REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 40 OF 2014

ESTON NJERU MUNYI………………………………………………………..PLAINTIFF

VERSUS

JOSEPH GACHOKI KARANI…………………………………………...…1ST DEFENDANT

JOHN NJERU NJIRU…………………………………………………....2ND DEFENDANT

ZACHARIA NJAGI NJIRU……………………………………………..3RD DEFENDANT

FLORENCE NGITHI MWANIKI……………………....……..…………..4TH DEFENDANT

JAMES MURIUKI NGARI…………………………..……………………5TH DEFENDANT

JAMES NJIRU MWANGARIO……………………..……………………6TH DEFENDANT

MARY NDIGA MWATATE………………………………………………7TH DEFENDANT

VIRGINIA NTHUA NGIRI……………………………....…………………..8TH DEFENDANT

JOSPHAT MWANIKI NYAGA……………………..……………………9TH DEFENDANT

JUSTIN MURIUKI NYAGA……………………....……..……………10TH DEFENDANT

ABRAHAM NJIRU NYAGA………………………..………………….…11TH DEFENDANT

JAMES KARUIGI NYAGA…………………………..…...………………..12TH DEFENDANT

DORCAS MUTURI IRERI……………………...……………...…………..13TH DEFENDANT

ISAAC NJERU KITHAKA……………………………...……………14TH DEFENDANT

ELYSTON MUGAMBI NTHATHAI………………..…………..…………15TH DEFENDANT

RULING

1. By a plaint dated 22nd April, 2014 which was filed on 13th May 2014, the Plaintiff sued the 15 Defendants claiming various reliefs against them including:

a. A permanent injunction to restrain the Defendants from entering, using, remaining, continuing in occupation or trespassing upon Title Nos. Mbeti/Gachuriri/2643, 2644, 2647, 2648 and 2655 (hereinafter known as the ('suit properties') and from interfering with the Plaintiff's quiet enjoyment of the suit properties.

b. An eviction order of the Defendants from the suit properties.

c. General damages for trespass and mesne profits.

d. Costs

e. Interest

f. Any orders as the court may deem fit to grant.

2. It was pleaded in the plaint that there were various proceedings and cases between the Plaintiff and one Johana Karigi Kabuga over the suit properties (originally part of Mbeti/Gachuriri/171) which were handled by the D.O Gachoka, Mbeere Land Disputes Tribunal (LDT), and the Resident Magistrate's Court at Siakago. It was further pleaded that the said Land Disputes Tribunal made an award in the Plaintiff's favour in 2001 which was adopted by the Resident Magistrate in 2002 as a judgement.

3. It is also pleaded that the said award and judgement were unsuccessfully challenged by the said Johana Karigi Kabuga before the High Court and the Court of Appeal. The appeal to the Court of Appeal was concluded in 2013.

4. It would appear that while the above proceedings were going on, the said Johana Karigi Kabuga had the Plaintiff's suit in Embu CMCC No. 18 of 1993 dismissed for want of prosecution and also obtained orders lifting restrictions placed on the suit properties in consequence of which he sub-divided and transferred the resultant sub-divisions to himself and the current Defendants. It was pleaded by the Plaintiff that he later on successfully had the said the said orders and sub-divisions set aside.

5. The Defendants filed a statement of defence and counterclaim on 19th June 2014 which stated that they were not involved in any of the above cases by the Plaintiff even though the Plaintiff knew that they would be affected. They also pleaded that the Plaintiff had fraudulently obtained the suit properties and sought an order for cancellation of the Plaintiff's title and for the earlier sub-divisions to be restored.

6. The 1st Defendant appears to have conceded the Plaintiff's claim and he filed a replying affidavit dated and filed on 30th May 2017 denying having instructed any advocate to file a defence and counterclaim on his behalf. All the 1st Defendant wanted was a refund of the purchase price for the one acre of land which he had paid to the aforesaid Johana Karigi Kabuga.

7. The 14th Defendant in his witness statement dated and filed on 11th February 2015 stated that he is not occupying any of the suit properties the subject of the suit. He stated that he had his own parcel of land known as Mbeti/Gachuriri/1984 which was not a subdivision of Mbeti/Gachuriri/171. He therefore contended that he had been wrongly sued.

8. On or about 23rd October 2014, the Plaintiff filed a notice of motion dated 21st October 2014 seeking the following orders:

That the Defendants' statement of defence dated 14th and 18th June 2014 respectively and the counterclaim dated 18th June 2014 be struck out with costs to the Plaintiff.

That judgement on admission be entered against the 1st Defendant.

That the suit be set down for formal proof for assessment of general damages, mesne profits and costs as

prayed for in the plaint.

9. There were 7 grounds on which the said application was based. It was stated, *inter alia*, that the Defendants' defence and counterclaim lacked merit and were full of falsehoods and half-truths; it was a sham calculated to delay the fair trial of the suit; it was scandalous, frivolous and vexatious; and that various courts had already ordered that the suit property belonged to the Plaintiff. The said application was supported by the supporting affidavit sworn by the Plaintiff on 21st October 2014 in which he reiterated the contents of the plaint and added that the Defendants' defence and counterclaim were *res judicata*.

