



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 828 OF 2017**

**(Formerly Milimani ELC Case No. 234 of 2016)**

**FLORENCE SOILA NGOSSOR.....PLAINTIFF**

**VERSUS**

**RIKOYAN OLE KUKU.....1<sup>ST</sup> DEFENDANT**

**GEOFFREY NDUNGU GATHII.....2<sup>ND</sup> DEFENDANT**

**ROOTS INVESTMENTS COMPANY LIMITED.....3<sup>RD</sup> DEFENDANT**

**DCF ENGINEERING COMPANY LIMITED.....4<sup>TH</sup> DEFENDANT**

**JEFFERY ROBIN MEIN..... 5<sup>TH</sup> DEFENDANT**

**DESTERIO OYATSI..... 6<sup>TH</sup> DEFENDANT**

**KIRIINYA MUKIRA..... 7<sup>TH</sup> DEFENDANT**

**THE LAND REGISTRAR, KAJIADO COUNTY.....8<sup>TH</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL..... 9<sup>TH</sup> DEFENDANT**

**RULING**

The application before Court for determination is an amended Notice of Motion dated the 5<sup>th</sup> May, 2017, by the 6<sup>th</sup> Defendant, brought pursuant to Section 1B and Section 3A of the Civil Procedure Act, Order 10 rule 6 and Order 2 Rule 15 of the Civil Procedure Rules. The 6<sup>th</sup> Defendant seeks the following orders:

1. That the defences of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Counterclaim be struck out and Judgement be entered for the 6<sup>th</sup> Defendant as the Plaintiff in the Counter Claim on liability against the said Defendants jointly and severally.
2. That the claim against the 6<sup>th</sup> Defendant in the original suit be struck out or dismissed with costs.
3. That the Counter claim be set down for formal proof.

4. That the costs of this application be awarded to the 6<sup>th</sup> Defendant.

The application is premised on the following grounds, which in summary is that the original suit filed by the Plaintiff against the 6<sup>th</sup> Defendant is a hoax and a fraud. The Plaintiff's case against the 6<sup>th</sup> Defendant offends the statutory law on administration of justice and is based on false, perjured as well as fabricated evidence. The Plaintiff freely sold the property claimed in the original suit, land parcel number KAJIADO/KAPUTIEI NORTH/ 2966 to the 5<sup>th</sup> Defendant in 1993 and upon completion of the sale, the Plaintiff was paid and received the full purchase price. The Plaintiff has concealed the fact that she sold the aforementioned parcel of land to the 5<sup>th</sup> Defendant and the instant suit is an abuse of the court process by the Plaintiff, meant to assist her acquire property by making false claims that she is the owner of the property, and she was defrauded of the same, by among others, the 6<sup>th</sup> Defendant. The 2<sup>nd</sup> Defendant in the Counter claim, as officers of the Court, are in breach of their statutory duties under Section 1A and 1B of the Civil Procedure Act, and their legal duties to the 6<sup>th</sup> Defendant and are party or privy to the said fraudulent claim by drawing, including as well as allowing the Plaintiff in the original suit, as their client, to swear false affidavits, produce as well as rely on imperfect and false documents to advance her fraudulent claims. The allegations that the Plaintiff deposited the original title No. KAJIADO/KAPUTIEI NORTH / 2966 with Shapley Barret & Co. Advocates in 1993 when she obtained titles for the said subdivisions, and requested the said law firm to return to her the title in 2013 is entirely false and a fabrication. When confronted with the truth from the Counterclaim and Witness statements, the Plaintiff has resorted to the media and lied that the value of the land in dispute is Kshs. 500 million instead of Kshs. 500,000, which she admits herein. The actions and misconduct of the Plaintiff are in contempt of court. The Defences in the Counter claim are not sustainable and are an abuse of the Court process.

