



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 105 OF 2017

ANTHONY NJOKA MUGO.....1ST PLAINTIFF/RESPONDENT

GEORGE MUTUOTA MUGO.....2ND PLAINTIFF/RESPONDENT

VERSUS

STANLEY MURIITHI MUGO Alias

STANLEY M. RICHARD.....DEFENDANT/APPLICANT

RULING

[1] This application is brought under **Order 2 Rule 15 (1) (a) (b) and (c) of the Civil Procedure Rules**. The applicant pray that the suit filed herein be struck out. The applicant alleges that the plaint herein discloses no reasonable cause of action against the defendant. He further states that he is the registered owner of MUTIRA/KAGUYU/525 as an absolute owner thereof and further that the plaintiffs have not produced any documents to Court to show that there was an intention to create a trust of the suit property in favour of the plaintiffs at the time of allocation and registration of the title thereafter. He argues that the defendant's title is indefeasible and that the defendant cannot rely on the alleged trust to overcome an indefeasible title and that the suit is scandalous, frivolous and vexatious.

[2] The plaintiffs/respondents filed a replying affidavit and alleged that the defendant's application is shallow, a non-starter and full of falsehoods and a waste of judicial time. They stated that the defendant is registered to hold parcel number MUTIRA/KAGUYU/525 in trust for himself and his siblings who include the plaintiffs. The respondents aver that the applicant was allocated the suit land at a junior age by the clan in 1959 during adjudication period to hold the same in trust for himself and in trust for his siblings. They argued that the said trust was customary and thus implied on the said register of land. They aver that the proof of trust is a matter for adduction of evidence in a Court of law therefore proof of an implied or customary trust is a matter reserved for trial. The plaintiffs finally states that **Section 28 of the Land Registration Act No. 3 of 2012** recognizes customary trust as the one they allege to exist in land parcel MUTIRA/KAGUYU/525 and that if this application is allowed, they will suffer prejudice in that they will not prove the trust.

[3] The law allows striking out of pleadings under **Order 1 Rule 10 of the Civil Procedure Rules and Order 2 Rule 15**.

There has been a lot of litigation in this area. It is a well trodden path.

In **DT DOBIE COMPANY KENYA LTD (KENYA) VS MUCHINA(1982) K.L.R**, MADAM J.A stated:

“No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously disclose 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 the case before it”.

WAKI J. in ***Bank of Credit and Commerce International*** stated:

“Summary determination of cases are draconian and should only be applied in plain and obvious cases both as regards the facts and the law. In a matter that alleges that the suit is scandalous, frivolous and vexatious and is otherwise an abuse of the Court process, it must be satisfied that the suit has no substance, or is forceful or the plaintiff is trifling with the Court, as the suit is not capable of reasoned argument. It has no foundation, no chance of succeeding and is only brought merely for purposes of annoyance or to gain forceful advantage and will lead to no possible good. A suit would be an abuse of the Court process where it is frivolous and vexatious”

It has been held in various cases; ***Blake Vs Albior Life Association Society 1876 LJQB 663, Marthem Vs Werwer, Beit & Company (1902) 18 TLR 763, Chustil Vs Chistle (1973) L & 8 (CH 499***, that a pleading is scandalous if it states:

(i) Matters which are indecent,

(ii) matters which are offensive,

(iii) matters made for the mere purpose of abusing or prejudicing the opposite party,

(iv) matters which are immaterial or unnecessary which contain imputation on the opposite party,

(v) matters that charge the opposite party with bad faith or misconduct against him or anyone else,

(vi) matters that contain degrading charges or;

(vii) matters that are necessary but otherwise accompanied by unnecessary details.

[4]. The claim in this case clearly states that the plaintiffs are praying for declaration that the suit land was registered in the name of the defendant in trust for them. They even go ahead and allege that this is a customary trust. The plaintiffs try to explain the reasons why the defendant was registered as the proprietor of the suit land and not his father of the plaintiffs.

The claim herein cannot in my view, be said to be vexatious or frivolous. The plaintiffs clearly states that there was a trust created.

They should be allowed to have their say in Court and prove their claims.

What is more is that those parties are siblings. The land clearly was clan land. Each and every party herein should be afforded an opportunity to canvass their claim.

I find the application without merit and I dismiss it with costs.

Ruling dated and delivered in open Court at Kerugoya this 18th day of May 2018.

S. MUKUNYA

JUDGE

18/5/2018

In the presence of:

Gichia - Court Assistant

Mr. Gori just appointed to act for the Plaintiffs

Mr. Mwiti for the Defendant/Applicant

Miss Waweru for Mr. Macharia for the Plaintiffs

Both parties.