



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO. 217 OF 2017

AYUB SHERO HUSSEIN.....PLAINTIFF

VERSUS

KAHONZI KOSHOLO GARI & 9 OTHERS.....DEFENDANTS

RULING

1. The Plaintiff/Applicant filed a Notice of Motion dated 22nd March, 2018 under Order 2 Rule 15 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Act praying that the counter-claim dated 20th July 2017 filed by the Defendants be struck out with cost and that summary judgment be entered for the Plaintiff against the Defendants as prayed in the plaint.

2. The Application is supported by the affidavit of Ayub Shero Hussein sworn on 22nd March, 2018 and is based on the grounds that the said defence and counter-claim is a mere denial and a sham and does not disclose any reasonable defence in law, and the defence is an abuse of court process. It is also argued that the face of the counter-claim is based on adverse possession with material non-disclosure. That the Defendants did not disclose to court that in 2007, they were evicted from the suit premises pursuant to execution of court decree in **Civil Suit No.2015 of 2003** and that between 2007 and 2017 when the current suit was filed, it is a period of nine years and not 12 years to establish a claim of adverse possession.

3. The Defendants did not file their response within the time they were granted and only filed grounds of opposition on 9th October 2018 outside time and without leave of the court. I will however invoke the provision of **Article 159 (2) (d)** and the inherent power of the court and deem the grounds as properly filed.

4. The 1st, 2nd, 3rd, 4th, 5th & 9th Defendants' contention is that they were not parties to **Civil Suit No.2051 of 2003** and that they have never been evicted from the suit property. That the Plaintiff is pursuing **Civil Suit No.2051 of 2003** against the 6th Defendant and therefore is having two cases running before court, hence an abuse of the court process. The Defendants contend that their defence and counter-claim raises triable issues.

5. I have considered the Application. The principles which guide the courts in determining an Application for striking out pleadings are well settled. In the case of **DT Dobie & Company Kenya Limited –v- Muchina (1982) KLR**, Madan JA stated as follows:

“i)...the power to strike out should be exercised only after the court has considered all facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an Application to strike out pleadings, no opinions should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.

ii) the court should aim at sustaining rather than terminating suit. A suit should only be struck out if it is beyond redemption and incredible by amendment. As long as a suit can be injected with life by amendment, it should not be struck out. ”

6. In the case of **Henkel Polymer Co. Ltd & 2 Others (2004)eKLR**, Ojwang, J (as he then was) after analyzing several authorities stated as follows:

“From the foregoing review of authorities, it is clear that only very sparingly will any application for the striking out of a statement of defence be entertained.... The decision to strike out a defence should not be based on the unlikely success of the defence case. ”

7. I will apply this test in this Application. I have considered the argument by the Plaintiff that there was a civil suit, to wit, **Civil Suit No. 2051 of 2003** in which he alleges that the Defendants were evicted. The 1st, 2nd, 3rd, 4th, 5th and 9th Defendants have denied being parties in that other suit. The Defendants also have a counter-claim which in my view raises a triable issue among others worth a trial by the court. I do not need to go into the merits of those issues. It suffices to state from the pleadings, whether the issues are or are not triable issues in the

sense of the law. I find that the defence also raises triable issues and I sustain it.

8. The upshot is that the notice of motion dated 22nd March 2018 is without merit and is hereby dismissed. Each party to bear their own costs.

DATED, SIGNED and DELIVERED at MOMBASA this 16th day of January, 2019.

C. YANO

JUDGE

In the presence of

Ms. Wambani for Plaintiff

No appearance for Defendants

Yumna Court Clerk.

C.K. YANO

JUDGE

15/1/19