REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 165 OF 2015

CYRUS NAMU JUSTIN ……....…….....1ST PLAINTIFF

VIOLET MUTHONI MURAGE……..…….……..2ND PLAINTIFF

VERSUS

FRANCIS MURIUKI KIBUCHI…….…..……DEFENDANT

RULING

It is amazing how some parties will strive to expend time, energy and other resources litigating even in cases where the most efficacious and prudent route would be an out of Court settlement. This is even more disturbing when the combatants are family. But then again, this dispute involves land (mugunda) where, it would appear, every inch is worth a fight. Even a hopeless fight. This case serves as a perfect example.

In considering the application before me which seeks the striking out of the defendant's defence and entry of judgment for the plaintiffs as prayed in their plaint, I am reminded of what was stated by the Court of Appeal in the case of ***FREMAR***

CONSTRUCTION COMPANY LTD VS MINAKASH N. SHAH C.A CIVIL APPEAL No. 85 of 2002 (NBI). In that case, the Court stated as follows:

> ***"This Court has stated many times before, and the learned Judge of the Superior Court was conscious of it, that striking out a pleading is a drastic remedy and the powers of the Court are to be exercised with great caution and only in clear cases. But the power is clearly donated in the rules and exists inherently for the Court in the interest of justice, to reject manifestly frivolous and vexatious pleadings or suits and to protect itself from abuse of its process".*** Emphasis added

The Court went on to add the following:

> "***Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined by oral evidence in open Court. Unless a trial is an discernible issues, it would be farcical to waste judicial time on it***" Emphasis added

The locus classicus in applications for striking out pleadings has always been the case of ***DT DOBIE & COMPANY (KENYA) LTD VS MUCHINA (1982) K.L.R 1*** where **MADAN J.A** said:

> ***"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".

Finally, on the Court's power to strike out pleadings, in ***CRESCENT CONSTRUCTION CO. LTD VS DELPHIS BANK LTD C.A CIVIL APPEAL No. 141 of 2001 (2007 e K.L.R***), the Court of Appeal 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 realization 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 drug a person to the seat of justice when the case purportedly brought against him is a non-starter".

And with regard to the Court's power to enter summary judgment, the Court of Appeal in the case of ***JOB KILACH VS NATION MEDIA GROUP LTD C.A CIVIL APPEAL No. 94 of 2006 (2015 e K.L.R),*** held that:

"Summary judgment has far reaching consequences. It must therefore be granted only in the clearest of cases as was stated by this Court in LALJI t/a VAKKEP BUILDING CONTRACTORS VS CAROUSEL LIMITED 1989 K.L.R 386 in which the predecessors of this Court held that:

"Summary judgment is a draconian measure and should be given in only the clearest of cases. And a trial must be ordered if a triable issue is found to exist or one which is fairly arguable. The Court should avoid the temptation to anticipate the ultimate result of the trial".

This application will be determined bearing in mind the above principles.

The pleadings herein are fairly straight forward. The parties are siblings and are children of **JUSTIN KIBUCHI NJOMO** (deceased) who owned land parcel No. NGARIAMA/NYANGENI/1318 measuring 0.81 Hectare. By their plaint filed herein on 17th December 2015, the plaintiffs pleaded in paragraph five (5) thereof as follows:

"When the said JUSTIN KIBUCHI NJOMO died, a Succession Cause was filed being GICHUGU SUCCESSION CAUSE NO. 20 of 2010 and the same was confirmed on 15th June 2000 (sic) whereby land parcel No. NGARIAMA/NYANGENI/1318 was to be registered in the names of the plaintiffs and the defendant jointly with 2 others to hold the same in trust for themselves and three other beneficiaries being JANE NJOKI KIBUCHI, NESTER WANGITHI KIBUCHI and PHYLIS WANJIRU KANGARU"

The grant was actually confirmed on 21st February 2011 and not 15th June 2000 as erroneously pleaded above.