10. The said application was opposed by the Defendants except the 14th Defendant who contended that he had been wrongly sued and the 1st Defendant who conceded the claim. The 6th Defendant swore a replying affidavit on his own behalf and on behalf of the 2nd – 13th and the 5th Defendants. He stated that the Defendants were not involved in the earlier proceedings and did not participate therein. He also stated that the Land Disputes Tribunal had no jurisdiction to deal with title to registered land and the applications for judicial review were not heard on merit but were decided on technicalities. They also stated that the Court of Appeal only dealt with the specific issue before it on whether or not the earlier application for judicial review was time barred.

11. The Defendants also stated that they were members of Rweru group together with the Plaintiff and that as members they were all entitled to a share of the suit properties. They further stated that they have been in possession all along and have established their homes thereon whereas the Plaintiff has never settled there.

12. The Court is aware that there is an application by some of the Defendants for leave to amend their defence and counterclaim dated 11th February 2015 and filed on 12th February 2015. There is no indication in the court file if the said application was heard and disposed of. In the absence of such record, the court shall assume that it is still pending.

13. The principles to be considered in an application for striking out pleadings are fairly well settled in Kenya. The case of ***D T Dobie & Co (Kenya) Ltd v. Joseph Muchina & Another [1982] KLR 1*** is one of the leading authorities on the matter. Generally, a suit or pleading ought not to be summarily struck unless it is so weak and hopeless as to be beyond redemption by amendment. The power of striking out is a drastic power and ought to be exercised cautiously and in the clearest of cases. Finally, the drastic power of striking out pleadings should not be exercised by a minute examination of all documents by way of mini-trial in a manner to usurp the function of the trial court see ***Wenlock v. Maloney & Others [1965] 1WLR 1238.***

14. That is not to say that hopeless or sham pleadings should not be struck out in appropriate cases. That can be done as long as the case in plain and obvious. For instance, see ***Bruce Joseph Bockle v. Coquero Limited Malindi Civil Appeal No. 41 of 2013 and Raghbir Singh Chatte Vs National Bank of Kenya Kisumu Civil Appeal No. 50 of 1996.***

15. So is this case one of those plain and obvious cases for striking out of the defence and counterclaim as sought by the Plaintiff? Have the Defendants raised any triable issue worth investigation in a full trial?

16. The court has considered the pleadings in this file including the affidavits and exhibits relied upon by the parties in urging their respective positions. The court is not satisfied that this is one of the clear and plain cases for striking out the defence and counterclaim. Although the Plaintiff considers himself to have a strong case, the Defendants appear to have raised some triable issues worthy of further investigation at the trial. It is pleaded that they were not party to the earlier proceedings in which the Plaintiff obtained the award from the Land Disputes Tribunal which was adopted by the Resident Magistrate's Court. They were, therefore, not accorded an opportunity of being heard as the dispute proceeded through the various courts even though they were persons who were directly affected. The question of whether or not the Defendants were aware of those proceedings but kept away can only be

resolved after a full trial.

17. The Defendants also pleaded that the Land Disputes Tribunal which made an award in favour of the Plaintiff did not have jurisdiction under the law to deal with title to land. This is an arguable issue which should be fully ventilated because the existence of jurisdiction is very critical before a tribunal can embark upon adjudication of any dispute submitted to it. The court is aware that some other parties unsuccessfully challenged the award but that question was not heard and resolved on merit. One of the applications for judicial review was dismissed because it was time-barred whereas another was disallowed because it was filed by strangers who had no *lucus standi* because they were not party to the proceedings before the Land Disputes Tribunal.

18. The Defendants have also raised issues of fraud on the Plaintiff's acquisition of the suit property. Although the particulars of fraud were not pleaded in the defence and counterclaim, there is an application on record for leave to amend the pleading to supply the particulars. The question of whether the Defendants were purchasers of the suit property or were entitled to a share as members of Rware Group as pleaded is also question which may require further investigation at a trial.

19. The Plaintiff's advocate submitted that the court, while considering the Defendants' application for interlocutory injunction had found that the counterclaim was *res judicata*. With due respect to the learned counsel, I do not agree that such remarks made at an interlocutory stage were meant to conclusively determine such an issue. There was no application before the court for striking out of the defence and counterclaim on account of the doctrine of *res judicata*. They were most probably made obiter.

20. In my view, therefore, the instant case is not suitable for striking out of the defence and counterclaim save for the defence of 1st Defendant who has disowned his defence and counterclaim. The 14th Defendant has stated that he resides on a separate property of his own which has never been part of the suit properties. Whether or not the 14th Defendant is right or mistaken in his position can only be conclusively resolved at the trial.

21. The upshot of the foregoing is that the court finds that save for the prayer against the 1st Defendant, the prayers sought against the rest of the Defendants are not tenable. The court consequently enters judgement against the 1st Defendant on admission but dismisses the application against the 2nd – 15th Defendants with costs.

22. Orders accordingly.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **24th** day of **JULY, 2017**

In the presence of Mr. R.M. Mugo for the Plaintiff, Ms Simiyu holding brief for Mr Makori for the 2nd – 13th and 15th Defendants and the 1st and 14th Defendants in person.

Court clerk Njue/Leadys

Y.M. ANGIMA

JUDGE

24.07.17