



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 149 OF 2016**

**NGURAKAPEL NG'IRO (suing as the Legal Administrator of the  
Estate of NGIRO CHACHAKIN) ..... PLAINTIFF**

**VERSUS**

**ALEXANDER A. REUBEN (suing as the Legal Representative  
of the KARIWO LOKWANYANG KERKER)..... DEFENDANT**

**R U L I N G**

1. The application dated **28/7/2017** seeks an order that the suit be struck out for being scandalous, frivolous and vexatious and an abuse of the court process.
2. The grounds upon which the application is made is that there exists **Kitale ELC No. 75 of 2015** between the same parties and this suit relates to the same subject matter in that suit.
3. The plaintiff in the instant suit has sworn a replying affidavit in opposition to the application for striking out. The grounds on which the application is opposed are that the defendant has not exhibited any evidence showing that the suitland belongs to him and that the plaintiff is not a party in **Kitale ELC No. 75/2015**. He avers that though his brothers are parties in **ELC No. 75 of 2015**, they are not the Administrators of the Estate of his late father Ngiro Chachakin. I find this to be the correct position.
4. Further the plaintiff avers that the plaint in the instant suit has been amended, that the striking out application was filed before close of pleading, and that the defendants' application is now overtaken by events as it is not based on the amended plaint which brings in the doctrine of adverse possession. Therefore the plaintiff in this suit claims adverse possession the ownership of the suitland thus abandoning the claim of fraud.
5. It is further averred that the registered proprietor of the suitland remains Kariwo Lokwanyang Kerker and the Legal Administrator of his Estate in **ELC No. 75 of 2015** claims against the plaintiff's brothers for trespass onto his land. He has not sued the plaintiff in this suit.
6. Therefore the real issues in controversy in the instant application are whether the parties and subject matter in this suit is the same as those in **Kitale ELC No. 75 of 2015** and if so whether this suit should be struck out for that reason.
7. Though the applicant incorrectly cites **Order 3 rule 15**, the substantive law governing striking out of pleadings is founded in the provisions of **Order 2 Rule 15 of the Civil Procedure Rules. Sub-rule 15 (1)** of the aforementioned Order, states that:

**“(1) at any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**

- a) It discloses no reasonable cause of action or defence in law; or**
- 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 be.”**

8. While applying the provision, the Court has the discretion to either dismiss, stay or enter judgment as it may deem fit for the ends of justice, once it has been established that the grounds as set out in the said application warrant such relief.

9. In *Dev Surinder Kumar Bij v Agility Logistics Limited Civil Suit No. 311 of 2013[2014] eKLR* it was held, inter alia, that:

**“For a pleading to be dismissed pursuant to the provisions of Order 2 rule 15(1), it should be made clear and obvious that the issues raised by the Plaintiff can neither be substantiated, nor disclose any reasonable or justifiable an action as against the Defendant.”**

10. It would appear to this court then that the striking out of a suit for being scandalous, frivolous and an abuse of the process of the court is usually done more on the basis of the merits of the cause of action rather than on the premise of the mere pendency of a related suit.

11. This is further illustrated by the case of *Transcend Media Group Limited –vs- Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR* where the court stated as follows:

**“However, the word “scandalous” for the purposes of striking out a pleading under Order 2 rule 15 of the Civil Procedure Rules is not limited to the indecent, the offensive and the improper and that denial of a well-known fact can also be rightly described as scandalous. See J P Machira vs. Wangechi Mwangi vs. Nation Newspapers Civil Appeal No. 179 of 1997. But they may not be scandalous if the matter however scandalizing is relevant and admissible in evidence in proof of the truth of the allegation in the plaint or defence so that when considering whether the matter is scandalous regard must be had to the nature of the action.**

**A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the Court; or (iv) when to put up a defence would be wasting Court’s time; or (v) when it is not capable of reasoned argument. See Dawkins vs. Prince Edward of Save Weimber (1976) 1 QBD 499; Chaffers vs. Golds Mid (1894) 1 QBD 186.**

