REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO. 80 OF 2017

WILLIAM OPIYO OKUMU.....PLAINTIFF

VERSUS

JOSEPH OUMA ADONGO .....1ST DEFENDANT

LAND REGISTRAR, KISUMU.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

R U L I N G

In **D.T. DOBIE & CO LTD .V. MUCHINA 1982 KLR 1**, **MADAN J.A** (as he then was) stated as follows with regard to the power to strike out pleadings:-

> ***"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 week 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."***

The general principle is that the power to strike out a pleading is a draconian one to be used sparingly and only in obvious cases. In **KIVANGA ESTATES LT D .V. NATIONAL BANK OF KENYA C.A CIVIL APPEAL NO 217 OF 2015 [2017 eKLR]**, the Judges described that power in the following terms: -

> ***"It is not for nothing that the jurisdiction of the Court to strike out pleadings has been described variously as draconian, drastic, discretionary, a guillotine process, summary and an order of last resort. It is a powerful jurisdiction capable of bringing a suit to an end before it has even been heard on merit yet a party to civil litigation is not to be deprived lightly of his right to have his suit determined in a full trial. The rules of natural justice require that the Court must not drive away any litigant from the seat of justice without a hearing however weak his or her case may be. The flip side is that it is also unfair to drag a person to the seat of justice when the case brought against him is clearly a non – starter. The exercise of the power to strike out pleadings must balance these two rival considerations."***

By a plaint filed herein on 24th February 2017, the plaintiff describing himself as the bona fide owner of the land parcel **NO KISUMU/BORDER/4** (the suit land) sought Judgment against the defendants in the following terms: -

> **(a) A declaration that the suit land belongs to the plaintiff.**
>
> **(b) An order to have the title to the suit land changed to the names of the plaintiff.**
>
> **(c) A permanent injunctive order restraining the defendants, their servants, and/or agents from interfering, encroaching and/or trespassing on the suit land.**
>
> **(d) Costs of the suit and interest thereon.**

The basis of the plaintiff's claim is that the suit land has been the subject of a long-standing dispute between him and one **DOMINICUS ADONGO** the deceased father to the 1st defendant which dispute was resolved by the then **NYANZA LAND DISPUTES APPEAL COMMITTEE** in case **No. 79 of 2009** in the case plaintiff's favour. **DOMINICUS ADONGO** agreed to transfer the suit land to the plaintiff. However, the 1st defendant filed **SUCCESSION CAUSE No 403 of 2008** which is pending and took advantage of the plaintiff's illiteracy to make him sign documents for medical help yet it was a sale agreement. Particulars of irregularities and fraud have been pleaded

in paragraph 23 of the plaint.

The 1st defendant filed a defence denying that the plaintiff is the bona fide owner of the suit land and put him to strict proof thereof. He also denied that **DOMINICUS ADONGO** had agreed to transfer the suit land to the plaintiff as well as the allegations of irregularities and fraud levelled against him. He added also that there is a pending case being **KISUMU HIGH COURT SUCCESSION CAUSE No 403 of 2008** which is still pending and involves the suit land and therefore this Court lacks the jurisdiction to determine this dispute.

The 2nd and 3rd defendants filed a joint defence in which they pleaded that they are strangers to the plaintiff's averments and that if there was any transfer, it was done procedurally and in accordance with the law.

On 5th March 2020, the 1st defendant filed a Notice of Motion anchored upon the provisions of **Sections 1A, 1B and 3A of the Civil Procedure Act** and **Order 2 Rule 15(1) (b) (c) and (d) of the Civil Procedure Rules** seeking the following orders: -

> **1. That the Honourable Court be pleased to strike out the plaint herein and dismiss the entire suit with costs to the 1st defendant.**
>
> **2. That the costs of this application be borne by the plaintiff**.

