



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**E.L.C CASE NO. 49 OF 2015**

**ERICK KIPKEMBOI (Suing as the administrator of the estate of  
JAMES CHERIRO DECEASED).....PLAINTIFF**

**VERSUS**

**UNILVER (KENYA LIMITED).....1<sup>ST</sup> DEFENDANT**

**REGISTRAR OF TITLES.....2<sup>ND</sup> DEFENANT**

**ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT**

**R U L I N G.**

This ruling is in respect of an application dated 3<sup>rd</sup> June, 2016 filed by the 1<sup>st</sup> Defendant /Applicant under Order 2 Rule 15 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act seeking the following orders:

1. THAT the Plaintiff's suit be struck out as:

- a) It discloses no reasonable cause of action
- b) It is scandalous frivolous and vexatious
- c) It may prejudice, embarrass or delay the fair trial of this case

2. THAT the cost of this application be provided for.

The application is supported by the affidavit of Lucy Lelo, the Legal Counsel of the 1st Defendant herein. In her affidavit Counsel for the 1<sup>st</sup> Defendant /Applicant depones that the Plaintiff lacks the capacity to sue on behalf of Paraiywot and Partners Company as the said entity is not an incorporated company. She depones that the partners of Paraiywot and Partners Company are all deceased save for one Simion arap Chebusit, consequently, the Plaintiff ought to have sought the authority of the representatives of all the partners before instituting the suit herein.

She depones that the 1<sup>st</sup> defendant who was earlier known as Kenya Tea Company and subsequently, Brooke Bond Kenya Ltd purchased all that land comprised in **I.R No. 2140/1** and known as **L.R No. 6026 (original No, 3945/9)** measuring **794** acres from **GEORGE STUARD SNEY** and the same was transferred to the 1<sup>st</sup> Defendant vide entry No. 4 on 7<sup>th</sup> May, 1929.

The 1<sup>st</sup> defendant subsequently took possession of the suit land until 1974 when it transferred **134** acres to **Paraiywot and Partners Company**. The said land which was known as **I.R No 27616** was registered in the names of the partners in Paraiywot Partners Company on **19<sup>th</sup> June, 1975**.

She further depones that subsequent to the said transfer and registration the 1<sup>st</sup> defendants took possession of the land and have remained in occupation to date. She also deposes that even if the Plaintiff's claim was valid, the cause of action arose way back in **1975** and is therefore statute barred.

In his replying affidavit the Plaintiff depones that the 1<sup>st</sup> defendant connived with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to fraudulently make entry no. 8 as the last entry in **L.R No 2140 (6026)**, the property of the Partners of Paraiywot Partners thus extinguishing their rights to that title in favour of the 1<sup>st</sup> defendant.

The Plaintiff maintains that he has the *locus standi* to file the suit in his capacity as the legal administrator of the estate of his late father who was one of the partners of Paraiywot Partners Company. He further depones that his suit is not time barred as he only discovered the fraud allegedly committed by the defendants when he conducted a search at the Land Registry in Nairobi.

The main issues for determination are as follows:

1. Whether the Plaintiff's suit offends the provisions of Order 2 Rule 15 of the Civil Procedure Rules by disclosing no reasonable cause of action, being scandalous, frivolous and vexatious and whether it may prejudice, embarrass or delay the fair trial of this suit.
2. Whether the Plaintiff has the *locus standi* to institute the suit.
3. Whether the suit herein is time barred.

On the first issue as to whether the Plaintiff's case has a reasonable cause of action, it is the 1<sup>st</sup> Defendant/Applicant's submission that the claim of fraud by the defendants is not well founded for the following reasons:

1. The Plaintiff is a member of Paraiywot Partners Company which purchased a portion of land comprised in title no **I.R 2140 measuring 134 acres** out of the total acreage of **794** acres as evidenced in the certificate of title dated 19<sup>th</sup> June 1975.
2. The alleged fraudulent entry in the register in respect of title No. I.R 21140/1 (L.R No 6026) was meant to depict the change of name of the proprietor of the title from Brook Bond Liebig Limited to Brooke Bond Kenya Limited and it in no way affected the rights of the Plaintiff and his partners.

