



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO.245 OF 2017

GATHAITE FARMERS CO-OPERATIVE

SOCIETY LIMITED.....PLAINTIFF/RESPONDENT

VS

PETER MAINA MIANO.....1ST DEFENDANT/APPLICANT

JOEL KIRUKU NJENGA..... 2nd DEFENDANT/APPLICANT

FRANCIS KIGO NJENGA.....3rd DEFENDANT/APPLICANT

PETER KNUTHIA NDUNGU.....4th DEFENDANT/APPLICANT

KAMAU KANGI.....5th DEFENDANT/APPLICANT

GIDRAP KINYANJUI KAMAU.....6th DEFENDANT/APPLICANT

DUNCAN NGINYA KAHUHIA.....7th DEFENDANT/APPLICANT

GABRIEL KINYANJUI KABARU....8th DEFENDANT/APPLICANT

JOEL KINYANJUI NJENGA &

PETER MAINA MIANO..... 9th DEFENDANT/APPLICANT

MIRIAM NUNGARI WAITHAKA..10th DEFENDANT/APPLICANT

ONESMUS NJENGA KIRUKI.....11th DEFENDANT/APPLICANT

LUCY NJERI MUUNDI.....12th DEFENDANT/APPLICANT

BENSON NJUKI KAMAU.....13th DEFENDANT/APPLICANT

RULING

1. On the 28/7/2015 the Plaintiff filed suit against the Defendants. In the suit the Plaintiff is claiming L.R No. Makuyu/Makuyu Block 11/1098 measuring 5.28 Ha (suit land) from the Defendants. The Plaintiff claims that the 1st and 2nd Defendants fraudulently caused the suit land to be registered in their joint names without the knowledge and consent of the Plaintiff and later subdivided them and transferred to the 3rd-13th Defendants. The Plaintiff has *inter-alia* sought a declaration that the suit land was fraudulently acquired by the defendants and the same be cancelled and reverted back to the Plaintiff's name.

2. The verifying affidavit to the above plaint was sworn by one Arcadius Njora Chege who deponed that he is on the bonafide members of the Plaintiff Society and thus competent to swear the said affidavit. Alongside this he has also filed a written witness statement pursuant to Order 3 Rule 2 of the Civil Procedure Rules in which he stated that he is an active member of the Plaintiff Society.

3. On the 25/9/17 the Applicants/Defendants filed an application seeking the following orders;

- a. The suit be struck out on grounds that it is incompetent.
- b. That Arcadius Njora Chege be ordered by the Court to meet the costs of this application and also of the suit.

4. The application is based on the following grounds;

- a. The Cooperative Society has not authorized the filing of the suit.
- b. The suit, as filed is defective for want of a verifying affidavit.
- c. Arcadius Njora Chege is neither a member nor an official of Gathaithe Farmer's Cooperative Society Limited.
- d. The suit filed is in the premises invalid.

5. In the supporting affidavit sworn by Stephen Mwangi, he deponed that he is the Secretary to the Management Committee of Gathaithe Farmers' Cooperative Society ("Society"). He stated that the Cooperative Society did not authorize the filing of the suit. That it was not commenced by and through its Management Committee. That the said Arcadius Njora Chege is not a member of the Plaintiff Cooperative Society and so lacks the necessary locus standi which renders the suit invalid.

6. In the Affidavit, Stephen Mwangi has annexed an undated letter signed by one S. K. Thuku, the Sub County Cooperative Officer, Muranga South, which does not contain the name of the said Arcadius Njora Chege. In addition, he attached a ruling delivered by the Cooperative Tribunal in CTC No. 358 of 2012 in which the Tribunal determined that the said Arcadius Njora Chege was not a member of the Cooperative Society and thus the tribunal had no jurisdiction to hear the dispute.

7. The Plaintiff/Respondent opposed the application through a Replying affidavit deponed by Arcadius Njora Chege. In it, he stated that he is a member of the Society and therefore competent to swear the affidavit. That the deponent of the supporting affidavit, one Stephen Mwangi is not the current Secretary of the Plaintiff Society and lacks locus standi to file the application. He dismissed the letter from the Sub-County Cooperative Officer as suspect and sought to cross examine the maker on the veracity of the same.