The application is based on the grounds set out therein and is also supported by the 1st defendant's affidavit dated 3rd March 2020. The gist of the application is that the suit land is registered in the names of **DOMINICUS ADONGO** now deceased and there is pending at the **HIGH COURT KISUMU SUCCESSION CAUSE No 403 of 2008** where the suit land is a subject and in which the plaintiff has raised objections seeking to annul the grant issued to the 1st defendant. That this suit is an abuse of the Court process and may prejudice or delay the determination of the succession cause. The plaint should therefore be struck out with costs to the 1st defendant.

The application is opposed and in a lengthy 35 paragraphs replying affidavit dated 31st August 2020, most of whose contents are really not relevant to this application, the plaintiff has given a long history of the suit land. He states, in so far as is relevant to this application, that the suit land was awarded to him by elders but **DOMINICUS ADONGO** refused to obey the decision of the elders and continued using the suit land. That following the death of **DOMINICUS ADONGO**, the 1st defendant instituted succession proceedings without informing the plaintiff who is the beneficial owner of the suit land. That if this application is allowed, it will amount to a miscarriage of justice.

When this application was placed before me on 2nd August 2020 during the service week at the **ENVIRONMENT AND LAND COURT KISUMU**, it was agreed both by **MR MWAMU** holding brief for **MR OMONDI** for the plaintiff and **MR OKOTH** holding brief for **MR MAUBE** for the 1st defendant that it be canvassed by way of written submissions. The 1st defendant was to file and serve within 10 days and the plaintiff to respond within 10 days of service. The 2nd and 3rd defendants did not attend. I directed that ruling would thereafter be delivered on 13th October 2020 by way of electronic mail.

By the time the file was transmitted to me at the **ENVIRONMENT AND LAND COURT BUNGOMA** for purposes of drafting the ruling, only the plaintiff's submissions were filed.

I have considered the application, the rival affidavits by the plaintiff and the 1st defendant as well as their other pleadings and the submissions filed.

Although the Notice of Motion does not state specifically why the plaintiff's suit should be struck out, a reading of the application and the supporting affidavit shows that the main grounds upon which the orders therein are sought are: -

> **1: That the plaint is frivolous, vexatious and is an abuse of the process of this Court as it discloses no reasonable cause of action against the 1st defendant.**
>
> **2: That this Court lacks the jurisdiction to determine this suit in view of the pending HIGH COURT KISUMU SUCCESSION CAUSE No 403 of 2008.**

Order 2 Rule 15(1) of the Civil Procedure Rules provides 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."***

In **BLACK'S LAW DICTIONARY 10TH EDITION**, the term **scandal** is defined as: -

"Disgraceful, shameful or degrading acts or conduct. Defamatory reports or rumors esp, slander."

The term **frivolous** is defined as: -

"Lacking a legal basis or legal merit; not serious, not reasonably purposeful."

The term **vexatious** is defined to mean: -

"(of conduct) without reasonable or probable cause or excuse; harassing; annoying."

The term abuse of process is defined to mean: -

"The improper and tortious use of a legitimately issued Court process to obtain a result that is either unlawful or beyond the process's scope – Also termed abuse of legal process, malicious abuse of process, malicious abuse of legal process; wrongful process; wrongful process of law."

In **JETLINK EXPRESS LTD .V. EAST AFRICAN SAFARI AIR EXPRESS LTD 2015 eKLR**, the Court of Appeal adopted the following definition of abuse of process in **BEINOSI .V. WIYLEY 1973 S.A 721 SCA** a decision by the Court of Appeal of South Africa: -

"What does constitute an abuse of process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of "abuse of process. It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of Court to facilitate the pursuit of the truth are used for purposes extraneous to that objective."

Other than making sweeping allegations that this suit is frivolous, vexatious, scandalous and an abuse of the process of this Court and which also discloses no reasonable cause of action, the 1st defendant has not demonstrated any grounds upon which I should therefore strike out the plaint herein. The plaintiff has pleaded why he thinks he is entitled to the orders sought in his plaint. He pleads that he is the ***"bona fide owner"*** of the suit land. The 1st defendant has denied that averment adding that at no time did his father **DOMINICUS ADONGO** surrender the suit land to the plaintiff. As to who is therefore the **bona fide owner** of the suit land will be a matter for the trial Court to determine. However, looking at the pleadings herein, I am not persuaded that the plaintiff's suit is scandalous, vexatious, frivolous or any abuse of the process of the Court which discloses no reasonable cause of action. To strike out the plaint on the basis of the material before me will amount to an infringement of **Article 50(1) of the Constitution** which provides that: -

"Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal or body."

