



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 950 OF 2014**

**KUKAM LIMITED.....PLAINTIFF**

**=VERSUS=**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST DEFENDANT**

**NATIONAL LAND COMMISSION.....2ND DEFENDANT**

**THE ATTORNEY GENERAL.....3RD DEFENDANT**

**RULING**

1. On 18/7/2014, the plaintiff in this suit, Kukam Limited, brought a plaint dated 18/7/2014 in which it contended that it was the lawful registered proprietor of Land Title Number Nairobi/Block 72/3081, having been allocated the said parcel of land by the Government of Kenya in 2003. It added that, upon being issued with a lease in respect of the suit property, it subdivided the land and commenced development of 37 four- bedroom dwelling units on the land. It sold 26 units to third party purchasers. Subsequently, on 20/7/2013, agents of the 1st and 3rd defendants demolished the houses. Consequently, the plaintiff sought the following verbatim orders against the defendants:

***i. A declaration that the defendants' act of demolishing the plaintiff's houses at the plaintiff's property known as NAIROBI BLOCK 72/3081 Unit 1 to 37 was unlawful and illegal and in breach of the plaintiff's constitutional right to own property.***

***ii. An order that the plaintiff be compensated by the defendants in the sum of Kshs 566,934,700/- being the value of the completed 26 units of houses and the value of the 11 units which were under construction.***

***iii. An order that the plaintiff be compensated by the 2nd defendant in sum of Kshs. 282,740,000/- being the value of the 37 parcels of land in the alternative 2nd defendant allocates the plaintiff another parcel of land of the same acreage and value within Nairobi (sic).***

***iv. General damages for trespass, nuisance and loss of business***

***v. Punitive and exemplary damages of Kshs.500,000,000/-***

***vi. Any other relief and orders the court may deem fit to grant***

***vii. Costs of the suit***

***viii. Interest***

2. In its defence dated 17/8/2015, the 1st defendant denied liability and stated that its statutory mandate included construction, upgrading, rehabilitation and maintenance of Class A, B and C roads, and management and protection of road reserves. It added that the subject structures were erected on a road reserve. It further contended that the Commissioner of Lands and the plaintiff did not follow the law in procuring titles for the said land hence the allocation of the road reserve to the plaintiff was illegal. It further stated that the Minister for Roads, Public Works and Housing, vide Gazette Notice Number 3632, duly issued notice to all persons, including the plaintiff, to remove illegal structures from the road reserve, hence the demolition was lawful.

3. The court file did not bear any defence by the 2nd and 3rd defendants at the time of preparing this ruling.

4. On 29/8/2017, the 1st defendant brought a notice of motion dated 25/8/2017 seeking an order striking out the plaintiff's suit on the principal ground that the National Land Commission (2nd defendant) had subsequent to the filing of this suit reviewed the plaintiff's title and had made a determination to the effect that the plaintiff's title related to a public utility land and that the public utility land was illegally allocated to the plaintiff and the title thereto ought to be revoked. It was the 1st defendant's case that in the circumstances, the substratum of the plaintiff's suit no longer existed and there was no basis for maintaining the suit against the 1st defendant. The application was supported by an affidavit sworn on 25/8/2017 by Milcah Muendo, the 1st defendant's in-house senior surveyor, in which she reiterated that the subject title related to a road reserve.

5. The plaintiff opposed the application through a replying affidavit sworn on 24/1/2019 by Rahab Karei Mukiyama, its Managing Director. She deposed that the 1st defendant demolished the plaintiff's property without any court order. She further stated that the road had since been constructed without any encroachment on the suit property. Ms Mukiyama further deposed that the reason given by the 2nd defendant in the Gazette Notice was that the land was reserved for Mombasa Road Slums Upgrading Programme while the 1st defendant's position was that the property was required for construction of a transport corridor. She added that whereas the demolition took place in 2013, the purported Gazette Notice by the 2nd defendant was published in 2017. The plaintiff's case was that the Gazette Notice which was published five years after the demolition did not exonerate the 1st defendant from liability. She contended that the Gazette Notice was an afterthought. She urged the court to dismiss the application.

6. The application was canvassed through written submissions. The applicant filed its submissions on 17/4/2019. It was submitted that, pursuant to its lawful powers in Sections (4) and 14(5) of the National Land Commission Act, the 2nd defendant made an unchallenged finding that the suit property was public utility land and directed the Chief Land Registrar to revoke the plaintiff's title to the land. It was further submitted that the 2nd defendant did not have the mandate to sit in review of its decision. Consequently, the second decision in which the 2nd defendant made on the subject matter was a nullity *ab initio*. Finally, it was submitted that the plaintiff's suit was scandalous, frivolous or vexatious and therefore, it should be dismissed. Reliance was placed on **Kivanga Estates Ltd v National Bank of Kenya Ltd [2017] eKLR**.