8. Regarding the ruling of the tribunal in CTC No 358 of 2010, he contended that the said Tribunal only determined the jurisdiction of the Court and struck out the suit and not the merits of the dispute. That he was appointed as Chairman of the Society in 1997 and has continued as chairman to-date. That vide a Special General Meeting held on 28.4.2000 he was mandated to update the register of members and issue each member with a share certificate. That in 2002 he bought shares vide share certificate No 54 from one, Peter Karanja Ngethe. That despite his notification to the Cooperative Officer to enter the minutes and resolutions in his books and records to reflect the current officials of the Plaintiff Society, (he being one of them) he has failed to do so. He contended that no prejudice will be occasioned to the applicant by the dismissal of the application.

9. In his supplementary affidavit filed on the 15/12/2017 Stephen Mwangi stated that the Registrar of Cooperatives and the County Cooperative Officer are custodians of the records of the Society. That those records do not show the said Arcadius Njora Chege as a member nor chairman. That the election of the said Arcadius Njora Chege was found to be a mistake as he was not a member. That since 1996 the Society has had numerous office bearers as per its bye laws and currently the 1st and 2nd Defendants are lawfully the Chairman and Secretary respectively.

10. In response, Arcadius Njora Chege stated in his further affidavit filed on the 23/11/2017 that the title No. Makuyu/Makuyu /Block 11/1091 was issued to him as the Chairman pursuant to Court orders in PMCC Misc. Application No. 13 of 2009 issued on 31.7.2009. That the matters in contention and raised in the application can only be determined in a trial and not by way of an application.

11. It is notable that the Applicants despite service have never filed any statement of defence in this case.

12. It is also notable that on the 5/8/2016, the Plaintiff filed a request for judgment under Order 10 Rule 6. There is no evidence on record that judgment in default of appearance or filing defence was ever granted in accordance with the appropriate Civil Procedure Rules.

13. Both the Applicants and the Respondent have filed their written submissions which I have read and considered.

14. The Applicant submitted that for a Cooperative Society to sue there must be a resolution of its Management Committee. That the Society has been dragged into litigation that neither its Management Committee nor its shareholders are aware of. That there was no such resolution thus rendering the suit a nullity.

15. The Applicant contended that Arcadius Njora Chege swore an affidavit as a bonafide member of the Society whilst he is not. That to that extent, then there is no verifying affidavit by members of the Management Committee, the suit lacks a verifying affidavit and offends Order 4 rule 1(4) of the Civil Procedure Rules. The Applicants have denied that the said Arcadius Njora Chege is the Chairman of the Society. They contend that they are the bonafide officials and have annexed an undated letter from the Ministry of Cooperative Development to support their status. That the said Arcadius Njora Chege has not attached any documents to support his position. That the documents that he has annexed are not from the Ministry of Cooperatives and therefore their source are unknown. The Applicant further stated that the said Arcadius Njora Chege lacks the capacity to bind the Society in this suit. That the Society has not filed any suit and urge the Court to strike out the same and condemn Arcadius Njora Chege to pay the costs. The applicant has relied on the case of **Kenya Commercial Bank Limited Vs Stage Coach Management Limited HCCC NO. 45 of 2012** to support its case.

16. The Respondent submitted that the Applicant has not disclosed the grounds they are relying to have the suit struck out. That the grounds under which the application has been brought are not amongst those enumerated under Order 2 rule 15 of the Civil Procedure Rules, 2010.

17. As regards Order 4 Rule 1(2) of the Civil Procedure Rules, the Respondent stated that the Plaintiff has sworn a verifying affidavit dated the 22/7/16 in compliance with the said rule. The Respondent contended that the allegations that the plaint is not accompanied by a verifying affidavit is factually false.

18. The Respondents stated that the power to strike out suit should be exercised after the Court has considered all the facts. That if a party has shown a bonafide triable issue he must be allowed to defend without conditions. The Respondent relied on the case of **Margaret Njeri Mbugua Vs Kirk Mweya Nyaga CA No 110 of 2012**.

19. The Respondent further summed up its submissions by stating that the suit is not for striking out because the he has filed relevant documents to evidence that he is a member of the society (shareholder) and Chairman. Relying on Art 48 and 50, the Respondent stated that the Respondent should be accorded access to justice as well as the right to be heard.

