



**REPUBLIC OF KENYA**  
**IN THE ENVIROMENT AND LAND COURT**

**AT MIGORI**

**ELC CASE NO. 237 OF 2017**

**(FORMELY KISII ELC NO. 149 OF 2016)**

**JANE AROKO OGUMA**

**DORRIS AOKO OGUMA**

**MONICA ANYANGO OGUMA.....PLAINTIFFS/RESPONDENTS**

**SIMON ODHIAMBO OGUMA**

**ISAAC ONYANGO OGUMA**

**NICHOLAS OTIENO OGUMA**

**VERSUS**

**DOMNIC ODHIAMBO OYIEKE.....DEFENDANT/ APPLICANT**

**RULING**

1. An application by way of a Notice of Motion dated 13<sup>th</sup> June, 2017 (hereinafter referred to as the application) by the defendant/applicant namely Dominic Odhiambo was brought under Order 8 rule 6 and Order 51 rule 1 of the Civil Procedure Act and Rules 2010 and any other or further provisions of the law. He is seeking against the Plaintiffs/respondents, the following orders:-

**a. That the originating summons dated 25<sup>th</sup> May 2016 be struck out as no cause of action is disclosed against the respondent in the originating summons by the applicants therein and the pleadings in the originating summons are otherwise an abuse of the process of this Hon. Court in law and fact.**

**b. That cost of this application be borne by the applicants in the originating summons.**

2. The defendant/applicant is represented by learned counsel, Mr. Roch Odhiambo. The Plaintiffs/respondents are represented by learned counsel, Mr Omonde Kiseru.

3. The application is anchored on the grounds on the face of application. The grounds include:

**i. That the order dated 30/11/2016 giving the respondents leave to amend and serve their originating summons within 14 days having ceased to have effect the position of the pleadings revert to the originating summons dated 25/6/2016 and replying affidavit dated 28/6/2016.**

**ii. That all the prayers sought by the applicants in the originating summons are untenable in law and fact as the same are based on non-existent parcels of land i.e. SUNA EAST/WASWETA 1/20136 & 20137.**

4. The application is further premised on a supporting affidavit sworn on 13<sup>th</sup> June, 2017 by the defendant/applicant. Accompanying the affidavit are documents marked as follows;

a. DOO EXT1 (court proceedings herein),

- b. DOO EXT2A (record/green card in respect of L.R No. Suna East/Wasweta 1/20136),
- c. DOO EXT2B (record/green card in respect of L.R No.Suna East/Wasweta 1/ 2037) and
- d. DOO EXT3 (Record/green card in respect of L.R No. Suna East/Wasweta 1/ 16905).

5. By a replying affidavit of 14 paragraphs filed on 18<sup>th</sup> September, 2017 by counsel for the plaintiff/respondent, the application is opposed. Counsel annexed to the replying affidavit, record/green cards for LR Numbers Suna East/Wasweta I/21501 to 21507 and 22043 to 22046 and letters dated 7/12/16 and 20/06/2017.

6. Learned counsel for defendant/applicant filed submissions dated 15/11/2017 in which he submitted that court order of 30/11/16 has not been complied with and confirmed that a replying affidavit and an amended Originating Summons were filed and served in court on 18/9/17 and 6/11/17. Counsel gave the background of the matter and that there was no evidence of purchase, adverse possession and fraud as alleged by the plaintiff/respondents. He then urged the court to allow the application with costs of the same and any other pending applications to the defendant/applicant.

7. Learned counsel for the plaintiffs/respondents filed no submissions yet on 6<sup>th</sup> November, 2016, the court ordered the defendant/applicant's counsel to serve him with written submissions. Indeed counsel for the plaintiff/respondents was duly served with submissions further to the court order as proved by an affidavit of service sworn on 16<sup>th</sup> December, 2017 by Vitalis Onyango Akuku, a duly licenced process server.

8. I note that on one hand, in a Notice of Motion dated 29<sup>th</sup> September, 2016, the defendant/applicant sought to strike out Originating Summons dated 25<sup>th</sup> May, 2016 with costs. On the other hand, the plaintiffs/respondents' counsel sought to amend the Originating summons by a Notice of Motion dated 26<sup>th</sup> October, 2016. The plaintiff/respondent's counsel filed grounds of opposition dated 19<sup>th</sup> October, 2016 together with the 1<sup>st</sup> plaintiff/respondent's replying affidavit sworn on 19<sup>th</sup> October, 2016 to the defendant's/applicant's notice of motion. On 30<sup>th</sup> November, 2016, J M Mutungi, J sitting at Kisii Environment and Land court dismissed with costs the notice of motion filed by the defendant/applicant. He allowed the plaintiffs/respondents' counsel to file and serve the amended Originating Summons within 14 days from that date and the defendant's/applicant's counsel to file and serve an amended response thereto within 14 days of being served .

