



REPUBLIC OF KENYA



**KENYA LAW**  
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**Emfil Limited v Attorney General & 423 others (Environment & Land  
Case 113 of 2015) [2017] KEELC 2243 (KLR) (20 July 2017) (Ruling)**

*Emfil Limited v Attorney General & 423 others [2017] eKLR*

Neutral citation: [2017] KEELC 2243 (KLR)

**REPUBLIC OF KENYA**

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

**ENVIRONMENT & LAND CASE 113 OF 2015**

**AA OMOLLO, J**

**JULY 20, 2017**

**BETWEEN**

**EMFIL LIMITED ..... PLAINTIFF**

**AND**

**THE HONOURABLE ATTORNEY GENERAL & 423 OTHERS .... DEFENDANT**

**RULING**

1. The plaintiff moved this Court under the provisions of Order 1, 2, 10 & 50 vide two chamber summons applications dated 28<sup>th</sup> September 2016 and 1<sup>st</sup> February 2017 respectively. In both applications, the plaintiff/applicant seeks for an order that:
  - a) The defences of all the defendants filed on record be struck out and judgement be entered for the plaintiff as prayed in the plaint.
  - b) Costs of the application be in the cause.
2. The two applications are premised on the grounds on the face thereof inter alia that the defences filed are frivolous, an abuse of the Court process and is intended to delay the hearing of this case. Secondly that both the high Court and the Court of appeal have confirmed the indefeasibility of the plaintiff's titles. That the plaintiff's property was not available for alienation therefore no one can acquire title over the same. Consequently there are no issues to go for trial.
3. The application is also supported by the affidavits sworn by James Gitau Singh, Athanas Kyalo Muli and Vinuchandra Papat. Mr Singh deposed that owing to the large number of defendants, service of summons was done by advertisement with leave of the Court. The 1<sup>st</sup> – 6<sup>th</sup> Defendants and 8<sup>th</sup> defendants who are government agencies failed to enter appearance within the prescribed time. The plaintiff therefore prays for leave of the Court for judgement to be entered against them. Mr Singh



deposed further that having read the statement of defences filed by the 154<sup>th</sup>, 157<sup>th</sup>, 161<sup>st</sup>, 166<sup>th</sup>, 167<sup>th</sup>, 239<sup>th</sup>, 241<sup>st</sup>, 293<sup>rd</sup>, 306<sup>th</sup>, 308<sup>th</sup>, defendants he found them to be frivolous and only intended to delay the hearing of this matter.

4. Mr Athanas Muli deposed that he is a registered land surveyor and acting on instructions of the plaintiffs, he conducted a survey exercise to ascertain whether the titles owned by Emfil limited and those issued under Ramisi Kimondo SS were situated on the same property. That having carried out the survey, he confirmed that they relate to the same property. He annexed copies of documents he relied on and his report as “AKM 1 to 5”.
5. Mr Popat deposed that the plaintiff purchased the listed properties from Ms Associates Sugar Co Ltd in the year 1987. That some parcels were voluntarily given away to Chale Fishermen Group and the government for public use. Mr Popat deposed further that the plaintiff is up to date with payment of land rents as assessed by 2<sup>nd</sup> defendant. Mr Popat deposed in detail results of litigation previously done on the subject land in files in HC Petition No 181 of 2007 and in the Court of Appeal Civil Appeal No 314 of 2012 whose decisions were both in favour of the plaintiff. Therefore in view of the decisions in the two suits, Mr Popat states that the defences filed are vexatious and an abuse of the Court process. He urged the Court to grant the orders sought in their plaintiff’s applications.
6. The application is opposed by the 12<sup>th</sup>, 142<sup>nd</sup>, 145<sup>th</sup>, 147<sup>th</sup>, 149<sup>th</sup>, and 318<sup>th</sup> replying affidavit sworn on their behalf by Adranus Maria Verhoef on 11<sup>th</sup> May 2017. Ms Adnanus deposed that the application dated 28.9.2016 is fatally defective and ought to be struck out for being premised on the wrong provisions of the law. Secondly that the application seeks striking out orders without tackling any triable issues raised in the defence. The deponent contends that the affidavit of Mr James Singh advocate deposes to facts that are at variance with grounds on the face of the application and swears to matters that are contested.
7. In response to the affidavit of Mr Muli, these defendants contend that it also ought to be struck out for delving into matters that forms the substance of the plaintiff’s suit yet he is not listed as a witness. Secondly that he did not include his particulars of registration with the relevant body or annex an expert report in consonance with the activities purportedly carried out therein.
8. In regard to Mr Popat’s affidavit, Mr Adranus deposed that they were not parties to the cases cited and that those cases did not confirm the indefeasibility of the plaintiff’s title but merely quashed the gazette notices. It is Mr Addrianus contention that the present application is premature, ill-advised and ought to fail.
9. On 23<sup>rd</sup> February 2017 the plaintiff applied and was granted leave that the orders sought for striking out do apply to the 75<sup>th</sup> & 76<sup>th</sup> defences in case there is any defence filed and on record. Mr Ngeno for the 283<sup>rd</sup> defendant said the orders sought were not affecting his client. He therefore opted not to oppose the two applications.
10. I have perused the court file and noted that the following defendants have not filed any defences except for defendants Nos 12, 142, 145, 147, 149, 154, 157, 158, 161, 166, 167, 239, 241, 293, 306, 308 and 318 who also participated in opposing the present application.