The application is supported by the affidavit of DESTERIO OYATSI who is the 6<sup>th</sup> Defendant herein and the Managing partner of messrs Shapley Barret & Co. Advocates. He avers that on 12<sup>th</sup> January, 2017, the 7<sup>th</sup> Defendant delivered to him material evidence crucial in the determination of the instant application. Further that there is a fraudulent scheme by the Plaintiff to acquire by fraudulent means ownership and possession of the suit property land title number KAJIADO/NORTH KAPUTIEI/2966 through this case, by misusing and abusing it. He claims the Plaintiff has now developed cold feet. He contends that the 7<sup>th</sup> Defendant purchased the suit land from the 5<sup>th</sup> Defendant who is now deceased but is described by the Plaintiff as alive; and that the 7<sup>th</sup> Defendant is well aware of how the 5<sup>th</sup> Defendant acquired it. He confirms that upon becoming aware of the present case through the press in the article referred to in his supporting affidavit, the 7<sup>th</sup> Defendant approached the 5<sup>th</sup> Defendant's advocate P.W. Kontos whom at the material time of the transaction was practising as a Partner in the firm of messrs Walker Kontos Advocates, who was able to trace the file concerning the sale transaction of the suit land between the Plaintiff as the seller and the 5<sup>th</sup> Defendant as purchaser. He states that upon receipt of documents relating to the transaction from the 7<sup>th</sup> Defendant, messrs Shapley Barret & Co. Advocates were able to retrieve their documents from the accounts department, relating to the said transaction, confirming Plaintiff indeed received respective cheques in payment. He reiterates that from the evidence produced, it clearly proves beyond any reasonable doubt that the Plaintiff freely sold the suit land to the 5<sup>th</sup> Defendant in 1993, with the 5<sup>th</sup> Defendant obtaining title in February, 1994. He reaffirms that based on the evidence, it is clear beyond reasonable doubt that the present claim by the Plaintiff is a fraudulent attempt by her, to recover ownership of the suit property in the false belief that all evidence concerning her lawful sale and transfer of the property to the 5<sup>th</sup> Defendant has been erased or could not be traced. Further, her claim coincides with the death of Mr. Mirabeau Da Gama Rose and Louis D'Souza of messrs Shapley Barret & Company Advocates who acted in the above transaction. He explains that the Plaintiff has been misusing various government agencies in the implementation of her fraud. These include the Lands Office where she provided false evidence on her lost title, with the Land Registrar publishing the same in the Gazette Notice dated the 15<sup>th</sup> March, 2013 intimating that the Plaintiff was the owner of the suit land and her title deed was lost. She also misled the Director of Public Prosecutions by lodging a complaint therein vide her letter dated the 28<sup>th</sup> January, 2014 as well as the CID which is evident from their letter dated the 2<sup>nd</sup> September, 2013 to the Land Registrar, Kajiado. He deposes that to execute her fraudulent scheme, the Plaintiff caused the said transfer which she freely signed to be photocopied on the

front page, in such a way that it erased the 6<sup>th</sup> Defendant's Advocates Stamp and cancelled the back page so as not to disclose the signature of the 5<sup>th</sup> Defendant as transferee, as well as the name of messrs Walker Kontos Advocates, that drew the transfer, in order to support her false claim that the transfer was drawn by the 6<sup>th</sup> Defendant.