The allegation of fraud is therefore frivolous, scandalous and vexatious as it is a misrepresentation of the facts surrounding the transactions relating to the suit land.

Black's Law Dictionary 7<sup>th</sup> Edition defines scandal as follows:

***“Scandal consists of the allegation of anything which is unbecoming of the dignity of the court to hear, or is contrary to decency or good manners, or which charges some person with a crime not necessary to be shown in the cause to which may be added any unnecessary allegation, bearing cruelly upon the moral character of an individual, is also scandalous. The alleged matter however must be not only offensive, but also irrelevant to the cause, for however offensive it may be, if it be pertinent and material to the cause the party has a right to plead it. It may be necessary to charge false representations, fraud and immorality, and the pleading will not be open to the objection of scandal, if the facts justify the charge.”***

A scandalous matter is one that is both grossly disgraceful and irrelevant to the action or defence.

According to **Bullen, Leake and Jacobs Precedents of Pleadings (12<sup>th</sup> Edition)**- a pleading or action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless and offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense.

The word frivolous is described as something lacking a legal basis or legal merit; not serious, not reasonably purposeful.

A matter is said to be vexatious when:

- i. It has no foundation.
- ii. It has no chance of succeeding.
- iii. The pleading is brought merely for the purpose of annoyance.
- iv. It is brought so that the party's pleading should have some fanciful advantage or,
- v. Where it can really lead to no possible good (per *Willis Vs Earl Beauchamp* (1866)).

In **Strokes Vs Grant (1878) AC 345** and **Hardnorb Vs Monk (1876) 1 Ex D 367** cited in the case of **Elijah Sikona & George Pariken Narok on behalf of Trusted Society of Human Rights Vs Mara Conservancy and 5Others, (2014) KLR** it was held that a pleading tends to prejudice and embarrass or delay the fair trial of the suit when:

*i. It is evasive or*

*ii. It obscures, conceals the real question in issue between the parties in the case and is embarrassing if*

*i. It is ambiguous or unintelligible, or*

*ii. It raises immaterial matter thereby enlarging issues, creating more trouble, delay and expense or*

*iii. It is a pleading that a party is not entitled to make use of or*

*iv. A defence does not say how much he admits and how much he denies*

A pleading which is an abuse of the court process really means in brief, a pleading which is a misuse of the court machinery or process- **Trust Bank Ltd Vs Hemanshusirkat Amin & Co Ltd & Another** (Nrb HCCC No. 984 of 1999).

In **Nyati (2002) Kenya Limited Vs Kenya Revenue Authority 2009 KLR Justice Ringera** stated as follows:

***“A matter would only be scandalous, frivolous and vexatious, if it would not be admissible in evidence to show the truth of any allegation in the pleading which is sought to be impugned, for example imputation of character is not in issue. A pleading is frivolous if it lacks seriousness. It would be vexatious if it annoys or tends to annoy. It would annoy if it is not serious or contains scandalous matter, or is irrelevant to the action or defence. A scandalous and/ or frivolous pleading is ipso facto vexatious.”***

The question therefore is whether in light of the facts set out in the foregoing paragraphs, the plaintiff's claim discloses any reasonable cause of action or it is merely a scandalous, frivolous and vexatious suit which is brought to embarrass the defendants herein.

The first issue to be determined is whether the plaintiffs claim has any legal basis or is purely intended to annoy the defendants. The Plaintiff claims that the 1<sup>st</sup> defendant fraudulently created entry no. 8 in the Register relating to L.R No I. R 2140/1 (LR 6026) indicating that Brooke Bond Kenya Ltd was the registered owner instead of Paraiywot & Partners Company thus extinguishing the rights of Paraiywot & Partners Company. He further alleges that the defendants fraudulently reduced the acreage of the suit land from 794 to 133 acres.