9. I consider the application, the supporting affidavit, the replying affidavit and the accompanying documents duly filed herein. I also take into account the written submissions by the counsel for the defendant/applicant. The issues for determination at this stage are;

- a. the originating summons dated 25<sup>th</sup> May, 2015 discloses no cause of action hence it be strike out
- b. who is to bear costs of the application?

10. Counsel for the defendant/applicant contended that the Originating Summons disclosed no cause of action. What is cause of action? Simply put, it is the right violated and the attached liability. In **Auto Garage-VS-Motorkov (No. 3) (1971) EA at 519, Spry V-P**, remarked;

***“ In addition, of course, the plaintiff must appear as a person aggrieved by the violation of the right and the defendant as a person who is liable.”***

11. Is there a requirement of proof of an allegation in a pleading at this stage of the suit? The requirement would only arise at full hearing of the suit. In **Nyagah=vs=Nyamu and Anor (1976-80) 1 KLR 89 at 92**, it was held, that;

***“ In dealing with a submission of no cause of action, it is trite law that only a plaint is to be looked at.....: the matter of proof arises at the hearing.....”***

12. An amended Originating Summons dated 18<sup>th</sup> September, 2017 introduced new issues, 2<sup>nd</sup> to 9<sup>th</sup> Defendants and new title numbers as per paragraphs **1A, 1B and 1C**. It, further, introduced issues which call for determination on their merits as shown on the paragraphs hereunder:-

- a. **1D-** On the current registered owners of each of the titles in 1C hold the same lawfully and whether the same were registered in their names fraudulently,
- b. **1E-** In respect of fraudulent creation of numerous titles to defeat the lawful and equitable rights of the plaintiff over the same,
- c. **2A-**With regard to an order that the plaintiff be registered as the proprietor of the title numbers and
- d. **4A-**On the Deputy Registrar and or the Executive Officer to execute the transfer documents in the names of the plaintiffs.

13. I note from the court record of 30<sup>th</sup> November, 2016 that a party ought to be given a fair hearing. I concur with Mutungi, J in his observation that;

***“.....The court will always be slow to strike out a suit unless it is demonstrated that the suit is so hopeless that even an amendment cannot cure it. See the case of DT.Dobie Ltd Vs. Muchina. The rationable is that a party ought not to be shut out***

*from the seat of justice. Let him have his day in court.....*” (emphasis added)

14. Has the court order of 30<sup>th</sup> November, 2016 lapsed? **Order 8 rules 3, 4 and 5** of the **Civil Procedure Rules, 2010** provide for amendment of pleading with leave, amendment of Originating Summons and general power to amend respectively. As ordered by the court, the plaintiff/respondent has amended and served his amended originating summons on the defendant’s/applicant’s counsel who confirmed accordingly. The court can’t ignore any pleading on a technicality in this matter.

15. Under **Section 19 (1) of the ELC Act, 2015 (2011)**, this application is one of such cases where this court is mandated to act expeditiously, without undue regard to technicalities of procedure, if any, in the pleadings including the amended originating Summons and service of the same. The section reinforces the principles that guide this court under **Article 159 (2) (d) of the Constitution of Kenya, 2010**. Moreover, In the case of **Obado-vs-Oyugi and 2 others Civil Application No. 7 of 2014-SCK (2014) eKLR**, it was held, inter alia:

*“ . . . . .Indeed this court has had occasion to remind litigants that article 159 (2) (d) of the Constitution is not a panacea for all procedural short falls. All that the courts are obliged to do is to be guided by the principle that ‘justice is to be administered without undue regard to technicalities.’ It is plain to us that article 159 (2) (d) is applicable on a case-by-case basis; Raila Odinga and 5 others-vs-IEBC and 3 others; Petition No. 5 of 2013, 92013) eKLR...”* (emphasis provided)

16. The Originating Summons has been amended and served. The issues raised therein call for proof at the hearing of the suit as judicially recognized in **Nyagah case** (supra). Apparently the matter is not desperate or hopeless. I am reluctant to strike out the Originating Summons for want of cause of action. The amended originating summons cries for hearing on it’s merits.

17. I find that application is not merited.

18. A fortiori, I order as hereunder;-

- a. The application dated 13<sup>th</sup> June, 2017 by the Defendant/Applicant be and is hereby disallowed**
- b. Costs of the application shall be in the cause**
- c. The orders of this court issued on 30<sup>th</sup> November, 2016 for filing and service of amended pleadings be and are hereby extended until the mention date.**
- d. Mention on 15<sup>th</sup> March, 2018 for directions**
- e. The Plaintiff/respondent’s counsel to serve the Defendant’s/Applicant’s counsel accordingly.**

**Dated, signed and delivered at Migori this 29<sup>th</sup> day of January, 2018.**

**G M A ONGONDO**

**JUDGE**

In the presence of;

Mr Kisia counsel holding brief for Kisera counsel for the

Plaintiff/Respondent

Tom Maurice-court assistant.

**G M A ONGONDO**

**JUDGE**