFF

(suing as a representative capacity)

VERSUS

JAMES FINLAY (K) LIMITED.....1ST DEFENDANT
COUNTY COUNCIL OF KIPSIGIS.....2ND DEFENDANT
ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. The Applicant, **James Finlay (K) Limited** filed a Chamber Summons dated **6th June, 2007** under **Section 3A** of the **Civil Procedure Act**, **Order VI Rules 13(1) (a)** and **Order VII Rule 2** and **3** of the **Civil Procedure Rules** seeking that the plaint be struck out and the plaintiff's suit dismissed with costs. The application is made on the grounds *inter alia*, that the Plaintiffs claim as pleaded is not cognizable in law and does not show justiciable issues and that in any event the Plaintiff's claim is time barred.
2. The application came up for ruling on **22nd June, 2011** where my brother GBM Kariuki J. (as then was) vacated delivery of a ruling on the application so as to afford the plaintiffs an opportunity to be heard. He directed the applicant to serve the plaintiffs with the present application.

3. The Plaintiffs opposed the application. The 1st Plaintiff filed a Response dated **24th May, 2012** on the grounds *inter alia* that the plaintiffs have a reasonable cause of action raising justiciable issues and that they have a right to be heard.
4. The parties made their oral submissions before me on the **29th August 2013**. Learned Counsel, **Mr. Njeru** submitted on behalf of the Applicant. **Mr. Peter Cheruiyot** (1st plaintiff), **Charles Arap Maiywa** (2nd Plaintiff) and **Philip Ragut** (7th Plaintiff) submitted for and on behalf of the plaintiffs.
5. The learned Counsel submitted that according to the plaint, the suit land was acquired in 1926 and therefore a claim instituted by the plaintiffs in 2005 is time barred. He further submitted that the plaintiffs do not disclose any cause of action against the 1st defendant and that the orders sought against the 1st defendant are not cognizable in law. He thus urged the court to allow the application.
6. In response, the plaintiffs submitted that the application is brought with the intent to defeat the ends of justice. They urged the court not to dwell on technicalities and allow the matter to proceed to full hearing. They further submitted that they had gone to great length to deposit security of costs and dismissing the matter at interlocutory stage would be greatly prejudicial.
7. The duty of the court when faced with an application to strike out the plaint and dismiss the suit is to determine whether there is reasonable cause of action. It is also trite law that courts ought to exercise utmost caution before striking out a suit summarily, for the reason it does not disclose a reasonable cause of action. In the decision in **DT Dobie & Co vs Muchina (1982) KLR 1** the court held that:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly 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.”

8. So does this suit disclose a cause of action as claimed by the plaintiffs? I have considered the application and submissions by all the parties. I have read the plaint and at paragraph 5 and 6 it states as follows;

“the plaintiffs at all material times relevant to this suit were ordinary local inhabitants of the area now occupied by the 1st Defendant measuring 6483 hectares or thereabouts.....

the plaintiffs state that in unknown period the said parcels of land were fraudulently registered in the name of the 1st Defendant by the 3rd Defendant under a leasehold interest, of 999 years with regard to the plaintiffs proprietary interest and or revisionary interest thereby denying the plaintiffs the use and occupation of the said parcels of land thus occasioning the plaintiffs to suffer loss and damages”.

9. From the extract, the gist of the plaintiffs claim is that whilst in occupation of the suit property it was fraudulently transferred in the name of the defendants without due regard of their proprietary interest and as a result seek general damages and compensation from the defendants. To my mind, they have demonstrated a reasonable cause of action.
10. The last issue for determination is whether the claim is time barred. Counsel submitted that the plaintiff's in their pleadings stated that the land was acquired in 1926 and therefore a claim instituted in 2005 is time barred. Having perused the pleadings, I do not find anywhere in the plaint where the plaintiffs stated the land was acquired in 1926. This is an averment by the 1st defendant in his defence. Furthermore, there is no evidence to support this assertion and therefore this Court is not in a position to decide on the matter at this stage. The matter can be revisited at a more appropriate time in the course of the full hearing.

11. For these reasons, the chamber summons filed on **6th June, 2007** is therefore dismissed.

Costs will be in the cause.

Dated, signed and delivered on this 11 day of February 2014.

L N WAITHAKA

JUDGE.

PRESENT

Judgment delivered by J.K Sergon J on behalf of Lady Justice L N Waithaka

1st & 7th Plaintiffs present in person

N/A for 2nd, 4th & 5th Plaintiffs

3rd & 6th plaintiffs deceased

Sigira holding brief for P Njeru for 1st Defendant

Sigira or 2nd Defendant

J K SERGON

JUDGE