It is clear from the transfer document dated 31<sup>st</sup> December, 1974 attached to the Plaintiff that Paraiywot & Partners Company purchased a portion of original parcel no I.R 6026/1 measuring 54.22 hectares belonging to the Brook Bond Liebig Kenya Limited of whom the 1<sup>st</sup> Defendant is the successor in title. Subsequent to the said transfer, the members of Paraiywot & Partners Company were registered as the owners of land title No. 1.R 227616 on 19<sup>th</sup> June, 1975. The said parcel measures 54.22 hectares which converts to 134 acres. The Plaintiff is under the erroneous impression that Paraiywot & Partners Company purchased the entire parcel of land from Brooke Bond Liebig Kenya Limited although this is not borne out by the transfer document attached to the pleadings. The allegation of fraud which is of itself scandalous, is therefore unfounded.

On the second issue touching on *locus standi*, the Plaintiff has instituted this suit in his capacity as the son and administrator of the estate of James Cheriro-Deceased). He has attached a Rectified Certificate of Confirmation of Grant in his name and that of one Linah Chebet Cheriro dated 12<sup>th</sup> November 2013. It is clear from the records that the said James Cheriro did not purchase land from the 1<sup>st</sup> defendant in his sole name, therefore the said land cannot form part of the late James Cheriro's estate as wrongly indicated in the rectified certificate of confirmation grant.

Furthermore, the title document shows that the land was transferred to the following persons; James arap Cheriro, Samuel arap Soi, Kimitei arap Tele, Kiplanagat arap Kenduiwo, Kipyegon arap Chumo, Kiplangat arap Lesan, Kepnyige arap Kaplelach, Kimasit arap Chumo, Wilson arap Koske, Chesilim arap Too, Esta w/o arap Chumo, Chumo arap Nyige, Kipsang arap Keino, Kipkurui arap Boror, Joel arap Mitey, Chepkwony arap Mitey, William Kinsieleara Lasoi, Simon arap Chebusit, William arap Borand Kipsibe arap Korir all trading as Paraiywot & Partners Company was a Partner in Paraiywot Partners Company which was not registered as a company. **The Plaintiff therefore has no capacity to institute the suit on behalf of the said Paraiywot & Partners Company without the authority of the other partners or their legal representatives.**

On the third issue as to whether the suit is statute barred, it is clear that the transfer of land to Paraiywot & Company Partners took place way back in 1975 when the Plaintiff's father was still alive. According to Section 7 of the Limitation of Actions Act Cap 22 a suit for a claim to land must be brought within 12 years. **The Plaintiff's suit which was filed in 2015, 40 years after the cause of action arose is hopelessly out of time.**

The above analysis points to the fact that the Plaintiff has no legal basis to sustain a claim against the defendants and I am inclined to grant the application. In arriving at this conclusion, I am guided by the principles in respect of applications for striking out of pleadings set out in **D. T Dobie & Company (Kenya Ltd Vs Muchina 1982 KLR 1 in which Madan J** (as he then was stated as follows:

***“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way,” Sellers LJ. (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.*”**

*If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind to summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing.*

*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.”*

That decision of Madan J.A (as he then was) in the case above has been consistently followed and is sound law. In the case of **Crescent Construction Co. Ltd vs Delphis Bank Ltd Civil Appeal No.146 of 2001** decided on 9<sup>th</sup> February, 2007, this Court after quoting it with approval further stated thus:

*“However, 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 seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drug a person to the seat of justice when the case purportedly brought against him is a non-starter.”*

Having considered the 1<sup>st</sup> Defendant's application together with the entire set of documents filed herein including the pleadings, notice of motion, affidavits and other supporting documents I am of the view that the plaintiff's claim against the defendant is unfounded as it has no legal basis. I am persuaded that on the basis of the material placed before me, this is a case where the 1<sup>st</sup> Defendant has unfairly been dragged to the seat of justice on a claim that is unsustainable. I therefore exercise my discretion and dismiss the plaintiff's case with costs.

In the event that I am wrong, I believe that the plaintiff still has recourse to court by filing a fresh suit after obtaining the requisite consent from the other members of Paraiywot & Partners Company. He would also need to obtain leave to file suit out of time as the limitation period has lapsed.

Dated, signed and delivered at Kericho this 16th day of March, 2017.

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**JANE M. ONYANGO**

**JUDGE**