



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 3 OF 2015**

SOLOMON KIPCHOKE KIPSISEL.....1<sup>ST</sup> PLAINTIFF

ALEX PAUL KIPSISEL.....2<sup>ND</sup> PLAINTIFF

**VERSUS**

LAKE VICTORIA NORTH WATER SERVICES BOARD...1<sup>ST</sup> DEFENDANT

NDIWA K. CHEMARUYM.....2<sup>ND</sup> DEFENDANT

CHARLES BARASA BERA.....3<sup>RD</sup> DEFENDANT

COUNTY GOVERNMENT OF BUNGOMA.....4<sup>TH</sup> DEFENDANT

**RULING**

In **D.T DOBIE & COMPANY (KENYA) LTD V MUCHINA 1982 K.L.R 1**, the late **MADAN JA** (as he then was) said the following about the Court's power to strike out a pleading: -

***“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.”***

The late Judge added that: -

***“A Court of justice should aim at a sustaining a suit rather than terminating it by summary dismissal. Normally, a suit is for pursuing it.”***

The Judge then concluded as follows: -

***“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 amendment, 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.”*** Emphasis added

In **CRESCENT CONSTRUCTION CO. LTD .V. DELPHIS BANK LTD 2007 eKLR**, the Court of Appeal stated as follows on the same issue: -

***“However, one thing remains clear, and that is the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the Court must not drive away any litigant however weak his case may be from the seat of justice. This is a time honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”***  
Emphasis added

Finally, in **FREMAR CONSTRUCTION COMPANY LTD .V. MINAKASH N. SHAH C.A CIVIL APPEAL NO 85 OF 2002 NBI** the Court of Appeal held that: -

*“This Court has stated many times before, and the learned Judge of the superior Court was conscious of it, that striking out a pleading is a drastic remedy and the powers of the Court are to be exercised with great caution and only in clear cases. But the power is clearly donated in the rules and exists inherently for the Court in the interest of justice, to reject manifestly frivolous and vexatious pleadings or suits and to protect itself from abuse of its process.”*

The Court went on to add that: -

*“Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined by oral evidence in open Court. Unless a trial is on discernible issues, it would be farcial to waste judicial time on it.”*

Order 2 Rule 15(1)(a) of the Civil Procedure Rules provides that: -

*“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.”*

I shall be guided by the above legal precedents and the applicable law in determining the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants’ Notice of Motion dated 24<sup>th</sup> January 2019 and which seeks the main prayer that the suit against them be struck out for want of any cause of action.

By an amended plaint dated 20<sup>th</sup> March, 2018 the plaintiffs sought against the four (4) defendants herein Judgment as follows as per paragraph 7A: -

*“The plaintiffs claim thus is for a permanent order of injunction restraining the defendants by themselves, their agents, workers and/or servants from entering, invading, constructing or interfering in any manner with the land title number ELGON/KAPSOKWONY/35 and such order be issued to the land Registrar to cancel any new title and/or cancel any planned registration of title NO ELGON/KAPSOKWONY/425 and stop any further processing of any new land titles and stop any further transfer and issuance any new titles.”*

The plaintiffs filed this suit as the registered proprietors of the land parcel NO ELGON/KAPSOKWONY/35 (herein the suit land) and the basis of their claims against the defendants is not necessary for purposes of this ruling. What is important is the averments made against each of the defendants herein. In paragraphs 6B and 6C of the amended plaint, the plaintiffs have pleaded that the 1<sup>st</sup> and 4<sup>th</sup> defendants are unlawfully utilizing the suit land. However, although the order of injunction in paragraph 7A of the amended plaint is sought against all the four (4) defendants herein, no allegations are levelled against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants in the body of the said plaint.

That prompted the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants to move this Court by their Notice of Motion aforesaid and which is supported by the affidavit of **BONIFACE MULAMA** the 1<sup>st</sup> defendant’s legal officer in which he has deponed, inter alia, that the dispute with regard to the suit land is only between the plaintiff and the 4<sup>th</sup> defendant and that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have been wrongly enjoined and their names should be struck out because an agent cannot be sued where the principal is disclosed that being the 4<sup>th</sup> defendant.

The application is opposed and the plaintiffs filed grounds of opposition and a replying affidavit in which they contend, inter alia, that the amended plaint discloses a suit against all the defendants and that this application is infact time barred. Further, that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants have not filed any defence since 2015.

The application has been canvassed by way of written submission which have been filed by the plaintiffs in person and by **MR AKANGO** instructed by the firm of **B. O. AKANGO ADVOCATES** for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

I have considered the application, the replying affidavit and grounds of opposition as well as the submissions by counsel and the plaintiffs.

It is clear from the precedents cited above that while this Court has the powers, indeed the duty in law to strike out pleadings, that power must be invoked with the greatest care and caution and only in clear cases. In determining whether or not a pleading discloses a cause of action or is otherwise frivolous and vexatious, the Court cannot go beyond the parties’ own pleadings. Other than paragraphs 3A and 4A which describes the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, there is no mention in the amended plaint of how, if at all, the said 2<sup>nd</sup> and 3<sup>rd</sup> defendants have interfered with the suit land to warrant the orders of permanent injunction being issued against them as sought by the plaintiffs. In the absence of a specific pleading addressed against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants describing their transgressions upon the suit land, the case against them, as was held in the case of **CRESCENT CONSTRUCTION CO LTD** (supra), *“is a non – starter”*. Although the plaintiffs have in their grounds of opposition argued that the application is time barred, the law does not provide for any time within which such an application must be filed. Indeed **Order 2 Rule 15(1) of the Civil Procedure Rules** states that the Court may order the striking out of any pleading *“At any stage of the proceedings ……”*

It is clear from the above that the suit as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants does not disclose any cause of action as no allegations have been levelled against them with respect to the suit land yet orders are being sought against them. They cannot possibly defend themselves against claims which are not specified. I notice from the record that although the 3<sup>rd</sup> defendant has filed a defence, the 2<sup>nd</sup> defendant has not done so. Given the paucity of the plaintiffs’ pleadings, it is not surprising that the 2<sup>nd</sup> defendant has filed no defence and that also explains why the 3<sup>rd</sup> defendant’s defence is a mere denial. There were really no allegations that he could have traversed in the circumstances. The suit against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants must be struck out which I hereby do.

As regards the suit against the 1<sup>st</sup> defendant, I am not satisfied that it is a clear and plain case for striking out. While the plaintiffs' pleadings may not be elegantly drafted, it is clear from paragraph 6C of the amended plaint that the case against it is that it has constructed a dam on the plaintiffs' land and also created another parcel of land being parcel **NO ELGON KAPSOKWONY/425** from the suit land. A reasonable cause of action is disclosed from those pleadings and the suit as against the 1<sup>st</sup> defendant is not for striking out.

Ultimately therefore and having considered the Notice of Motion dated 24<sup>th</sup> January 2019, I make the following orders: -

- 1. The suit as against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants is struck out.**
- 2. The 3<sup>rd</sup> defendant shall have costs.**
- 3. The suit as against the 1<sup>st</sup> defendant shall proceed to trial with costs being in the cause.**

**Boaz N. Olao.**

**J U D G E**

**21<sup>st</sup> November 2019.**

**Ruling dated, delivered and signed in Open Court this 21<sup>st</sup> day of November 2019 at Bungoma.**

1<sup>st</sup> plaintiff – present

2<sup>nd</sup> plaintiff – present

Respondents absent

**Boaz N. Olao.**

**J U D G E**

**21<sup>st</sup> November 2019.**