



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT EMBU**

**E.L.C. CASE NO. 219 OF 2014**

**(FORMERLY KERUGOYA ELC NO. 523 OF 2013)**

**SAMWEL KIVUTI CIRIBA.....PLAINTIFF**

**VERSUS**

**JOEL KITHAKA MARINGA.....DEFENDANT**

**RULING**

1. By his amended plaint amended and filed on 17<sup>th</sup> July 2017, the Plaintiff sought the following reliefs against the Defendant;

*a) That block number 148 in Gichiche Adjudication Section belongs to the Plaintiff's Mugwe clan.*

*aa) A declaration that the undated decision by the Siakago Land Disputes Tribunal in Claim No. 330 of 2008 and the subsequent Decree adopting the same in Siakago Principal Magistrate's Court Land Disputes Tribunal Case No. 35 of 2010 were null and void for contravening clear provisions of the law.*

*bb) That there be a permanent injunction restraining the Defendant, his agents, clan members, servants and/or anyone claiming through him from entering, cultivating, selling or dealing in any manner whatsoever with land known as Block No. 148 in Gichiche Adjudication Section.*

*b) Costs.*

2. It was alleged in the body of the amended plaint that all that portion of land known as Block 148 in Gichiche Adjudication Section in Mbeere District (hereinafter known as the "suit property") rightfully belonged to members of the Plaintiff's Mugwe clan and that they were in actual occupation thereof. It was also pleaded that vide an undated decision the Siakago Land Disputes Tribunal had, in violation of the law, declared the Defendant's clan to be the owner of the suit property.

3. The Defendant did not consider the said amended plaint to disclose any reasonable cause of action and by a notice of motion dated 6<sup>th</sup> October 2017, he sought the following orders against the Plaintiff;

*a) That the amended plaint dated 17<sup>th</sup> July 2017 be struck out for not disclosing a reasonable cause of action and the Plaintiff's suit be accordingly dismissed with costs.*

*b) That the Plaintiff/Respondent do bear the costs of this application.*

4. It was contended by the Defendant that the Plaintiff's suit and the reliefs sought were misconceived in law since this court had no primary jurisdiction over the matter. It was contended that the Plaintiff had no legitimate cause of action since he had failed to challenge the award of the said Land Disputes Tribunal either under **section 8 of the Land Disputes Tribunals Act, 1990** or **section 8 of the Law Reform Act (Cap 26)**.

5. If I understand the Defendant's contention, he takes the position that the Plaintiff was obliged either to challenge the award of the Siakago Land Disputes Tribunal in the manner prescribed in the establishing legislation, or to undertake judicial review proceedings. He does not consider a suit for a declaration and other reliefs as sought in the amended plaint to be legally tenable.

6. The Plaintiff, in opposition to the said application, submitted that the amended plaint disclosed a reasonable cause of action as known to law; that his reliefs were not confined to the two (2) avenues defined by the Defendant; and that a declaratory relief was a legitimate remedy recognized under Order 3 Rule 9 of the Civil Procedure Rules.

7. The principles to be considered in striking out a pleading were considered in the case of **D.T. Dobie & Co (Kenya) Ltd Vs Joseph Muchina & Another [1982] KLR**. In the said case, the Court of Appeal held, *inter alia*, that;

*a) As the power to strike out pleadings is exercised without the court being fully informed on the merits of the case through discovery and oral evidence, it should be used sparingly and cautiously.*

*b) The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge.*

*c) The court should aim at sustaining rather than terminating a suit. A suit should only be struck out if it is so weak that it is beyond redemption and incurable by amendment.*

8. The court has considered the allegations contained in the amended plaint. The amended plaint may not have been elegantly drawn but in my view, it discloses a reasonable cause of action. It was held in the case of **D.T. Dobie & Co (Kenya) Ltd Vs Muchina & Another** (supra), that the words “reasonable cause of action” in the Civil Procedure Rules mean an action which has some chance of success, when the allegations in the plaint only are considered. So, if a Defendant considers that he has a perfect defence to an action, such defence cannot be considered for the purpose of striking out a plaint for failing to disclose a reasonable cause of action.

9. As indicated hereinbefore, the Defendant’s main contention was that since the Plaintiff had failed to undertake the appellate process under the Land Disputes Tribunals Act 1990 or judicial review proceedings under the Law Reform Act (Cap 26), then he was debarred from seeking relief by filing a civil suit. This court has considered the Court of Appeal judgement in **Jamin Kionbe Lidodo Vs Emily Jerono Kionbe & Another [2013] eKLR** on the issue. This court is satisfied that there is no legal bar to a litigant filing suit for a declaration that the award of a Tribunal under the **Land Disputes Tribunals Act, 1990** was null and void. In the said case, the court held, *inter alia* that;

*“...my own opinion on the matter is that there is no bar to filing a suit to declare the decision of a Land Disputes Tribunal null and void. True, the avenues of appeal and judicial review are available, but I am not of the view that these are the sole avenues for relief...”*

10. In the circumstances, the court is not persuaded that the Plaintiff’s amended plaint does not disclose a reasonable cause of action. Consequently, the court finds no merit in the Defendant’s notice of motion dated 6<sup>th</sup> October 2017 and the same is hereby dismissed with costs to the Plaintiff.

11. In view of the age of this suit, the court shall fix a hearing date for the suit at the time of delivery of this ruling.

12. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 17<sup>th</sup> day of May, 2018**

In the presence of Mr Musungu holding brief for Mr Andande for the Plaintiff and in the absence of the Defendant’s advocate.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

**17.05.18**