The application is opposed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the Counterclaim who filed a replying affidavit sworn by LUCAS LEPERES NAIKUNI who is a Senior Partner in the 2<sup>nd</sup> Defendant's firm. He deposed that upon institution of the suit herein, the 6<sup>th</sup> Defendant in the main suit elected to file a counterclaim suing their client who is the Plaintiff/1<sup>st</sup> Defendant in the Counterclaim and the 2<sup>nd</sup> Defendant's law firm, alleging they failed to conduct independent investigations prior to joining him as a Defendant in the original suit, hence alleging they were acting without care and attention. He avers that they appointed the firm of messrs Mungao Rachier & Company Advocates to come on record for both the 1<sup>st</sup> and 2<sup>nd</sup> Defendants in the Counterclaim but could not file their Defence on time as the Court file could not be traced. Further that based on the failure to file and serve their respective Defences, the 6<sup>th</sup> Defendant/Applicant (Plaintiff in the Counterclaim) vide an application dated the 28<sup>th</sup> November, 2016 sought to have judgement entered as per the Counterclaim in default of their appearance and Defence. He claims when the application came up for hearing on 16<sup>th</sup> January, 2017, vide a consent between the 6<sup>th</sup> Defendant/Plaintiff in the Counterclaim and themselves, Justice Gitumbi allowed the 2<sup>nd</sup> Defendant in the Counterclaim to file a Defence out of time but the 6<sup>th</sup> Defendant insisted to proceed with the application against the 1<sup>st</sup> Defendant in the Counterclaim, despite their plea. He confirms that in compliance with the consent order, through their Advocates on record, they filed the 2<sup>nd</sup> Defendant's Defence on 29<sup>th</sup> January, 2017. He contends that on 5<sup>th</sup> May, 2017, the 6<sup>th</sup> Defendant/Plaintiff in the Counterclaim, filed the current Amended Application seeking to strike out the Defence of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the Counterclaim. Further that they had a difficulty in responding to the instant application on behalf of the 1<sup>st</sup> Defendant in the Counterclaim on the basis that her Defence was not on record. He insists the application is baseless, misconceived and misplaced as it lacks merit as it is made with ill motive as well as bad intention to mislead the court. Further that the suit should be set down and heard on its merit. He avers that as a law firm, they discharged their duty to their client upon receiving instructions and putting together evidence prior to preparing the pleadings and filing them in court. He reiterates that they do not have capacity to conduct independent investigation and only rely on instructions provided by the client. Further that if the 6<sup>th</sup> Defendant/Plaintiff in the counterclaim had any issue to the suit, he should have defended it to the hilt to enable the court determine the matter on its merits. He contends that the 6<sup>th</sup> Defendant/Plaintiff in the Counterclaim has no good and/or justifiable cause to be turning to attack a lawfirm which only followed instructions by the client to the letter. Further that the 6<sup>th</sup> Defendant has not demonstrated any grounds to warrant the striking out of the 2<sup>nd</sup> Defendant's Defence to the Counterclaim and he has not shown whether the Defendant is a sham and raises no triable issues. He further contends that it is in the interest of Natural Justice, Equity and Conscience that the current application be disallowed and the 1<sup>st</sup> Defendant in the Counterclaim be allowed to file her Defence out of time.

### **Analysis and Determination**

Upon perusal of the materials presented by the 6<sup>th</sup> Defendant/Plaintiff to the Counterclaim in respect of the amended Notice of Motion dated the 5<sup>th</sup> May, 2017, I find that the following are the issues for determination:

- whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendants Defence to the Counterclaim discloses no reasonable cause of action and calculated to delay trial and an abuse of Court process.
- Whether the 1<sup>st</sup> and 2<sup>nd</sup> Defendant Defence to the Counterclaim should be struck out and the Counterclaim set down for formal proof.
- Whether the claim against the 6<sup>th</sup> Defendant in the original suit be struck out or dismissed with

The 6<sup>th</sup> Defendant who is the Plaintiff in the Counterclaim contends the Plaintiff's claim against him in the main suit is a hoax as well as a fraud and offends the statutory law on administration of justice since it is based on false, perjured including fabricated evidence. He insists the Plaintiff in the main suit freely sold the suit property to the 5<sup>th</sup> Defendant in 1993 and upon completion of the sale, she was paid and received the full purchase price. He claims that the Plaintiff/1<sup>st</sup> Defendant to the Counterclaim has concealed the fact that she sold the aforementioned parcel of land to the 5<sup>th</sup> Defendant and the instant suit is an abuse of the court process by the Plaintiff meant to assist her acquire property by making false claims, and she was defrauded of the same, by among others, the 6<sup>th</sup> Defendant. He claims the 2<sup>nd</sup> Defendants in the counter claim, as officers of the Court, are in breach of their statutory duties and their legal duties to the 6<sup>th</sup> Defendant as they are party or privy to the said fraudulent claim by drawing and allowing the Plaintiff in the original suit to swear false affidavits, produce false documents to advance her fraudulent claims.