The plaintiff, and the firm of Apollo Muinde & Co. Advocates on behalf of the 12<sup>th</sup>, 142<sup>nd</sup>, 145<sup>th</sup>, 147<sup>th</sup>, 149<sup>th</sup>, 154<sup>th</sup>, 239<sup>th</sup>, 241<sup>st</sup>, 293<sup>rd</sup>, 306<sup>th</sup>, 308<sup>th</sup>, & 318<sup>th</sup> defendants filed written submissions. Mr Asige for the 157<sup>th</sup>, 158<sup>th</sup>, 161<sup>st</sup>, 166<sup>th</sup> & 167<sup>th</sup> defendants also filed though late written submissions which Mr Singh advocate for the plaintiff urged the Court to expunge from the record for being filed without leave. I have taken all these issues into consideration while reaching my determination.



11. To start on the procedural objections raised by the Respondents affidavit (represented by Apollo Muinde & C Advocate) that the application is defective for want of form i.e. that it ought to have been commenced by way of notice of motion and not chamber summons. In their submissions, they did not touch on this issue. To answer this question, I invoke the provisions of article 159 (1) of the Constitution 2010 which mandates this Court not to give undue regard to procedural technicalities and instead deal with substantive matters. These defendants know what case is before them to meet hence the omission did not prejudice them. Consequently I find no merit in this objection.
12. On merits of the orders sought, the Court of Appeal in the old case of D.T Dobie & Co (K) Ltd v Muchina [1982] KLR I held in paragraph 2 that the words “cause of action” means an act on the part of the defendant which gives the plaintiff his cause of complaint. In Holing No 8 reads thus:
 

“ the power to strike out should be exercised only after the Court has considered all facts but must not embark on the merits of the case itself as this is solely reserved for the trial Judge. On an application to strike out, no opinions should be expressed as this would pre judge a fair trial and restrict the freedom of the trial and restrict the freedom of the trial Judge in disposing the case.”
13. The current application is premised on the ground that the defences filed are vexatious and abuse of the Court process and is meant to delay the fair trial of the plaintiff’s case. Under Order 2 rule 15, the Court is mandated to strike out pleadings (read defence). If there is no defence in law or is scandalous, vexatious, frivolous and may prejudice, embarrass or delay the fair trial of the action or if it is an abuse of the Court process. The simple question this Court is tasked to determine is whether the defences filed by the respective parties who have filed and on record falls under the category specified in Order 2 rule 15 (1) b – d as stated by the plaintiff’s application.
14. The 12<sup>th</sup>, 142<sup>nd</sup>, 145<sup>th</sup>, 147<sup>th</sup>, 149<sup>th</sup>, & 318<sup>th</sup> defendants filed a joint statement of defence. They denied the plaintiff’s claim as contained in paragraphs 2, 3, 4, 5, 7, 8, 9 – 33, 36, 37 of the plaint and put the plaintiff to strict proof. In paragraphs 5B & 7 of the defence, they pleaded that they are bonafide purchasers for value without notice. These defendants stated that they shall rely on their documentation for its full purpot thereof.
15. The 157<sup>th</sup>, 18<sup>th</sup>, 161<sup>st</sup>, 166<sup>th</sup>, & 167<sup>th</sup> defendants also filed their joint statement of defence on 2<sup>nd</sup> November, 2015 also denying the plaintiff’s claim. In paragraph 7 these defendants pleaded that the plaintiff’s title had been unlawfully acquired and were surrendered, cancelled and or revoked with the knowledge of the plaintiff. In paragraph 10, they pleaded they were not parties to HCC 181 of 2007 or the Judicial review proceedings or the civil suit and therefore are strangers to paragraphs 21, 22, 23, 24 & 25 of the plaint. These defendants pleaded in paragraph 15 & 17 that they are lawfully registered as owners of parcels of land Kwale/Ramisi Kinondo SSS Nos 60, 61, 62, 63, 64, 67 & 70 and urged the Court to dismiss the plaintiff’s suit.
16. The 239<sup>th</sup>, 241<sup>st</sup>, 308<sup>th</sup>, 154<sup>th</sup>, 293<sup>rd</sup> & 306<sup>th</sup> defendants filed a joint statement of defence on 29.10.2016 similar to the set of the 12<sup>th</sup> & co defendants. I was unable to see the defence of the Attorney General for the 1<sup>st</sup> & 8<sup>th</sup> defendants therefore the application proceeds on the basis that none was filed. The plaintiff responded to the sets of defences earlier filed. I deduce from the 12<sup>th</sup>, 142<sup>nd</sup>, 145<sup>th</sup>, 149<sup>th</sup>, 154<sup>th</sup>, 318<sup>th</sup>, 239<sup>th</sup>, 241<sup>st</sup>, 293<sup>rd</sup>, 306<sup>th</sup> and 308<sup>th</sup> defences is that they take issue with the application because their defences raises a defence of bonafide purchaser for value without notice as stated under section 53 of the Land Registration Act hence the suit should be allowed to go for full trial as against them.