And in **YAYA TOWERS LTD .V. TRADE BANK LTD (IN LIQUIDATION) C.A CIVIL APPEAL NO 35 OF 2000 [2000 eKLR]**, the Court stated that: -

"A plaintiff is entitled to pursue a claim in our Courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial." Emphasis added.

The Court then proceeds to cite **LORD HERSCHELL in LAWRENCE .V. LORD NORREYS (1890) 15 APP CAUSE 210 at 219** as follows: -

"It cannot be doubted that the Court has inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be sparingly exercised and only in very exceptional cases. I do not think it's exercise would be justified merely because the story told in the pleadings was highly improbable and one which was difficult to believe, could be proved. No suit should be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and it so week as to be beyond redemption and incurable by amendment."

I am not persuaded that the plaint herein should suffer the draconian remedy of being struck off as pleaded by the 1st defendant. I must therefore decline any invitation by the 1st defendant to do so.

With regard to the jurisdiction of this Court to determine this suit, **Section 13(1) of the Environment and land Court Act** states as follows: -

"The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other written law relating to environment and land."

Section 150 of the Land Act, as amended, now reads: -

"The Environment and land Court established in the environment and Land Court Act and the Subordinate Courts as

empowered by any written law shall have jurisdiction to hear and determine disputes, actions and proceedings concerning land under this Act."

The dispute herein relates to the ownership of the land parcel **NO KISUMU/ BORDER/14** which the plaintiff claims to be the ***"bona fide owner"*** thereof, a claim that the 1st defendant has denied and had put the plaintiff to strict proof thereof. That is a claim withing the jurisdiction of this Court and it cannot therefore be correct for the 1st defendant to submit otherwise.

However, it appears to me from a reading of paragraphs (b) (c) and (d) of the 1st defendant's Notice of Motion that the basis for questioning this Court's jurisdiction to handle this suit is because of the pending **KISUMU HIGH COURT SUCCESSION CAUSE NO 403 OF 2008** where the suit land is the sole property awaiting distribution and in which the plaintiff is an objector. That in itself is not a sufficient ground to warrant the striking out of the plaint. At most, it can only be a ground for staying this suit.

It must also be remembered that the primary role of a Probate Court is to identify the assets of a deceased, the survivors and beneficiaries to the Estate and thereafter distribute the same. Claims by third parties who do not qualify as beneficiaries can only be resolved through other forums and in the case of disputes about ownership of land, that forum is this Court. That is why **Rule 41(3) of the Probate and Administration Rules** provides that where a party claims an interest to the Estate of a deceased which cannot conveniently be determined by the Probate Court, such property can be set aside to abide the determination of that issue as prescribed by law. From the evidence available herein, all that this Court has been informed is that the plaintiff has, by an application dated 5th January 2009, instituted summons for revocation and/or annulment of the grant in **KISUMU HIGH COURT SUCCESSION CAUSE No 403 of 2008** with respect to the Estate of **DOMINICUS ADONGO** which is still pending hearing and determination – see paragraphs 5 and 6 of the 1st defendant's supporting affidavit. Clearly, succession proceedings are not the appropriate vehicle for the resolution of serious contested claims against the Estate of a deceased person by third parties. That is the preserve of this Court.

The up – shot of the above is that the 1st defendant's Notice of Motion dated 3rd March 2020 and filed herein on 5th March 2020 is devoid of merit. It is accordingly dismissed with costs to the plaintiff.

Boaz N. Olao.

J U D G E

13th October 2020.

Ruling dated and signed at BUNGOMA this 13th day of October 2020. The same is delivered by way of electronic mail pursuant to the **COVID – 19** guidelines as was advised to the parties on 2nd September 2020.

Boaz N. Olao.

J U D G E

13th October 2020.