20. Having considered the application, the rival affidavits and the submissions of the parties the key issue is whether the suit should be struck out for reason that it is incompetent.

21. Order 2 Rule 15 of the Civil Procedure Rules states 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 sub rule (1) (a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

22. The power to strike out suits is vested in the Court by Order 2 Rule 15. The Court retains the discretion to strike out a plaint if it discloses no cause of action and to strike out a defence if it discloses no reasonable defence or to order their amendment. A cause of action is defined in Blacks Law Dictionary 9th Edition as Page 251 as;

“a group of operative facts which giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person”

Pearson J in **Drummond Jackson – Vs – Britain Medical Association (1970)2 WLR 688 at page 616** defined a cause of action as:

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint. Therefore, what the plaintiff needed to show was that he had a prima facie case against the defendants.....”

23. It is trite that where an application is brought under Order 2 rule 15 1 (a), the court need not look at any evidence in considering whether or not the suit raises any cause of action, however the application must concisely state the grounds on which it is made. The instant application is seeking to strike out the suit for being incompetent. I would agree with the Respondents submissions that the above order does not envisage such a ground. Be that as it may, the grounds upon which the application are premised are that; the cooperative society has not authorized the filing of the suit; the suit is defective for want of a verifying affidavit; Arcadius Njora Chege is neither a member nor an official of the Society; the suit is invalid. Such plea places the application under O. 2 Rule 15(b) that the suit is scandalous, frivolous or vexatious.

24. The Defendants having been served with the Plaint and summons to enter appearance have not entered appearance or filed a defence within the time prescribed. Such time has passed.

25. The Defendants have through the Affidavit of Stephen Mwangi sought to strike out the Plaintiff’s suit on the grounds that Arcadius Njora Chege is not a Member or bonafide Chairman of the Plaintiff and that the Plaintiff has not authorized filing of the suit. These are strong allegations.

26. Nevertheless, the same Stephen Mwangi is not a party in this case, he has not deponed authority of the Plaintiff to swear the Affidavit in support of the application and has not produced any authorization, employment or relationship with the Plaintiff. He and the capacity for which he meanders into this case is not easily ascertainable. It appears he is a busy body seeking to aid the Defendants in a summary form to escape a formal response to the very serious allegations made against them in the Plaint and the court to make a decision thereon.

27. Similarly, the said Stephen Mwangi, the deponent of the Supporting affidavit dated 12.9.2017 has averred that he is the Company Secretary and that the 1st and 2nd Defendant are Chairman and Committee member respectively. The Defendants have relied on undated letter by one SK Thuku. The said letter has been challenged as suspect by the Respondent. He did not produce evidence of authorization of the Plaintiff Society to file the application and swear the supporting affidavit.

28. In the case at hand, the Plaintiff's case is that the land was fraudulently transferred by the 1st and 2nd Defendants without authorization. That the 1st and 2nd Defendants conspired and deceived the Land Registrar Muranga and fraudulently caused the suit property to be registered in their joint names without the knowledge or consent of the Plaintiff. The suit has set out fraud as the grounds against the 1st and 2nd Defendants. The defendants have not filed a defence against the allegations. It is deemed that the defendants have admitted the allegations as of today.

29. It is now settled that striking out is a drastic remedy and it has been held that striking out procedure can be invoked only in plain and obvious cases and such discretion should be exercised with extreme caution. In the case of **D T Dobie K Limited Vs Muchina (1982) KLR** Justice Madan stated that if such a suit shows a semblance of a cause of action provided it can be injected with life through amendments, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it. The case before this Court cannot be said to be frivolous vexatious or the very least scandalous. There is established a cause of action in the case . The suit is not for striking out.

30. In the end the application is not meritorious. It is dismissed with costs to the Plaintiffs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 26TH DAY OF JULY 2018.

J G KEMEI

JUDGE

Ruling read in open Court in the presence of;

Mr. Odawa HB for Mr Bwonwonga for the Plaintiff.

Mr. Mwaniki HB Ms. Waithera Mwangi for the Defendants.

Mr. Wainaina, Ms.Irene and Ms Njeri, Court Assistants