



**REPUBLIC OF KENYA**

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

**AT ELDORET**

**E & L CASE NO. 303 OF 2017**

**MARTIN ROBIN KINUTHIA.....PLAINTIFF**

**VERSUS**

**AMIT AGGARWAL.....DEFENDANT**

**RULING**

Amit Aggarwal, the defendant herein has filed an application dated 19.12.2017 praying that the plaint to be struck out for disclosing no reasonable cause of action and that the plaintiff to pay costs. The application is based on grounds that the plaintiff filed the current suit under certificate of urgency and prayed for judgment against the defendant for a declaration that the defendant's forceful takeover of the suit property known as Plot 2/87 Mitta Street, Eldoret Town on 11<sup>th</sup> September, 2017 was out rightly illegal and that an order for permanent injunction restraining the defendant/respondent, his agents and/or servants from trespassing, selling, transferring, disposing, auctioning and/or in any manner entering dealing with and/or interfering with the plaintiff's occupation, use and enjoyment of that parcel of land known as Plot 2/87 Mitta Street, Eldoret town or interfering with/erecting new structures therein pending the legal determination of the lease agreement.

He further sought an order of eviction against the defendant from all that parcel of land known as Plot 2/87 Mitta Street, Eldoret town.

He sought special damages to be quantified within the course of the proceedings. Costs of this suit and Interest at court rates till payment in full.

The aforesaid suit was accompanied with a Notice of Motion dated 12<sup>th</sup> September, 2017 seeking same orders. The plaintiff obtained ex-parte orders on 14<sup>th</sup> September, 2017 maintaining the status quo ante 11<sup>th</sup> September, 2017 existing on all that parcel known as Plot 2/87 Mitta Street, Eldoret town."

Upon the aforesaid application coming up for inter-partes hearing on 21<sup>st</sup> November, 2017, the plaintiff's counsel stated that the plaintiff had already moved out of the suit property voluntarily hence marking the application as spent. According to the defendant's counsel, the application having been marked as spent means that prayers (a), (b) and (c) of the Plaint are spent and that prayers (d), (e), (f) and (g) of the Plaint do not disclose any reasonable cause of action.

In the replying affidavit, the plaintiff states that he is advised by his Advocates on record, which advice he verily believes to be true that the said application is bad in law, incompetent, mischievous, frivolous and misleading and an abuse of the court's process and it thus ought to be out rightly dismissed in the first instance.

He claims that he has since filed an amended Plaint quantifying the special damages he suffered as a result of the defendant's actions of 11<sup>th</sup> September, 2017 and prayer (d) of the Amended Plaint now discloses a cause of action that ought to be interrogated by this Honourable Court and that he has also filed his list of documents hence the suit herein should proceed to full trial to enable this Honourable court determine his claim on merit. The Plaintiff has not met the legal threshold for the grant of the orders sought in its application and the same ought to be dismissed with costs.

The defendant through **Mr. Mukhabane, learned counsel**, submits that the plaintiff has voluntarily moved out of the land and application was marked as spent. It is clear from the pleadings that there is nothing remaining as the suit property is registered in the defendant's name. The orders sought in the plaint are the orders sought in the application. He relies on pleadings and grounds.

**Mr. Lagat, learned counsel** for the plaintiff submits that no prayer for eviction was granted. There are special damages to be paid. The amended plaint has been annexed. To-date, no defence has been filed. At the time of filing amended plaint, pleadings had not closed. There is an issue of damages to be interrogated by the court.

This court is clothed with wide and ample powers, which are useful for enforcing the formal requirements of pleadings. This power is conferred on the court so that it can compel parties to comply with the rules of pleadings and the practice of the court's relating thereto. The source of the powers is found in Order 2 Rule 15 of the Civil Procedure Rules 2010. The powers are discretionary and they are under the inherent jurisdiction of the court.

Rule 15 The court may at any stage of the proceedings order to be struck out or amended any pleadings in an action or anything in any pleading on the grounds that

- a) *It discloses no reasonable cause of action or defence;*
- b) *It is scandalous, frivolous and vexatious.*
- c) *It may prejudice, embarrass, or delay fair trial.*
- d) *It is an abuse of the process of the court.*

The power of striking out is a summary process without a trial. The court has the power not only to strike out but can order that certain pleadings be amended if they are curable. Some pleadings are fatal and thus not curable, this is a discretionary power that the courts are supposed to exercise judiciously and is supposed to be used in very clear-cut cases because it involves striking out a case without affording the plaintiff an opportunity to be heard. The guideline before the court can exercise the discretion is that if it is striking it out on the ground that there is no reasonable cause of action, the cause of action must be incurably bad. It has to be beyond doubt unsustainable. The cardinal principles for striking out pleadings were set out in the case of **D.T. Dobie & Company Kenya Ltd Vs. Joseph Mbaria Muchina**, CA No. 37 of 1978, in which the court of Appeal stated that: -

**“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 has shown 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.”**

I have considered the submissions of both counsel and do find that though the plaintiff has moved out of the premises, he has claimed special damages and has filed an amended plaint. Striking out of pleadings is a draconian step that the court must consider carefully the grounds for striking out. The pleading must be so hopeless for the same to be struck out. The pleadings herein by way of plaint cannot be described as hopeless as it seeks a declaration that the takeover was illegal and an order of eviction. Moreover, there is a prayer for special damages quantified at Kshs.284,640.

The upshot of the above is that the application lacks merit and is dismissed with costs.

**Dated and delivered at Eldoret this 29<sup>th</sup> day of October, 2018.**

**A. OMBWAYO**

**JUDGE**