



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 871 OF 2017**

**(Formerly Nairobi Milimani ELC Case No. 118 of 2016)**

**MAISON NENE RORUA.....PLAINTIFF**

**VERSUS**

**NOAH MURESI KURRARU**

**T/A MWAMBA PROPERTIES AGENCIES.....DEFENDANT**

**AND**

**JEPKEMOI KOSGEI & OTHERS.....1<sup>ST</sup> INTERESTED PARTY**

**TRANSNATIONAL BANK LTD.....2<sup>ND</sup> INTERESTED PARTY**

**LUMUMBA PATRICK.....3<sup>RD</sup> INTERESTED PARTY**

**LAND REGISTRAR, KAJIADO COUNTY..4<sup>TH</sup> INTERESTED PARTY**

**RULING**

What is before Court for determination is the 2<sup>nd</sup> Interested Party's Notice of Motion dated the 24<sup>th</sup> April, 2018 brought pursuant to Order 2 Rule 15(1) (a), Order 1 Rule 15 – 22 and Order 51 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicant seeks for the Plaintiff's suit against it to be struck out with costs. The main ground for the application is that the Plaintiff is not seeking any relief against it and as such the subsistence of the suit amounts to an abuse of the court process.

The application is supported by the affidavit of FRED RUTTO who is the 2<sup>nd</sup> Interested Party's Credit Officer where he deposes that the Plaintiff commenced this suit by way of a Plaint on 12<sup>th</sup> February, 2016 and could only enjoin the 2<sup>nd</sup> Interested Party as a Defendant.

The Plaintiff **MAISON NENE RORUA** opposed the application and filed a replying affidavit where she explained that she is the registered proprietor of land parcel number KAJIADO/ LOODARIAK/ 697 (hereinafter referred to as the 'suit land') that was illegally, wrongfully and irregularly transferred to the Defendant, who subsequently subdivided it without her consent. She avers that the 2<sup>nd</sup> Interested Party has a direct and adverse interest on one of the resultant subdivisions KAJIADO/ LOODARIAK/ 3050 that was charged to it. She insists the 2<sup>nd</sup> Defendant was joined as an interested party as it has a direct interest or stake in this suit and will be directly affected by the Court's decision. She avers that one of the prayers in the Plaint, seeks for an order to revoke the Certificate of Titles for all parcels of land formally known as KAJIADO/ LOODARIAK/ 697. She reiterates that the suit discloses a reasonable cause of action against the Defendant including the Interested Parties and the 2<sup>nd</sup> Interested Party is legally as well as rightfully enjoined in this suit.

The 2<sup>nd</sup> Interested Party filed its submissions that I have considered.

**Analysis and Determination**

Upon consideration of the Notice of Motion dated the 24<sup>th</sup> April, 2018 including the supporting and replying affidavits as well as the 2<sup>nd</sup> Interested Party's submissions, the only issue for determination is whether the Plaintiff's suit against the 2<sup>nd</sup> Interested Party should be struck out with costs.

The Plaintiff claims to be the registered proprietor of the suit land that was fraudulently and irregularly registered in the name of the Defendant who later subdivided it. The 2<sup>nd</sup> Interested Party contends that the Plaintiff has not disclosed a reasonable cause of action against it. As per the Green Cards furnished by the Plaintiff, I note land parcel number KAJIADO/LOODARIAK/ 3050 which was Charged to the 2<sup>nd</sup> Interested Party is actually a resultant subdivision from the suit land.

Order 2 rule 15 of the Civil Procedure Rules provides as follows:

*‘(1) 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*

The Court of Appeal in the case of **RAMJI MEGJI GUDKA LTD –Vs- ALFRED MORFAT OMUNDI MICHIRA & 2 OTHERS** [2005] eKLR held as follows:

**“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said:-**

**“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”**

**In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham.”**

In the current scenario, I note the Plaintiff has alleged fraud on the part of the Defendant who subdivided the suit land. It is clear from the Plaintiff that one of the resultant subdivisions KAJIADO/ LOODARIAK/3050 is actually Charged to the 2<sup>nd</sup> Interested Party. These are triable issues which cannot be dispensed with at an application stage but can only be determined once viva voce evidence is adduced. I concur with the Plaintiff that the 2<sup>nd</sup> Interested Party has an adverse interest in this suit, and will be affected by any orders made.

In relying on the above Court of Appeal decision, I find that it would be pertinent if the suit was set down for hearing on its merits to enable the court make a final determination of the dispute at hand.

In the circumstances, I will disallow the 2<sup>nd</sup> Interested Party’s Application dated the 24<sup>th</sup> April, 2018 to strike out the Plaintiff and direct that the parties do comply with Order 11 within the next 30 days from the date hereof and set the suit down for hearing.

Costs will be in the cause.

**Dated signed and delivered in open court at Kajiado this 3<sup>rd</sup> day of April, 2019**

**CHRISTINE OCHIENG**

**JUDGE**