



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO.232 OF 2017

(Formerly ELC. Case No. 20 of 2016 - Nairobi)

BONIFACE MUTINDA KABAKA.....PLAINTIFF

VERSUS

DAVID MUTUA KAMONDE KATUA & 10 OTHERS.....DEFENDANTS

AND

ISAAC MULI KAMAU & 40 OTHERS.....INTERESTED PARTIES

RULING

1. In the Notice for Motion dated 8th June, 2016, the Plaintiff is seeking for the following orders:

a. This Honourable Court be pleased to strike out the 1st and 2nd Defendants' Amended Defence and Counter-claim since the 1st and 2nd Defendants' Memorandum of Appearance and Notice of Appointment of Advocates both filed at the same time under protest on 2nd March, 2016 and their initial Defence registered in court on 4th April, 2016 after being served by the process server on 4th and 5th February, 2016 respectively flouted the mandatory procedures of law by failure of the 1st and 2nd Defendants to seek leave of the court after the expiry of fourteen (14) days of service with Summons to Enter Appearance and the fourteen (14) days thereafter requirement of filing the initial Defence.

b. This Honourable Court further be pleased to strike out the 1st and 2nd Defendants' Amended Defence and Counter-claim as it does not disclose any reasonable ground of Defence in law and it is an abuse of the court process since the Defendants have improperly joined the National Land Commission, the Hon. Attorney General and following Interested Parties; 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32nd, 33rd, 34th, 35th, 36th, 37th, 38th, 39th, 40th and 41st who are mere busybodies (merely giving moral support to the 1st up to 9th Defendants) without seeking leave of the court.

c. Judgment be entered against the 1st and 2nd Defendants/Respondents and the Interested Parties herein in favour of the Applicant as prayed in his Pleint.

d. The costs of this Application be borne by the 1st and 2nd Defendants/Respondents herein.

2. The Application is supported by the Affidavit of the Plaintiff who has deponed that the 1st and 2nd Defendants (*the Defendants*) failed to enter appearance in the first instance in accordance with the law; that the Amended Defence and Counter-claim which was filed later *ipso facto* is a nullity and that the Defendants improperly joined the National Land Commission, the Hon. Attorney General and the 1st-41st Interested Parties.

3. According to the Plaintiff, the Amended Defence and Counter-claim contains mere denials and fails to disclose any reasonable Defence and that he is the registered proprietor of land known as L.R. Nos. 20885/4, 20885/5 and 20885/6 (*the suit property*).

4. The Plaintiff deponed that in HCCC No. 1162 of 1986 between *Mwangi Ngunju, Maina Githacu & 1500 others vs. Moses Kibai & Riakanau Farmers' Co-operative Society Limited*, the court dismissed the squatters claim and directed them to leave the suit land; that all the squatters were evicted from the land and that the 1st to 41st Interested Parties are land speculators who have been acquiring private

properties unlawfully.

5. It is the Plaintiff's case that in High Court Misc. Civil Cause No. 1253 of 2000, the court directed the Commissioner of Lands to process and issue grants of land known as L.R. No. 9442R, 3516R and 1986R to Riakanau Farmers' Co-operative Society Ltd; that as a shareholder in the Society, he was issued with grants for the suit land and that the Defendants entered and took possession of the suit land in the year 2002.

6. The Plaintiff finally deponed that the Defendants have never enjoyed peaceful, uninterrupted and exclusive occupation of the suit land; that the suit land is not Trust land; that the Amended Defence and Counter-claim is frivolous and baseless and that the Amended Defence and Counter-claim should be struck out.

7. In response, the Defendants' advocate deponed that the Amended Defence and Counter-claim was served on the Plaintiff's advocate on 18th May, 2016; that the Application to strike out the Amended Defence and Counter-claim was filed more than a month later in contravention with the provisions of Order 8 Rule 2(1) and that the Application was not served until 15th November, 2017.