The plaintiffs then proceed to plead in paragraph six (6) and seven (7) of the plaint that sometime in 2011, the beneficiaries of land parcel number NGARIAMA/NYANGENI/1318 agreed to transfer it to **KIRINYAGA COUNTY COUNCIL** for the benefit of **NGIRIAMBU GIRLS HIGH SCHOOL** in exchange of land parcel No. NGARIAMA/NYANGENI/1282 (the suit land herein) also measuring 0.81 Hectares. However, instead of all the beneficiaries listed in the certificate of confirmation of grant in Gichugu Succession Cause No. 20 of 2010 being named as owners of the exchanged suit land, the defendant fraudulently caused the same to be registered in his names thus provoking this suit to which the plaintiffs seek judgment against the defendant in the following terms:

(a) A declaration that the registration of the defendant as the sole owner of land parcel No. NGARIAMA/NYANGENI/1282 was fraudulent, or in the alternative, the defendant holds land

parcel number NGARIAMA/NYANGENI/1282 in trust for himself, the plaintiffs, sister in law SERAH SOLOMON and their sisters JANE NJOKI KIBUCHI, NESTER WANGITHI KIBUCHI and PHYLIS WANJIRU KANGARU.

(b) An order for rectification of the register of land parcel No. NGARIAMA/NYANGENI/1282 by registering the joint name of FRANCIS MURIUKI KIBUCHI, CYRUS NAMU, JUSTIN SERAH SOLOMON, JEREMIA KIBUCHI and VIOLET MUTHONI as trustees for themselves and in trust for JANE NJOKI KIBUCHI, NESTER WANGITHI KIBUCHI and PHYLIS WANJIRU KANGARU.

(c) Costs be provided for.

The defendant filed a defence in which he pleaded that apart from the plaintiffs herein, there are other siblings namely **JEREMIAH KIBUCHI, NESTER WANGITHI KIBUCHI, SOLOMON NJAGI KIBUCHI** (deceased), **JANE NJOKI KIBUCHI** (deceased) **and PHYLIS WANJIRU KANGARU (deceased).** And in response to paragraph five (5) of the plaintiffs' plaint, the defendant states as follows:

"The defendant admits the contents of paragraph 5 of the plaint save to add that the Estate in contention was L.R No. NGARIAMA/NGIRIAMBU/1318 in which the defendant was the administrator thereto"

The defendant also admits that land parcel No. NGARIAMA/NGIRIAMBU/1318 belonged to the deceased.

By a Notice of Motion dated 24th January 2017 premised under the provisions of ***Order 2 Rule 15 (b) (c) and (d) of the Civil Procedure Rules*** and also ***Section 3A of the Civil Procedure Act***, the plaintiffs seek the following orders:

(a) That the defence be struck out with costs.

(b) The judgment be entered for the plaintiffs that the land parcel No. NGARIAMA/NGIRIAMBU/1282 be registered in the names of FRANCIS MURIUKI KIBUCHI, CYRUS NAMU JUSTIN, SERAH WANGECHI NJAGI, JEREMIAH NJAGI KIBUCHI and VIOLET MUTHONI MURAGE as trustees for themselves and PURITY WAWIRA MUNENE, NESTER WANGITHI KIBUCHI and IRENE WANGUI NDEGWA.

(c) Costs of the application be provided for.

That application which is the subject of this ruling is based on the grounds that the defence herein is a sham as it consists of mere denials intended to delay the expeditious disposal of this case.

The application is also supported by the affidavit of **CYRUS NAMU JUSTIN** the 1st plaintiff and also sworn on behalf of his sister the 2nd plaintiff in which he confirms that the land parcel No. NGARIAMA/NGIRIAMBU/1318 measuring 2 acres belonged to the deceased and in 2010, the defendant who is their brother was appointed as the administrator of his Estate following orders issued in **GICHUGU COURT SUCCESSION CAUSE No. 20 of 2010** where all the eight siblings were to equally share the said land with each getting ¼ acre. However, the said land was exchanged with land parcel No. NGARIAMA/NGIRIAMBU/1282 also measuring 2 acres. Before that, land parcel No. NGARIAMA/NGIRIAMBU/1318 had been registered in the names of five (5) of the siblings in trust for the other three (3) siblings but it was discovered by the plaintiffs that on 20th February 2012 and without their knowledge, the defendant had registered land parcel No. NGARIAMA/NGIRIAMBU/1282 in his sole names and so they placed a caution thereon because the defendant was becoming evasive and rarely went home. It is their case therefore that the defence herein is a mere denial and raises no issues and infact admits that the land parcel No. NGARIAMA/NGIRIAMBU/1282 belongs to all the family. There is nothing to warrant this matter proceeding to trial. Annexed to that supporting affidavit are the

