



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC CASE NO. 479 OF 2017**

**NYAMALO SIRIMOI NKIMINIS.....1<sup>ST</sup> PLAINTIFF**

**BENJAMIN SIRIMOI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**SIRIMOI NKIMINIS.....1<sup>ST</sup> DEFENDANT**

**BARBARA NYAMBURA.....2<sup>ND</sup> DEFENDANT**

**GERALD GATITU GITAU.....3<sup>RD</sup> DEFENDANT**

**DOMINIC MIGWI KARANJA.....4<sup>TH</sup> DEFENDANT**

**PETERSON KAMUM.....5<sup>TH</sup> DEFENDANT**

**PETER NJUGUNA NJONARY.....6<sup>TH</sup> DEFENDANT**

**ROBERT NGUGI MULIL.....7<sup>TH</sup> DEFENDANT**

**JOHN KAMAU MWANGI.....8<sup>TH</sup> DEFENDANT**

**WILFRED ASAMAKA.....9<sup>TH</sup> DEFENDANT**

**NICHOLAS MBURU KIBERA.....10<sup>TH</sup> DEFENDANT**

**REUBEN WANJILIE MWANGI.....11<sup>TH</sup> DEFENDANT**

**BETT MUTHANJE NYAGE.....12<sup>TH</sup> DEFENDANT**

**GREAT GALAXY LIMITED.....13<sup>TH</sup> DEFENDANT**

**VINCENT ANYEGA OKERE.....14<sup>TH</sup> DEFENDANT**

**RULING**

What is before Court for determination is the Defendants' Notice of Motion application dated the 16<sup>th</sup> August, 2017 brought pursuant to Order 2 rule 15 b & d of the Civil Procedure Rules, Section 1A of the Civil Procedure Act and all the other enabling provisions of the Law. It seeks the following orders:

1. The Plaintiff's suit be and is hereby struck out.
2. That in the alternative, necessary directions be given.

3. The costs of this suit be borne by the Plaintiffs.

The application is premised on various grounds and supported by the affidavit of DOMINIC MIGWI KARANJA the 4<sup>th</sup> Defendant herein who avers that the Plaintiff has failed to demonstrate their interest in the suit properties, and how the same is about to be prejudiced by the Defendants to justify the orders sought. He contends that the Plaintiffs' suit does not disclose any cause of action or rather a right of claim as against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Defendants with regard to the parcels of land in question. He states that the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants legitimately purchased vide private treaty all that parcel of land known as KAJIADO/ PURKO/ 1067 from the 1<sup>st</sup> Defendant and procured all the relevant consents, paid the relevant duty including statutory payments and without notice of the purported interest of the Plaintiffs herein. He explains that thereafter, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants being the registered owners procured the relevant consents to subdivide and transfer the suit land to the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Defendants of their purported interests in the suit parcels of land. He states that there exists no nexus between these two particular transactions and course of action as against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Defendants and if any course of action exists at all, the same recourse is against the 1<sup>st</sup> Defendant which recourse does not fall within the purview of jurisdiction of this honourable court as the same is a family related matter. Further, in determining the question of family interests over the suit parcels of land, evidence has to be adduced in regards to the matter and which evidence shall change the character of the suit to that of family related issues. He reiterates that that the Constitution and the Land Act do not recognize the so called 'family land' thus defeating the alleged claim by the Plaintiffs. He insists the Plaintiffs' suit is scandalous, frivolous and vexatious and does not in any way justify the cancellation of titles belonging to the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Defendants.

The Plaintiff opposed the Application and filed Grounds of Opposition dated the 13<sup>th</sup> September, 2017 where he stated as follows:

1. That the application lacks merit.
2. That the application is in motion of section 28 of the Land Registration Act, the Constitution and the Matrimonial Property Act 2013.
3. That the Court has jurisdiction to entertain the claim.
4. That the suit is not frivolous.

Both parties filed their respective submissions that I have considered.

The Plaintiff submitted that the suit is not hopeless as the 1<sup>st</sup> Defendant sold land parcel number KAJIADO/ PURKO/ 1067 without involving the Plaintiffs. Further that there is no spousal consent and yet it is mandatory and cannot be wished away. Plaintiffs submitted that the mutations used to subdivide the land were not signed by the 1<sup>st</sup> Defendant.

The 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 12<sup>th</sup> and 13<sup>th</sup> Defendants relied on section 25(1) and 26(1) of the Land Registration Act and submitted that their Certificate of Title should be held as conclusive evidence of proprietorship. They contend that the Plaintiffs' have not demonstrated their interest in the suit lands. They relied on the judicial authority of **Mamucha & Co Advocates Vs City Council of Nairobi (2006) eKLR; Kashisha Vs Sempagana (1967) EA 16; Dawkins Vs Prince Edward of Save Weimber (1976) 1QBD 499; Chaffers Vs Golds Mid (1894) 1QBD 186; Crescent Construction Co. Ltd Vs Delphis Bank Ltd Civil Appeal 146 of 2001 (2007) eKLR and D T Dobie & Company (Kenya) Ltd Vs Muchina**, to support their argument. They insist the Plaintiffs suit is a classic case that falls within the purview of Order 2 rule 15 of the Civil Procedure Rules and the same should be struck out

#### **Analysis and Determination**

Upon perusal of the Notice of Motion dated the 16<sup>th</sup> August, 2017 including the supporting affidavit and the Grounds of Opposition as well as the submissions filed herein, the only issue for determination is whether the Plaint should be struck out.

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.'**

Further 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 in the Plaintiff at paragraph 32, the Plaintiffs have alleged fraud or mistake on the part of the Defendants and claim the 1<sup>st</sup> Defendant sold the suit land to the 2<sup>nd</sup> to 13<sup>th</sup> Defendants without their knowledge and failed to obtain spousal consent as required by law.

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.”***

In relying on this case, I find that the allegations of fraud pleaded at paragraph 32 of the Plaintiff are triable issues that can only be determined when viva voce evidence is adduced and not at this preliminary stage.

In relying on the facts above and the judicial authorities as cited, I find that there are triable issues that cannot be wished away and will exercise my discretion and decline to allow the Defendants’ Application dated the 16<sup>th</sup> August 2017 to strike out the Plaintiff. I direct that the parties do comply with Order 11 within 60 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 18th day of June, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**