7. The plaintiff filed its submissions on 19/3/2019. It was submitted that the 1st defendant had not demonstrated why the suit should be struck out. It was argued that what had been produced before court were unsupported statements and allegations. It was further submitted that the 2nd defendant directed the 1st defendant to compensate the plaintiff for the demolished structures and improvements. It was added that the 1st defendant's actions of demolishing the plaintiff's property without a court order was unlawful and therefore, it should be held liable. Reliance was placed on **Fina Bank Ltd v Spares and Industries Ltd (2000) 1 EA 52**. The plaintiff further submitted that the reasons for demolition by the 1st defendant and 2nd defendants were contradictory in that whereas the 1st defendant asserted that the revocation of the plaintiff's title was necessary because the suit property had been set aside for the purpose of a transport corridor, the 2nd defendant in their notice stated that the land was intended for Mombasa Road Slums Upgrading Programme. Finally, it was submitted that the application was incompetent and a waste of the court's time.

8. I have considered the application together with the rival affidavits and submissions. I have also considered the relevant legal framework and jurisprudence on the subject of striking out of suits. The 1st defendant seeks an order striking out the plaintiff's suit as against the 1st defendant. Two key issues fall for determination. The first 2nd issue is whether the plaintiff's suit is devoid of any triable issue against the 1st defendant. The second issue is whether the 2nd defendant's determination made in 2017 fully absolves the 1st defendant from the transgressions which the plaintiff alleges were committed by the 1st defendant in 2013.

9. Before I make my brief pronouncements on the above two issues, I will briefly outline the principle upon which our courts exercise jurisdiction to strike out suits. It is settled law that striking out a suit is a draconian jurisdiction which should be exercised cautiously in cases that are plainly hopeless. This guiding principle was emphasized by the Court of Appeal in the case of **D.T. Dobie & Company (Kenya) Ltd v Joseph Mbaria Muchina and another** in which **Madan JA** stated thus:

*“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 weak 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 amendments, 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.”*

10. The above criteria has withstood the test of time and remains the guiding principle whenever Kenya's out courts are invited to invoke the draconian jurisdiction to strike out a suit.

11. The first issue is whether the plaintiff's suit is devoid of any triable issue as against the 1st defendant. I have carefully looked at the substantive pleadings in this suit. The case of the plaintiff is that it held and still holds title to the suit property, duly issued by the Government of Kenya. It contends that in 2013, the 1st and 3rd defendants, without prior notice to the plaintiff, descended on the suit property and demolished the plaintiff's developments thereon. It seeks, *inter alia*, compensation in the sum of Kshs 566,934,700, being the value of the demolished properties. The 1st defendant denies liability and contends that the demolished properties were erected on a road reserve. It further contends that allocation of the suit property to the plaintiff was irregular. It adds that prior notice was duly served by the Minister responsible for roads.

12. It is therefore apparent from the pleadings before me that several triable issues fall for interrogation and determination at a full hearing. One of the issues to be interrogated and determined is whether the allocation of the suit property to the plaintiff was irregular. Another issue is whether the impugned developments were erected on a road reserve. A third issue to be determined is whether the parties who undertook the demolition were obligated to issue prior notice to the plaintiff and if so, whether prior notice was issued. These are just but some of the issues which, in my view, will fall for determination at the substantive hearing of this suit. It is therefore my finding that the pleadings before court disclose triable issues as between the plaintiff and all the defendants herein.

13. The second issue is whether the determination made by the 2nd defendant in 2017 fully absolves the 1st defendant from liability. The 2nd defendant made its determination during the pendency of this suit. There is no gain-saying that the 2nd defendant is not a court of law. Its

determinations are subject to challenge in a court of law. In the application under consideration, the 2nd defendant made the subject determination in 2017 whereas the cause of action in this suit is alleged to have arisen in 2013. In my view, the court would be acting irrationally if it were to find at this stage, without affording the parties a full hearing, that one of the parties whom the plaintiff sued has during the pendency of the suit ignored the doctrine of subjudice and has legitimately made a determination which disposes the plaintiff's claim against the 1st defendant to the detriment of the plaintiff. In my view, the 2nd defendant's determination of 2017 does not fully resolve the issues in this suit and does not absolve the 1st defendant from liability.

**14.** In light of the above findings, the plea for an order striking out the suit against the 1st defendant cannot be allowed. The plaintiff will be allowed to have its day in court and the defendants will be accorded the opportunity to controvert the plaintiff's evidence. Consequently, the 1st defendant's notice of motion dated 25/8/2017 is declined. Costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF SEPTEMBER 2019.**

**B M EBOSO**

**JUDGE**

**In the presence of:-**

Mr Obok advocate for the 1st defendant

Court Clerk - June Nafula