



**REPUBLIC OF KENYA**

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

**E.L.C. CASE NO. 153 OF 2017**

**BENJAMIN KITHU NAHASHON.....PLAINTIFF**

**VERSUS**

**SEVERINO NJUKI JOSEPH.....DEFENDANT**

**RULING**

1. By a plaint dated 3<sup>rd</sup> October 2017 the Plaintiff sought the following reliefs against the Defendant;

- a. The caution lodged by the Defendant over the Plaintiff's land parcel Number Mbeti/Gachoka/146 be lifted.*
- b. The Defendant pays the general damages to the Plaintiff.*
- c. The costs of this suit.*
- d. Any other relief this honourable court deems fit to grant.*

2. It was pleaded that the Plaintiff was the registered proprietor of *Title No. Mbeti/Gachoka/146* (hereinafter the *suit property*) and that the Defendant had maliciously and without lawful cause registered a caution over the suit property thereby infringing upon the Plaintiff's proprietary rights.

3. By his statement of defence dated 6<sup>th</sup> November 2017, the Defendant admitted lodging a caution against the suit property on the basis that the Plaintiff had acquired it fraudulently from the original owner one Njeru Kombo. The Defendant further pleaded that he had cautioned the suit property in order to protect his interest and that of his elderly father in the suit property pending determination of *Embu ELC No. 152 of 2017* between Joseph Njeru Kombo and Benjamin Kithu Nahashon.

4. By a notice of motion dated and filed on 8<sup>th</sup> January 2018 brought under the provisions of **Order 2 Rule 15 of the Civil Procedure Rules**, the Plaintiff applied for striking out of the Defendant's defence and for entry of judgement against the Defendant as prayed in the plaint.

5. The said application was based on the same grounds as those pleaded in the plaint. It was also based on the grounds that the defence was unreasonable, scandalous, and otherwise an abuse of the court process. It was supported by an affidavit sworn by the Plaintiff on 8<sup>th</sup> January 2018 which basically reiterated the grounds stated on the face of the motion.

6. The Defendant filed a replying affidavit sworn by himself on 23<sup>rd</sup> January 2018 in opposition to the said application. The Defendant reiterated the contents of his defence and maintained that he had an interest in the suit property which could be protected by a caution. He also stated that his defence raised triable issues and that the dispute between his father and the Plaintiff over the suit property was still pending in *Embu ELC No. 152 of 2017*.

7. By his further affidavit filed on 5<sup>th</sup> July 2018, the Defendant stated that his father had inherited the suit property from his clan as a gift hence he had an interest in it under customary law. He also averred that there were previous legal proceedings in *Siakago PMCC No. 11 of 2014* over the suit property. A copy of the judgement in that case was, however, not annexed. The Defendant only exhibited copies of the proceedings.

8. When the said application was listed for hearing on 19<sup>th</sup> February 2018, the advocates for the parties agreed to canvass it through written submissions. The parties were to file and exchange their respective submissions within 60 days. By the time of preparing this ruling, however, none of the parties had filed submissions.

9. The court has considered the pleadings in this matter, the Plaintiff's application for striking out, the Defendant's replying and further affidavits and the circumstances of the case. The principles to be considered in an application for striking out are now relatively well settled. In the case of **D.T. Dobie & Co (K) Vs Joseph Muchina & Another [1982] KLR1**. It was 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 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.**

10. The court should, therefore, be very hesitant in striking out a pleading summarily without a hearing on the merits. The court should endeavour to sustain rather than to terminate proceedings without a full hearing. That is not, however, to say that a pleading cannot be struck out in appropriate cases under **Order 2 Rule 15 of the Civil Procedure Rules**.

11. It was contended by the Plaintiff that the Defendant's defence was unreasonable, scandalous and otherwise an abuse of the court process. In the case of **Trust Bank Limited Vs Amin & Co Ltd & Another [2000] KLR 168** the court considered those terminologies as follows;

**'In Bullen & Leake and Jacobs precedents of pleading (12<sup>th</sup> Edition) on chapter dealing with striking out pleadings at page 145 it stated:**

**'A pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.'**

**'...and lastly a pleading which is an abuse of the court really means in brief a pleading which is a misuse of the court machinery or process.'**

12. In the circumstances of this case, there is no doubt that the Plaintiff is the current registered proprietor of the suit property. It would appear that he acquired the same from Joseph Njeru Kombo (hereinafter *Kombo*) who appears to be the Defendant's father. The Defendant's contention is that the Plaintiff acquired the suit property fraudulently and that since Kombo had obtained it from his clan, then he (the Defendant) had a "customary interest" in it.

13. On the question of the alleged fraud, the court holds that the Defendant has no *locus standi* to ventilate that issue. It can only be a legitimate question as between the Plaintiff and Kombo, who is still alive. In fact, there is evidence on record that the said Kombo has already filed *Embu ELC No. 152 of 2017*. If, therefore, Kombo needs any protective orders with respect to the suit property, he would be at liberty to seek them in that suit. Moreover, no good reason was given as to why the Defendant's father could not lodge the caution himself.

14. On the question of the Defendant's perceived interest over the suit property under customary law, the court is far from satisfied that any legitimate interest known to law has been demonstrated. On the authority of the case of **Esiroyo Vs Esiroyo [1973] EA 388**, the Defendant has no legitimate interest in his father's land. The court is also far from satisfied that any such customary law interest is capable of being established in this matter.

15. In view of the foregoing, it is apparent that the Defendant has no reasonable defence to the action and that his defence is scandalous and otherwise an abuse of the court process. The only person who stands a chance of reasonably challenging the Plaintiff's title is the Defendant's father, who has already initiated separate legal proceedings in that regard.

16. In the premises, the court finds merit in the Plaintiff's application for striking out the Defendant's statement of defence as prayed in prayer (1) of the notice of motion dated 8<sup>th</sup> January 2018.

17. The court is, however, not satisfied that prayer (2) for entry of judgement as prayed in plaint is merited. The court is of the view that this not being a liquidated claim, the Plaintiff should set down the suit for hearing as an undefended suit. The law does not provide for the granting of final orders which would result in a decree without a hearing in a suit of this nature.

18. The upshot of the foregoing is that the Plaintiff's notice of motion dated 8<sup>th</sup> January 2018 is hereby allowed in terms of order (1) only. The request for entry of judgement is hereby declined. The Defendant shall bear costs of the application. The Plaintiff shall be at liberty to set down the suit for hearing as undefended.

19. Orders accordingly.

**RULING DATED, SIGNED and DELIVERED in open court at EMBU this 27<sup>TH</sup> day of SEPTEMBER, 2018.**

In the presence of the parties in person.

Court clerk Muinde.

**Y.M. ANGIMA**

**JUDGE**

27.09.18