17. In response to this line of defence and submissions, the plaintiff submitted that section 53 presumes the existence of a valid title which is then transferred to an innocent 3<sup>rd</sup> party. That the plaintiff already outlined how the gazette notice was quashed by the Court of Appeal on 18<sup>th</sup> July 2014 therefore the titles under which the defendants claim to have acquired the properties are null and void and of no effect.
18. Mr Asige submitted (although Mr Singh urged the Court to expunge the submissions but I did not make any order to that application) that the indefeasibility of the plaintiff's title was not determined in the two suits referred to. He also submitted that the applicant failed to disclose under what sub-rule is premised therefore it's fatal. This last limb is true that the application was brought under order 2 rule 15 without specifying (a) or (b) or (c) or (d) but one easily gleans from the grounds in support of the application that it was not brought under Order 2 rule 15 (a). The omission in my view is not fatal. He also did not explain what prejudice his clients are occasioned as a result of the omission.
19. I have had occasion to read the decision in the case of *Emfil Limited v Registrar of Titles Mombasa* [2014] eKLR. The Court of appeal in paragraph 2 of their judgement made reference to the decision of Serгон J in the case of *Emfil Limited v Hamisi Mwalimu & 9 others* HCC 181 of 2007 delivered on 29<sup>th</sup> October 2010. That having heard that case the Judge made orders declaring the purported allocation and title deeds issued to intruders or any person in respect of the appellant's land irregular, unlawful, illegal, null and void and of no legal effect. The learned Judge also issued an injunction restraining the intruders and or their agents from remaining on the appellant's land.
20. Subsequent to this decision, a gazette notice No 6652 was published revoking the plaintiff's title. The plaintiff challenged that action vide his case stated above which ended in the Court of appeal. The Court of appeal agreed with him and went ahead to issue orders of Certiorari, Mandamus and Prohibition as was prayed in the motion. These two Court decisions confirm that the applicant/ plaintiff holds a title to the suit property. Of particular importance to this application is Justice Serгон's decision which found that anyone else holding a parallel title to the plaintiff's land that such title was of no legal effect.
21. The affidavit of Athanus Muli confirmed that the titles held by the defendants referred to the same parcel of land as the one held by the plaintiff. Without getting into the merits of the defendants' defence the defendants have not stated in their defence or by way of replying affidavit that their parcels of land are different from the ones the plaintiff is claiming as the defence of the 12<sup>th</sup>, 142<sup>nd</sup>, 145<sup>th</sup>, 147<sup>th</sup>, 318<sup>th</sup>, 154<sup>th</sup>, 239<sup>th</sup>, 241<sup>st</sup>, 293<sup>rd</sup>, 306<sup>th</sup> & 308<sup>th</sup> defendants is that they were purchasers for value without notice. On the other hand the defence of the 157<sup>th</sup>, 158<sup>th</sup>, 161<sup>st</sup>, 166<sup>th</sup>, & 167<sup>th</sup> defendants was that the plaintiff's title was irregularly acquired. Both sets of issues in my view were settled in the two cases and does raise a triable issue. If the high court declared the intruders titles to be of no legal effect then they had nothing to sell to parties claiming purchaser for value without notice. Similarly the Court of appeal found as a matter of principle in paragraph 27 of their judgement that if the original grantee had violated the terms of the grant, the government had the option to put in place machinery to have the grant revoked through an order of the Court. Since there is no mention of such steps having been commenced, the 154<sup>th</sup>, 157<sup>th</sup>, 158<sup>th</sup>, 161<sup>st</sup>, 166<sup>th</sup> & 167<sup>th</sup> defendants have no basis to allege that the plaintiff's title was acquired unlawfully as no such decision has been reached.
22. The defences of 12<sup>th</sup>, 142<sup>th</sup>, 145<sup>th</sup>, 147<sup>th</sup>, 149<sup>th</sup>, 154<sup>th</sup>, 239<sup>th</sup>, 241<sup>st</sup>, 293<sup>rd</sup>, 306<sup>th</sup> 308<sup>th</sup>, and 318<sup>th</sup> defendants pleaded they all acquired their titles after 2010 majority of which were acquired in 2013. This was after the judgement in HCCC 181 of 2007 which declared such titles to be of no legal effect. This judgement cannot be said to be in persona but in rem. I am therefore satisfied this is a clear case for striking out. Consequently I find nothing to proceed for trial as the same would result in delay of fair



trial of this case. The two applications dated 28th September 2016 and 1<sup>st</sup> February 2017 are merited and is hereby allowed as prayed

**DATED, SIGNED & DELIVERED AT MOMBASA THIS 20<sup>TH</sup> DAY OF JULY 2017**

**A. OMOLLO**

**JUDGE**