proceedings and confirmation of grant issued in **GICHUGU PRINCIPAL MAGISTRATE'S SUCCESSION CAUSE No. 20 of 2010**, the Green Cards for land parcels No. NGARIAMA/NGIRIAMBU/1318 and NGARIAMA/NGIRIAMBU/1282, copies of letters of Limited grants ad litem issued to **IRENE WANGUI MBIRIA, SERAH WANGECHI NJAGI** and **PURITY WAWIRA** in respect of the Estate of **PHYLIS WANJIRU MBIRIA, SOLOMON NJAGI KIBUCHI** and **JANE NJOKI KIBUCHI** respectively.

In opposition to that application, the defendant filed a replying affidavit in which he deponed, inter alia, that the plaintiffs have been difficult towards him as the administrator of their father's Estate and have refused to release the title deed to the suit land to him so that he can share it out to the beneficiaries. That the application is not made with clean hands. In paragraph eight (8) of the replying affidavit, he makes the following averment which is important for purposes of this ruling:

> ***"That I therefore pray that this Honourable Court do give directions that the plaintiffs/applicants to allow peaceful time to me as the administrator without any tie of hands as my only wish as their administrator is to proceed pursuant to the confirmed grant issued on 21st February 2011"***

He however seeks the dismissal of the application with costs.

The application was canvassed by way of written submissions which have been filed both by **MAINA KAGIO** advocate for the plaintiffs and **A.N. CHOMBA** advocate for the defendant.

I have considered the application, the rival affidavits, the annextures thereto and the submissions by counsel.

Order 2 Rule 15 (1) (b) (c) and (d) of the Civil Procedure Rules on which this application is premised provides as follows:

> ***"At any stage of the proceedings, the Court may order to be struck out or amended any pleading on the ground that –***
>
> ***(a) -***
>
> ***(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 b***e". Emphasis added

A pleading can be scandalous if it denies a well known fact and it can be frivolous if it has no substance, is fanciful or the party is trifling with the Court or is not raising any reasoned argument – see ***J.P. MACHIRA VS WANGECHI MWANGI & ANOTHER C.A CIVIL APPEAL No. 179 of 1997*** and also ***DAWKINS VS PRINCE EDWARD OF SAVE NEIMBURE 1976 1 QBA 499***. A pleading is also vexatious where it lacks bona fides and only tends to cause the opposite party unnecessary anxiety, trouble and expense – ***BULLEN & LEAKE PRECEDENTS OF PLEADING 12th EDITION*** at ***Page 145.*** Similarly, a vexatious pleading has no foundation or chance of succeeding and is brought merely for purposes of annoying the other party. A pleading will also be considered as prejudicing or embarrassing or delaying a fair trial when it is evasive, obscure, ambiguous or concealing the real issues. And when a pleading is frivolous, vexatious or both, it is an abuse of the process of the Court. The definition of the term abuse of Court process was given in ***BEI NOSE VS WIYLEY 1973 (SA 721 S.C.A*** and adopted by the Court of Appeal in ***MUCHANGA INVESTMENTS LTD VS SAFARIS UNLIMITED (AFRICA) LTD & OTHERS (2009 e K.L.R)*** as follows:

> ***"What does constitute an abuse of process of the Court is a matter which needs to be determined by the circumstances of each case. There can be no all-encompassing definition of the concept of 'abuse of process'. <u>It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of Court to facilitate the pursuit of the truth are used for purposes extraneous to that objection"</u>.*** Emphasis added