The 2<sup>nd</sup> Defendant in the Counterclaim contends that the application is instituted through ill motives and bad intention. He insists as a law firm, they discharged their duty to their client upon receiving instructions and putting together evidence prior to preparing the pleadings and filing them in court. Further that they did not have capacity to conduct independent investigation and rely on instructions given by the client. He reiterates that if the 6<sup>th</sup> Defendant/Plaintiff in the counterclaim had any issue to the suit, he should have defended it to the hilt to enable the court determine the matter on its merits. Further that the 6<sup>th</sup> Defendant/Plaintiff in the Counterclaim has not demonstrated any grounds to warrant the striking out of the 2<sup>nd</sup> Defendant's Defence to the Counterclaim and he has not shown whether the Defence is a sham and raises no triable issues.

Order 2 rule 15 of the Civil Procedure Rules provides as follows:

***'(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 subrule (1)(a) but the application shall state concisely the grounds on which it is made.'***

The Court of Appeal in the case of **RAMJI MEGJI GUDKA LTD –Vs- ALFRED MORFAT OMUNDI MICHIRA & 2 OTHERS [2005] eKLR held as follows:**

***“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said:-***

***“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.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”*

*In dealing with the issue of triable issues, we must point out that even one triable issue would be sufficient. A Court would be entitled to strike out a defence when satisfied that the defence filed has no merit and is indeed a sham.”*

I note at paragraph 19 of the Plaintiff, the Plaintiff has raised allegations of fraud while the 6<sup>th</sup> Defendant/Plaintiff in the Counterclaim has also averred that the Plaintiff is seeking to use fraudulent means to obtain land that she has already sold. These are triable issues which cannot be dispensed with at an application stage but only through viva voce evidence being adduced.

In the case of Davy...Vs...Garrette (1878) 7 ch.473 at Pg 489, the Court held that:-

*“In the common law courts, no rule was more clearly settled than that fraud must be distinctly proved and that it was not allowable to leave fraud to be inferred from the facts...”*

Further in the case of R. G. Patel v. Lalji Makanji [1957] EA 314 the former Court of Appeal for Eastern Africa stated thus:

*“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”*

*I find that all these allegations of fraud by both the Plaintiff and the 6<sup>th</sup> Defendant/Plaintiff in the counter claim must be proved and this can only be done once the suit is set down for hearing on its merit.*

I note that the 2<sup>nd</sup> Defendant in the Counterclaim has been sued as it is the law firm representing the Plaintiff in the main suit. The 2<sup>nd</sup> Defendant however wishes to be exonerated from the suit. It is my considered opinion that it would be important for the 6<sup>th</sup> Defendant/Plaintiff in the Counterclaim do provide evidence on the allegations levelled against the 2<sup>nd</sup> Defendant in the Counterclaim to enable the court make a determination. On the issue as to whether the Plaintiff in the original suit has abandoned her claim against the 5<sup>th</sup> Defendant, I will not make a determination at this juncture as there are no facts presented before me to prove this.

At this juncture and in relying on the overriding objective of this Court as governed by Section 3 of the Environment and Land Court Act which directs courts to **facilitate the just, expeditious, proportionate and accessible resolution of disputes**, I find that it would be pertinent if the suit was set down for hearing on its merits to enable the court make a final determination of the dispute at hand.

It is against the foregoing that I will decline to allow the 6<sup>th</sup> Defendant/Plaintiff in the Counterclaim’s Application dated the 5<sup>th</sup> May, 2017 and direct that the parties do comply with Order 11 within 30 days from the date hereof and set the suit down for hearing.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 14<sup>th</sup> day of March, 2018.

**CHRISTINE OCHIENG**

**JUDGE**