



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU

Civil Suit 322 of 1998

SAMUEL K. BARTENGE.....1ST
PLAINTIFF

KIBET KIBUSIA.....2ND
PLAINTIFF

CHERUIYOT BUNEI.....3RD
PLAINTIFF

ELKANA KIBINGOR.....4TH
PLAINTIFF

KIBUSIA TALLAM.....5TH
PLAINTIFF

KIPTUM MARINAI.....6TH
PLAINTIFF

KOMEN TOMNO.....7TH
PLAINTIFF

LISA ROTICH.....8TH
PLAINTIFF

KIPKOECH CHESIRE.....9TH
PLAINTIFF

KIBIRGEN KUTO.....10TH
PLAINTIFF

VERSUS

KIPTOO BUNDOTICH YAGAN TUIKONG.....1ST
DEFENDANT

WILLY YAGAN.....2ND
DEFENDANT

LAWI KIGEN KIPLAGAT.....3RD

	DEFENDANT	
KIPKUTUNY CHERUIYOT.....		4TH
	DEFENDANT	
KIPLAGAT KOSKEI.....		5TH
	DEFENDANT	
KUTO CHEBURET.....		6TH
	DEFENDANT	
RICHARD KIPCHUMBA TALLAM.....		7TH
	DEFENDANT	
KIBET CHEBUREI.....		8TH
	DEFENDANT	
PAUL KIPYATOR KOECH.....		9TH
	DEFENDANT	
JOHN TOMNO.....		10TH
	DEFENDANT	
SINGA CHEBURET.....		11TH
	DEFENDANT	
KIPKOECH KIPTOO.....		
	12TH DEFENDANT	

RULING

The instant application seeks that the plaintiffs’ suit be struck out for the reasons that:

- i) the reliefs sought in it cannot be obtained without the Commissioner of Lands;
- ii) the suit has been brought by the plaintiffs on behalf of 63 others without those others’ written authority;
- iii) the plaintiffs have alleged to be members of Emkwen Limited, a body corporate without authority or resolutions of the shareholders;
- iv) the suit is statute-barred;
- v) the title to the suit property having been surrendered and cancelled, no suit can be brought in respect of the same hence the suit is an abuse of the court process;
- vi) the defendants’ individual titles were issued after the consent of the Land Control Board was obtained and are therefore protected.

In response, the plaintiffs maintained that:

- (i) the suit is not statute-barred there having been other suits since 1986 including Eldoret RMCC No.93 of 1986 which is pending;

- (ii) the instant suit is partly heard and the only reason this application has been made is to stop the court from establishing the fraud in the matter;
- (iii) the plaintiffs obtained authority of the shareholders before filing the suit;
- (iv) the surrender and transfer to the defendants of the titles to the disputed land was fraudulent;
- (v) since the matter raises weighty issues it ought to be resolved after hearing evidence and not by summary procedure;

I have considered the application and the foregoing arguments as well as the written submissions along with the authorities cited.

By way of background, the plaintiffs instituted this action in 1998 against the defendants claiming that the latter fraudulently surrendered the original grant to parcel of land No. L.R. 8922 and thereafter the defendants, without the authority or knowledge of the members and shareholders of Emkwen Farm Limited caused the land to be sub-divided into 17 portions which they subsequently transferred to themselves.

Consequently and upon the foregoing, the plaintiffs pray that the said transfers be declared to have been fraudulent and that the surrendered title to the original parcels No.8922 be reinstated with a further order that the parcel be resurveyed, subdivided and distributed among the 73 members and shareholders of Emkwen Farm Limited. The defendants filed a defence to the above claim denying the averments in the plaint.

In particular, the defendants have averred that the plaintiffs forfeited their rights to membership of the company when they voluntarily ceased in 1969 to make payments towards the loan repayment; that the suit is statute-barred and that the defendants' titles being first registration cannot be challenged.

From the record, there are ten (10) plaintiffs and twelve (12) defendants. On 24th May, 2006, the hearing commenced before Koome, J (as she then was), with the 1st and 3rd plaintiffs giving their evidence. Thereafter, (in 2007), there was a lull until in the year 2010 when directions were taken that the matter proceeds from the stage it had reached. A year later, the present application was filed.

