



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE NO. 7 OF 2013

(FORMERLY HCC 262 OF 2009)

BRENDA KENJURI MIMANYIPLAINTIFF

VERSUS

KARANJA KAMAU.....DEFENDANT

Ruling

1. By Notice of Motion dated 14th March 2011, the plaintiff seeks the following orders:

- 1. That the defendant's written statement of defence filed herein be struck out.***
- 2. That in the result, judgment be entered in favour of the plaintiff as prayed in the plaint.***
- 3. That costs of the suit and of the application be awarded to the plaintiff.***

2. The application is stated on its face as being brought under order 2 rule 15 (b), (c) and (d) of the Civil Procedure Rules, 2010. I suppose what is meant is Order 2 rule 15(1) (b) (c) and (d). It is supported by an affidavit sworn by the plaintiff. She deposed that the defence herein is a mere denial which does not disclose any reasonable cause of action or defence in law. She further deposed that she is the registered proprietor of Nakuru Municipality Block 1/141 (Langalanga) (the suit property) having purchased it at an auction sale.

3. The defendant opposed the application through his replying affidavit sworn on 16th May 2012. He does not deny that the plaintiff is the current registered proprietor of the suit property. He however contends that the sale that led to the plaintiff being the registered owner was unlawful and illegal. He has therefore filed Nakuru HCCC No. 343 of 2008 in which he seeks cancellation of the sale. He intends to seek a consolidation of HCCC No. 343 of 2008 and this suit. Accordingly, he urged the court to dismiss the application.

4. The plaintiff filed written submissions in respect of the application on 4th February 2015. Counsel for the defendant did not file any submissions. He relied entirely on the replying affidavit.

5. I have considered the application, the affidavits filed and the submissions. The application seeks striking out of the defence herein for being a mere denial which discloses no defence.

6. In the plaint filed herein, the plaintiff avers that she is the registered proprietor of the suit property having purchased it at an auction sale on 22nd October 2008. She became registered proprietor on 4th August 2009. The defendant has however refused to code possession to the plaintiff and has further refused to allow the plaintiff access or even to allow the plaintiff to collect rent from tenants. It is acknowledged in the plaint that there is another suit being Nakuru HCCC No. 343 of 2008 between the defendant and Co-operative Bank which is pending. The plaintiff therefore seeks judgment against the defendant for:

a. A declaration that she is the lawfully registered proprietor of the leasehold interest contained in LR No. Nakuru Municipality Block 1/141 (Langalanga) together with all the improvement and development thereon.

b. An order of permanent injunction restraining the defendant either by himself, servants and/or agents or anyone claiming under him howsoever, from collecting rent, interfering or in any dealing with LR No. Nakuru Municipality Block 1/141 (Langalanga).

c. An order of eviction of the defendant, his servants, agents and or anybody claiming any interest under him.

d. Mesne profit from the 22nd October 2008 to date.

e. Costs and interest.

7. I have also perused the defence filed by the defendant herein, I note that it refers to Nakuru HCCC No. 343 of 2008 and further that it is averred therein that the sale to the plaintiff was unlawful, irregular and/or unprocedural as no statutory notice was issued.

8. The application is brought under Order 2 rule 15 (1) (b), (c) and (d) which 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—

.....

(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.

9. From the onset, I remind myself that striking out is a draconian remedy that should be resorted to sparingly. There are many authorities to that effect. Recently, in **Kivanga Estates Limited v National Bank of Kenya Limited [2017] eKLR** the Court of Appeal reiterated as follows:

... the remedy must be resorted to sparingly. It is only where a pleading cannot be salvaged by an amendment that the court will utilise this procedure, hence the use of the word “may”. Order 2 rule 15 which retains word for word Order VI rule 13 of the repealed Civil Procedure Rules has been construed over the years in a long line of cases, both by this Court and the courts below. For instance in Co-Operative Merchant Bank Ltd. vs George Fredrick Wekesa Civil Appeal No. 54 of 1999 the Court summarized the principles as follows:

“The power of the Court to strike out a pleading under Order 6 rule 13(1) (b) (c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong.....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.”

10. Can the defence herein be said to be plainly for striking out? I do not think so. The defendant avers that the auction sale was unlawful, irregular and or unprocedural. He already has in court another suit being **Nakuru HCCC No. 343 of 2008** in which he seeks cancellation of the auction sale. Those are weighty allegations which, even though they remain to be established at the trial, cannot be ignored at this stage. The defendant ought to have a chance to ventilate them. The plaintiff acknowledged the existence of **Nakuru HCCC No. 343 of 2008** in her pleadings. In other words, even while filing this suit in court, the plaintiff knew that there existed another case in court wherein the defendant herein is litigating with the chargee regarding the manner in which the statutory power of sale was exercised.

11. I find that this is not a proper case in which to exercise the power of striking out. In the circumstances, Notice of Motion dated 14th March 2011 is dismissed with costs to the defendant.

Dated, signed and delivered in open court at Nakuru this 20th day of March 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Mr. Kipkoech for the plaintiff/applicant

Mr. Ikua for the defendant/respondent

Court Assistants: Gichaba & Lotkomoi