8. The Defendants' counsel deponed that the 1st and 2nd Defendants have a strong Defence which raises triable issues including whether the Defendants have been in peaceful and quiet possession of L.R. Nos. 3516 and 1986 which is Trust land and that the Counter-claim has raised triable issues which include whether the Plaintiff's title was obtained regularly.

9. The Plaintiff's counsel submitted that Order 6 of the Civil Procedure Rules prescribes the rules of entering appearance; that the Memorandum of Appearance was filed outside the requisite fifteen (15) days; that the Defendants were required to file their Defence within fourteen (14) days after entering appearance and that the said Defence was filed out of time.

10. The Plaintiff's counsel submitted that after filing of the Defence, the Defendants had fourteen (14) days to amend their Defence and that they should have applied for leave of the court before filing the Amended Defence and Counter-claim which they did not do.

11. Counsel submitted that in any event, the Amended Defence and Counter-claim is frivolous and vexatious and amounts to mere denials; that the Plaintiff has shown how he acquired the suit land and that being in possession of title documents, the Plaintiff has maximum rights in terms of the period of ownership of the suit land.

12. The Plaintiff's advocate finally deponed that the doctrine of *Res judicata* requires that there should be an end to litigation and that the suit property has been litigated upon and Judgment issued.

13. The 1st and 2nd Defendants' advocate submitted that the Application offends the provisions of Order 8 Rule 2(1) of the Civil Procedure Rules; that the Amended Defence and Counter-claim raises triable issues and that the court should aim at sustaining a suit rather than terminating it.

14. In the Plaintiff's Complaint dated 11th January, 2016 and filed on 15th January, 2016, the Plaintiff alleged that in the year 2002, the Defendants wrongfully entered and took possession of parcels of land known as L.R. Nos. 20885/4, 20885/5 and 20885/6. The Plaintiff is seeking for a declaration that he is entitled to exclusive and undisturbed right of possession and occupation of the suit property.

15. The Summons which were extracted by the Plaintiff shows that the Defendants were required to enter appearance within fifteen (15) days from the date of service.

16. The Affidavit of Service shows that the 1st and 2nd Defendants were served with Summons to Enter Appearance on 5th and 4th February, 2016 respectively. However, it was not until 3rd March, 2016 that the 1st and 2nd Defendants entered appearance in the matter by filing a Memorandum of Appearance. The 1st and 2nd Defendants then filed their joint Defence on 4th April, 2016. The Amended Defence and Counter-claim by the Defendants was filed on 10th May, 2016.

17. Order 6 Rule 1 of the Civil Procedure Rules prescribes the rules for entering appearance, while Order 7 Rule 1 provides for the time within which a Defence should be filed. Order 6 Rule 1 provides as follows:

“Where a Defendant has been served with summons to appear, he shall unless some order be made by the court, file his appearance within the time prescribed in the summons.”

18. Order 7 Rule 1 on the other hand provides as follows:

“Where a Defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his Defence within fourteen days after he has entered an appearance in the suit and serve it on the Plaintiff within fourteen days from the date of filing the Defence and file an Affidavit of Service.”

19. The Defendants have not denied that they filed the Memorandum of Appearance and Defence out of time. Indeed, the Defendants have not even attempted to give reasons for the late filing of the Memorandum of Appearance and Defence. Instead, they have alleged that the Plaintiff's Application has in the same measure been filed out of time and should be struck out. The Defendants have relied on the provision of Order 8 Rule 2(1) of the Civil Procedure Rules which is not relevant in these proceedings.

20. It is trite that the Civil Procedure Rules do not provide for the entry of interlocutory Judgment in land matters. Indeed, this position was

reinstated by Munyao J. in the case of *Beatrice Wanjiru Kamuri vs. John Kibira Muiruri (2016) eKLR* in which he held as follows:

“7. It will be seen from the above that the claim in our case, being a claim for land, does not qualify for entry of interlocutory Judgment, and as I have mentioned earlier, that was the reason why no interlocutory Judgment was entered for the Plaintiff when she applied for the same...”