It is brought pursuant to the provisions of **Order 52 rule 1, Order 2 rule 15(1) (b) (c) and (d)** of the **Civil Procedure Rules, 2010. Section 3A** of the **Civil Procedure Act**, as usual has also been cited. Under **Order 2 rule 15** aforesaid pleading may be amended or struck out on the grounds that:

- a) it discloses no reasonable cause of action or defence; 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.

I reiterate that the application is premised on (b) (that the suit is scandalous, frivolous or vexatious, (c) (that it may prejudice, embarrass or delay the fair trial of the action) and (d) (that it is an abuse of the process of the court).

It must be observed at once that the court's power to strike out pleadings is discretionary hence the use in the rule of the word "may" and it also gives the option of amendment of the pleadings in **rule 15(1)**. Secondly, striking out a pleading is a draconian act, which may only be resorted to in plain cases; in cases where pleadings disclose no semblance of a cause of action or defence, as was explained by the Court of Appeal in **Yaya Towers Limited V. Trade Bank Limited** (In liquidation), Civil Appeal No.35

of 2000 thus:

“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 court, it must be allowed to proceed to trial..... If the defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits”

The present suit relates to ownership of land. The plaintiffs have made very serious allegations against the defendants; how the defendants jointly, without the knowledge or consent of the members of Emkwen Farm Limited, a land buying company, fraudulently transferred to themselves the sub-divisions of L.R. No.8922. *Vis à Vis* the defendants averments in this application, can the suit be described as scandalous, frivolous, or vexatious; is the suit likely to prejudice or embarrass the defendant or it is an abuse of the process of the court?

A pleading is scandalous if it states:

- i) matters which are indecent; or
- ii) matters that are offensive; or
- iii) matters made for the mere purpose of abusing or prejudicing the opposite party; or
- iv) matters that are immaterial or unnecessary; or
- v) matters that charge the opposite party with bad faith or misconduct; or
- vi) matters that contain degrading charges.

See **Blake V. Albion Life Assurance Society**, (1876) LJQB 663. See also **Christie V. Christie**.

A pleading is frivolous when it is without substance, or only fanciful or not capable of reasoned argument. See **Dowkinst Prince Edward of Save Weimber** (1976) IQB 499

Again a matter is frivolous when it is groundless and vexatious when it lacks bona fides and is hopeless or offensive and tends to cause unnecessary anxiety to the opposite party. An action is said to be vexatious when it has no chance of succeeding, when it is brought merely for purposes of annoyance and intended for no good purpose. See **Bullen & Leake & Jacobs Precedents of Pleading** (12th Edn) at P.145. See also **Willis V. Early Beachamp** (1986) 11 DP 59.

Pleading tend to prejudice, embarrass or delay fair trial when it is evasive or obscuring and concealing the real question in dispute and embarrassing if it is ambiguous and unintelligible and raises immaterial matters. See **Trust Bank Limited V. Hamanshu Siryakat Amin & Company Limited & Another**, Nbi. HCCC No.984 of 1999.

Applying these principles to the matters before me, it is my considered view, first and foremost, that the plaintiffs’ claim is genuine and the issues being raised in the present application amount to a mini trial upon affidavit evidence. Controverted issues of limitation cannot be resolved through a summary procedure sought herein. Likewise, whether or not the plaintiffs have the authority of the other shareholders to bring this action or whether there is a resolution by the shareholders are matters of fact which must await the trial. Should there be need to join the Commissioner of Lands, there is still time to do so.

In the result, I find that the suit is not scandalous, frivolous, vexatious or prejudicial in any way to the defendants. It is not an abuse of the process of the court. As a matter of fact, this application is an abuse

of the process of the court being brought fourteen (14) years after institution of this action and after the commencement of the hearing.

The application for these reasons is dismissed with costs. Considering the age of this dispute, parties through their advocates must take a hearing date on priority basis at the registry.

Dated. Signed and Delivered at Nakuru this 1st day of October, 2012

**W. OUKO
JUDGE**