Having considered the pleadings herein, the application to strike out the defence, the rival affidavits and annextures thereto, it is clear to me that the defence herein falls within the definition of those clearest of cases where a pleading is so hopeless that it discloses no reasonable cause of action nor any triable issues. Other than clarifying, and rightly so, that their late father's land was NGARIAMA/NGIRIAMBU/1318 (and not NGARIAMA/NYANGENI/1318 as pleaded by the plaintiffs), there is really nothing pleaded in the defence to warrant this suit taking up judicial time for a trial. The defendant concedes both in his defence and in his replying affidavit that he is the administrator of the deceased's Estate which comprised land parcel No. NGARIAMA/NGIRIAMBU/1318 which was subsequently exchanged for the suit land herein. It is not his case that land parcel No. NGARIAMA/NGIRIAMBU/1318 was his private property and neither is it his defence that he is the sole proprietor of the suit land. Indeed if that was the case, nothing would have been easier than to plead as such in his defence. If anything, by paragraph eight (8) of his own replying affidavit, he depones that his only wish "***is to proceed pursuant to the confirmed grant issued on 21st February 2011***". That grant apportioned land parcel No. NGARIAMA/NGIRIAMBU/1318 equally among the eight (8) siblings with each getting 0.10 HA. As the administrator to the deceased's Estate, his only duty is to ensure that the Estate is shared out as per the confirmed grant. His only problem, as can be gleaned from the defence and his replying affidavit, appears to be that the plaintiffs are holding onto the title of the suit land and that some of the beneficiaries are now deceased. But the deceased beneficiaries already have other parties appointed to represent their respective Estates. And with regard to the issue that the plaintiffs are in possession of the title to the suit land, that was obviously necessitated by his decision to register it in his sole names without the knowledge of the plaintiffs. The defendant cannot begrudge the plaintiffs for keeping the title to the suit land or for lodging a caution thereon as they needed to protect their interest in the same. There is nothing in the defence to even suggest that the suit land is his sole property. Indeed the confirmation of grant issued in **GICHUGU PRINCIPAL MAGISTRATE'S COURT SUCCESSION CAUSE No. 20 of 2010** stipulating how the land parcel No. NGARIAMA/NGIRIAMBU/1318 was to be distributed among the heirs is not disputed. It is instructive to note that, in his written submissions, the defendant's counsel states as follows:

> ***"Coming how (sic) the evidence adduced in the replying affidavit and the application by the plaintiffs one come to realize that the issue of the plaintiffs being beneficiaries over the Estate of the deceased is not in contention, also the issue the available property to distribute is not in dispute and a share of ¼ acre out of the land parcel NGARIAMA/NGIRIAMBU/1282 is also not in contention. The only issue here is that the defendant has been willing to distribute the land parcel to the other siblings but under one condition that; firstly he had to make a skeptical step since some of the beneficiaries (3) are deceased and there had to be a representation on their part"***

Counsel for the defendant further submits that the parties have been pursuing an out of Court settlement which the plaintiffs have refused to sign. For avoidance of doubt, counsel has annexed to those submissions a draft consent.

Clearly therefore the defence herein raises no triable issues and can only be described as scandalous, frivolous, vexatious and an abuse of the process of this Court as it will only serve to delay the expeditious disposal of this dispute. That is not in keeping with the provisions of ***<u>Article 159 (2) (b) of the Constitution</u>*** which provides that:

"Justice shall not be delayed".

To allow this defence to remain on record would, as was held in the case of ***<u>FREMAR CONSTRUCTION COMPANY</u>*** (supra), which I cited at the beginning of this ruling, amount to a "***waste***

of judicial time" which is scarce and ought to be expended in solving real and substantial controversies. Judicial time should not be availed to a litigant simply because the rules of Natural Justice demand that one must not be condemned un-heard. That is why the law provides for the summary procedure process and for good reasons.

Ultimately therefore and upon considering all the issues herein, I find that the plaintiffs' Notice of Motion dated 24th January 2017 is well merited. I accordingly allow it and make the following orders:

1. The defence dated 16th January 2016 and filed herein on 18th January 2016 is hereby struck out.

2. Judgment is entered for the plaintiffs that land parcel No. NGARIAMA/NGIRIAMBU/1282 be registered in the names of FRANCIS MURIUKI KIBUCHI, CYRUS NAMU JUSTIN, SERAH WANGECHI NJAGI, JEREMIA NJAGI KIBUCHI and VIOLET MUTHONI MURAGE as trustees for themselves and PURITY WAWIRA MUNENE, NESTER WANGITHI KIBUCHI and IRENE WANGUI NDEGWA.

3. As the parties are family, each will meet their own costs.

B.N. OLAO

JUDGE

16TH JUNE, 2017

Ruling delivered, dated and signed in open Court this 16th day of June 2017

Ms Kiragu for A.N. Chomba for Defendant present

Ms Njiru for Maina Kagio for Plaintiffs present

Plaintiffs both present.

B.N. OLAO

JUDGE

16TH JUNE, 2017