



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAKURU**

**ELC NO. 240 OF 2013**

**KEDONG RANCH LTD.....PLAINTIFF**

**VERSUS**

**SHADRACK MWANGI KAMAU & 23 OTHERS.....DEFENDANTS**

**RULING**

1. The Plaintiff filed a Notice of Motion under **Sections 1A, 1B and 3A of the Civil Procedure Act** and **Order 2 Rule 15, Order 7 and Order 51 of the Civil Procedure Rules** on **11<sup>th</sup> March, 2013**, seeking the following orders:

- a. **That the Honorable Court be pleased to strike out the Defence and Counterclaim filed by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> defendants**
- b. **That the costs of this application be paid for by the defendants**

2. The application is supported by the grounds on its face as well as the supporting affidavit of **Christine Chronchey**, the chairperson of the plaintiff Company. She depones that the defence and counterclaim were never served within the stipulated period despite correspondence between the Advocates of the respective parties (**CG2**) hence the same is incurably defective and is aimed at prejudicing and embarrassing the fair trial of this suit and is otherwise an abuse of the court process.

3. The application is opposed vide a replying affidavit of **Stephen Kiragu Maingi**, the 13<sup>th</sup> defendant in the suit, dated **16<sup>th</sup> January, 2014** with authority of the 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> defendants to swear the affidavit on their behalf. He depones that the former plaintiff's advocates were duly served with the defence filed on **20<sup>th</sup> November, 2009** but declined to stamp on the copy served on them. Furthermore, some of the defendants are deceased, namely: the 2<sup>nd</sup>, 4<sup>th</sup>, 17<sup>th</sup>, 18<sup>th</sup> and 19<sup>th</sup> defendants (copies of their death certificates are attached marked **SKM 1 a-e**) and the 9<sup>th</sup>, 15<sup>th</sup>, 16<sup>th</sup>, 20<sup>th</sup>, 21<sup>st</sup> and 24<sup>th</sup> defendants are also deceased but their death certificates cannot be traced. It is thus an abuse of the court process that the plaintiff has instituted suit against deceased persons and has not notified the court of this fact.

5. I have carefully considered the application, affidavits filed together with the annexures and written submissions. I find the issue for determination to be whether the defendants' defence and Counterclaim should be struck out for the reason that it was not filed and served within the time stipulated by law and is thus an abuse of the court process.

6. Striking out of pleadings is provided for under **Order 2 Rule 15 (1)** of the Civil Procedure Rules as follows:

**At any stage of the proceedings the court may order to be struck out or amended any pleadings on the grounds 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. It is settled law that the power of the court to strike out pleadings should be used sparingly and cautiously, as it is exercised without the court being fully informed on the merits of the case through discovery and oral evidence. This was stated in **D.T. Dobie & Company (Kenya) Limited V Muchina** (1982) KLR by **Madan J.A.** 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 the case before it.”**

8. Pleadings should be struck out if they are meant to embarrass or prejudice the fair trial of the suit. **Article 159 2(d)** of the Constitution requires this court to render justice without undue regard to technicalities of procedure and in particular where an error can be corrected through an amendment. Similarly, the court ought to be guided by the overriding objective as provided for in **Section 1A** of the Civil Procedure Act, which is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes.

9. From the record, although summons to enter appearance were collected on **26<sup>th</sup> October, 2006** it is not clear when they were served upon the defendants as no copy of summons was filed indicating the date upon which service was effected upon the defendants. It is therefore difficult for the court to determine whether the defendants entered appearance and filed their defence within the 15 days stipulated in the summons or not. Further, if it is true that the defendants served the defence upon Counsel for the plaintiff on time and that the plaintiff's Counsel refused to accept service, they too failed to file an affidavit of service to support this allegation. The above notwithstanding, I am of the view that failure to serve a defence within the stipulated period is not so critical as to make a suit collapse. I also do not see how declining to strike out the defence and counterclaim will embarrass or prejudice the fair trial of the suit.

10. To facilitate the just expeditious, proportionate and affordable resolution of this dispute, I invoke **Section 1A** of the Civil Procedure Act and decline to strike out the defence and counterclaim.

11. The defendant in their replying affidavit filed on **17<sup>th</sup> January, 2013** have stated that some of the defendants are deceased. Copies of their death certificates have been attached as evidence to confirm this position. The law is settled that a suit cannot subsist against a dead party as the same abates if there is no cause of action. By this very fact, the plaint is by itself defective.

In the interests of justice, I also invoke **Section 3A** of the Civil Procedure Act and direct that the plaintiff amends their plaint, and brings the suit only against defendants who can fully participate in this suit.

12. The upshot of the foregoing is that the Notice of Motion dated **11<sup>th</sup> March, 2013** is dismissed. Costs shall be in the cause.

**Dated, signed and delivered at Nakuru in open court this 3<sup>rd</sup> day October 2014.**

**L N WAITHAKA**

**JUDGE**

**PRESENT**

Mr Kobe holding brief for Mrs Ndeda for the respondent.

Ms Fatma holding for Mr Olonyi for the Applicant

Emmanuel Maelo: Court Assistant

**L N WAITHAKA**

**JUDGE**