



**REPUBLIC OF KENYA**

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

**CASE No. 301 OF 2015**

**SAMUEL MUNGAI KAMAU..... PLAINTIFF**

**VERSUS**

**ESTHER MUTHONI GITAHL..... DEFENDANT**

**RULING**

1. Proceedings herein commenced through plaint dated 19<sup>th</sup> October 2015 in which the plaintiff averred that he is the owner of plot number 495 situated in Industrial Area in Naivasha Town and that the defendant had encroached into the said plot and was developing a portion thereof. He therefore seeks judgment for orders that parties engage a joint surveyor to point out the boundary beacons of the suit property and that in default of the defendant complying or failing to co-operate the plaintiff be at liberty to engage a surveyor to erect the boundary beacons and further that in such event the defendant be permanently restrained from interfering with beacons once erected.

2. By Notice of Motion dated 23<sup>rd</sup> July 2018 and brought under Order 2 Rule 15 of the Civil Procedure Rules, the defendant seeks an order that this suit be struck out. The application is supported by an affidavit sworn by the defendant. The plaintiff opposed the application through a replying affidavit sworn by himself. The application was canvassed through written submissions. I have considered the application, the affidavits filed and the written submissions.

3. The defendant seeks striking out of the suit under Order 2 Rule 15 of the Civil Procedure Rules. The rule provides:

**15. (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**

**(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.**

**(2) No evidence shall be admissible on an application under sub rule (1) (a) but the application shall state concisely the grounds on which it is made.**

**(3) So far as applicable this rule shall apply to an originating summons and a petition.**

4. From the onset, I remind myself that striking out is a draconian remedy which should be ordered in plain cases. As recently as on 22<sup>nd</sup> March, 2019, the Court of Appeal stated as follows in **Uchumi Supermarkets Limited & another v Sidhi Investments Limited [2019] eKLR**:

***The striking out of a pleading, has time and time again been described as draconian and an order of last resort. A court will therefore only resort to it, in its discretion, where it has properly addressed itself on the principles enumerated under Order VI Rule 13(1) (b) and (d) of the Civil Procedure Rules (now repealed), and is satisfied, upon assessment of the material before it that any of the grounds enumerated exists or do not exist....***

**Order VI rule 13 of the repealed Civil Procedure Rules has been interpreted in various cases. In *Co-Operative Merchant Bank Ltd. Vs. George Fredrick Wekesa Civil Appeal No. 54 of 1999* the Court summarized the principles as follows:-**

***“...Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact....A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment.”***

***As stated in the case of Trust Bank Limited v Amin Company Ltd & Another (2000) KLR 164, a pleading or an action is frivolous when it is without substance or is groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble or expenses. In addition, an action should not be treated as an abuse of the process of the court unless it is plain beyond a peradventure at the interlocutory stage that the action cannot succeed. ...***

5. The principles applicable are thus abundantly clear. The plaintiff herein contends that on 30<sup>th</sup> November 2010, the Ministry of Roads compulsorily acquired a portion of the suit property and that the plaintiff's rights in respect of the suit property were thus extinguished. That the plaintiff cannot therefore sustain any claim in respect thereof since the suit property no longer exists. That this suit should therefore be struck out for being baseless, frivolous, vexatious and an abuse of the legal process.

6. The plaintiff maintains that the application is in fact an abuse of court process considering that according to the defendant, the alleged compulsory acquisition was in respect of only a portion of the suit property.

7. The sole reason why the defendant seeks striking out is that since according to her the suit property no longer exists owing to compulsory acquisition, the suit is therefore baseless, frivolous, vexatious and an abuse of the legal process. Yet the defendant herself acknowledges that the compulsory acquisition was only in respect of a portion of the suit property. Even assuming that it is indeed true that there was compulsory acquisition, a portion of the suit property would still remain and thereby forming a basis for the plaintiff to urge his case. In these circumstances, the plaintiff's case cannot be plainly hopeless and bereft of any chance of success or incurable by amendment.

8. I do not find any merit in Notice of Motion dated 23<sup>rd</sup> July 2018. It is dismissed with costs to the plaintiff.

**Dated, signed and delivered in open court at Nakuru this 19<sup>th</sup> day of June 2019.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

No appearance for the defendant/ applicant

Ms Wanuma holding brief for Mr Nzavi for the plaintiff /respondent

Court Assistants: Beatrice & Lotkomoi