21. On the issue of striking out pleadings which have been filed out of time, this court, in the case of *Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & Another Vs. Francis Bahati Diwani & 2 others (2014) eKLR* held as follows:

“15. In my view, an omission to fully comply with a provision of the Rules is an irregularity which except in very clear cases, may be cured. Striking out of a pleading, especially where the Rules do not expressly provide so, which has been filed out of time is an extreme measure which is resorted to in the clearest of cases where the court, after considering all the facts and circumstances of the case, comes to the conclusion that a party is abusing the process of the court... I say so because the Rules themselves allow the court, in appropriate cases, and upon such terms as the justice of the case may require to enlarge time where a limited time has been fixed for doing any act or taking any proceedings under the Rules.”

22. The above decision of this court relied heavily on the decision of the Court of Appeal in the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & Others (2013) eKLR* where the court held as follows:

“Deviation from and lapses in form and procedures which do not go to the jurisdiction of the court, or the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not to be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injunctive by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to the provisions of procedural law which at times create hardships and unfairness.”

23. The Plaintiff has not informed this court the prejudice that he has suffered with the late filing of the Memorandum of Appearance and Defence. Consequently, I shall allow the Memorandum of Appearance and the Defence that was filed out of time on record.

24. The second issue that I must determine is if indeed the Defendants required the leave of this court before filing the Amended Defence and Counter-claim.

25. The record shows that the Defendants filed their Defence on 4th April, 2016. However, it was not until 10th May, 2016 that an Amended Defence and Counter-claim was filed without the leave of the court.

26. Order 8 Rule 1(1) of the Civil Procedure Rules provides as follows:

“1(1) A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.”

27. Order 2 Rule 13 on the other hand provides that:

“13. The pleadings in a suit shall be closed fourteen days after service of the reply or Defence to Counter-claim, or, if neither is served, fourteen days after service of the Defence, notwithstanding that any order or request for particulars has been made but not complied with.”

28. It is therefore obvious that in the absence of a Reply by the Plaintiff after the filing of the Defence, the pleadings herein closed fourteen (14) days after 4th April, 2016. Consequently, the Defendants could not have filed the Amended Defence and Counter-claim on 10th May, 2016 without the leave of the court. Having filed the Amended Defence and Counter-claim without the leave of the court, I find that the Amended Defence and Counter-claim dated 10th May, 2016 and filed on the same day is a nullity.

29. The last issue that I will deal with is whether the Defence filed by the Defendants should be struck out for being frivolous, vexatious and an abuse of the court process.

30. The Plaintiff in his Complaint alleges that the Defendants trespassed on the suit land. On the other hand, the Defendants have stated in their Defence that they have been in occupation on the “Trust land”, which is the suit land, and that by the time the Plaintiff acquired the said land, they were already in occupation.

31. Although the Plaintiff has alluded to two cases which were decided in favour of his predecessor in title, the Plaintiff averred in the Complaint that there have been no previous proceedings in any court between him and the Defendants in respect of the suit land. Considering that the defence of limitation of time is available to the Defendants, the Plaintiff will have to prove at trial that the Defendants have not been on the suit land continuously, peacefully, exclusively and without his permission for twelve (12) years. That is a triable issue that the court will have to determine at trial. It cannot therefore be said that the Defence on record is frivolous or vexatious when the Plaintiff is seeking far reaching orders of having the Defendants evicted from the suit premises.

32. In the premises, and for the reasons I have given above, I partially allow the Plaintiff's Application dated 8th June, 2016 as follows:

a. The 1st and 2nd Defendants' Amended Defence and Counter-claim be and is hereby struck out for having been filed without the leave of the court.

b. The 1st and 2nd Defendants to pay the costs of the Application.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 28TH DAY OF SEPTEMBER, 2018.

O.A. ANGOTE

JUDGE