



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

CASE NO. 295 OF 2017

JOHN ROTICH CHUMA.....PLAINTIFF

VERSUS

TERESIAH NAISUKU KITAKITA DEFENDANT

RULING

1. This ruling is in respect of defendant's Notice of Motion dated 22nd November 2017, an application pursuant to which the defendant seeks an order that the plaintiff's suit be struck out with costs. The application is brought under **Order 2 Rule 15** of the **Civil Procedure Rules** and is supported by an affidavit sworn by the defendant.

2. The defendant contends that she took possession of Mariashoni Land Plot No. 09444 measuring about 5 acres (the suit property) in the year 1997 and has ever since been occupying and farming it. She adds that following a complaint laid by the plaintiff, she was charged with the offence of forcible detainer in Molo Criminal case No. 3466 of 2015 Republic v Teresiah Nasiegu Kitakita. She states that the plaintiff has acknowledged in the charge sheet in the aforesaid case that she has been on the land since 1997 and that the suit is therefore statute barred, frivolous, vexatious and an abuse of court process.

3. The plaintiff opposed the application through a replying affidavit wherein he deposed that he had been in occupation of the suit property from the year 1997 to January 2014 when the defendant displaced him. He denied that the defendant occupied the land in 1997 as alleged and added that the suit is therefore not statute barred.

4. The application was heard by way of written submissions. The applicant filed submissions on 20th February 2018 while the respondent filed submissions on 27th February 2018. I have considered the application, the affidavits and the submissions filed. The application is brought under **Order 2 Rule 15** of the **Civil Procedure Rules** which provides:

15. (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.

5. The applicant has argued that the respondent's case reveals no reasonable cause of action and that the applicant has been in possession for over 12 years thus resulting in the respondent being restrained by the provisions of **section 7** of **Limitation of Actions Act** from filing a suit for the recovery of the land.

6. When dealing with an application seeking striking out, the court is called upon to exercise discretion and to proceed with extra caution. In **Crescent Construction Co. Ltd vs Delphis Bank Ltd [2007] eKLR** the Court of Appeal stated:

...one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realisation that the rules of natural justice require that the court must not drive away any litigant, however weak his case may be, from the seat of justice. This is a time-honoured legal principle. At

the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.

7. In the earlier case of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another[1980] eKLR the same court stated:

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, 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.

8. The respondent's (plaintiff's) case as can be gleaned from the plaint dated 12th July 2017 and filed in court on 13th July 2017 as well as the accompanying documents is that he is the beneficiary of the suit property following its allocation to him in 1997. In January 2014, the defendant invaded the land, took possession of it, constructed a semi-permanent house and started farming on it. The plaintiff therefore seeks judgment for vacant possession and damages for trespass.

9. The applicant's argument, in short, is that the plaintiff's case reveals no reasonable cause of action since according to the applicant, the plaintiff lost possession way back in 1997. According to the applicant, the plaintiff has lost the right to sue for recovery of the suit property in view of the provisions of **section 7 of Limitation of Actions Act** since over 12 years have lapsed since the plaintiff lost possession. The section provides:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

10. Section 7 must be read alongside section 9(1) of the Act which provides:

Where the person bringing an action to recover land, or some person through whom he claims, has been in possession of the land, and has while entitled to the land been dispossessed or discontinued his possession, the right of action accrues on the date of the dispossession or discontinuance.

11. It follows therefore that the right to sue for vacant possession accrued from the date when the plaintiff was dispossessed – January 2014 according to the plaintiff and 1997 according to the defendant. It must however be remembered that the pleading sought to be struck out is the plaint and according to the plaintiff as pleaded in the plaint, he lost possession in January 2014. Though the applicant has argued that the plaintiff lost possession in 1997, that date does not emerge anywhere in the plaint. It therefore remains a matter of evidence to be proven at trial. Mathematically however, 12 years from 2014 had not lapsed by the time this suit was filed in 1997.

12. It would be totally unjust to strike out the plaint on the basis of contestable evidential matters arising not from the plaint itself. Such matters are best left to be resolved at trial, after evidence has been taken and tested at a hearing. In the circumstances, I am not persuaded that this is a fit and proper case in which to grant striking out. Notice of Motion dated 22nd November 2017 is dismissed with costs to the plaintiff.

13. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 27th day of September 2018.

D. O. OHUNGO

JUDGE

In the presence of:

Ms Gitau holding brief for Ms Kipruto for the defendant/applicant

Mr Mwalo holding brief for Mr Korongo for the plaintiff/respondent

Court Assistant: Gichaba