**Again a pleading or an action is frivolous when it is without substance or groundless or fanciful and is vexatious when it lacks bona fides and is hopeless or offensive and tends to cause the opposite party unnecessary anxiety, trouble and expense. See Bullen &Leake and Jacobs Precedents of Pleading (12<sup>th</sup> Edn.) at 145.**

**A matter is said to be vexatious when (i) it has no foundation; or (ii) it has no chance of succeeding; or (iii) the defence (pleading) is brought merely for purposes of annoyance; or (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. See Willis Vs. Earl Beauchamp (1886) 11 PD 59.**

12. However this court will nevertheless examine the applicant’s case. In pursuit of the line of reasoning

followed by the applicant, the question arises: Is **Kitale ELC No. 75 of 2015** between the same parties and in respect of the same subject matter as this suit?

13. A copy of the plaint in that suit is exhibited in the affidavit in support of the application. The title reads as follows:-

**Alexander A. Reuben.....Plaintiff**

**Versus**

**1. Ng'uriatudo Ngiroo .....1<sup>st</sup> Defendant**

**2. Joseph Ngiroo Chachakin.....1<sup>st</sup> Defendant**

14. The plaintiff in **Kitale ELC No. 75 of 2015** is the defendant in this suit. However, as the title shows **Kitale ELC No. 75 of 2015** is filed against persons other than the plaintiff herein. The plaintiff in this suit is Ngurakapel Ng'iro suing as the Legal Administrator of the Estate of one Ngiro Chachakin while the names of the defendants on the case title in **Kitale ELC No. 75 of 2015** are Nguriatudo Ngiroo and Joseph Ngiroo Chachakin. In **Kitale ELC No. 75 of 2015**, Alexander A. Reuben seeks an order for eviction of the defendants from the suitland. The plaintiff herein is therefore not a defendant therein.

15. The land subject matter in **Kitale ELC No. 75 of 2015** is **West Pokot/Chemwochoi/269**, the same land in this suit. In this suit the plaintiff seeks a declaration that the suitland is property of the late **Ngiro Chachakin** and that the title deed should be cancelled on the basis that the registration of the suitland in the name of one **Kariwo Lokwanyang Kerker** was obtained fraudulently.

16. A strange averment is made in the supporting affidavit, that the plaintiff ought not to have filed this suit but he should have applied to amend the earlier suit to include the plaintiff.

17. In other words the defendant in this suit, seems to desire that the plaintiff herein do apply to join himself as a defendant in that suit, a task that should principally be that of the plaintiff in that suit. I think this is not the correct position as a person is, depending on the cause of action, at liberty to file his own suit if he does not wish to be joined to another suit as a defendant. In my opinion, the suit against the plaintiff's brothers can be maintained independently of this suit.

18. For the reasons evident in the above quest to find out if the two suits are between the same parties and are on the same subject matter, it is difficult for this court to classify the respondent's suit within the parameters given in the case of **Transcend Media Group Limited v Independent Electoral & Boundaries Commission (IEBC) [2015] eKLR** above.

19. In conclusion, after going through the pleadings I find that though the subject matter land in both suits is the same and the claims are related, the parties and the cause of action are not the same. The relationship between the plaintiff in the instant case and the defendants in **Kitale ELC No. 75 of 2015** is not sufficient to entitle the applicant to an order striking out this suit as the defendants in **Kitale ELC No. 75 of 2015** are not administrators of the estate of the plaintiff's deceased father and the claim therein can stand on its own against them.

20. I must also state that this application was filed before the respondent amended his plaint and it is not possible to relate the applicant's submissions to the amended pleading since the application dated **7/11/2016**, as was correctly pointed out by the respondent, was filed prior to the amendment.

21. Without commenting on the propriety of the amended pleading which was not made the subject of the application by the applicant, I therefore find that the application dated **7/11/2016** therefore has no merits and the same is dismissed with costs.

**Dated, signed and delivered at Kitale on this 19<sup>th</sup> day of October, 2017.**

**MWANGI NJOROGE**

**JUDGE**

**19/10/2017**

Before - Mwangi Njoroge Judge

Court Assistant - Isabellah

Ms. Sitati holding brief for Arunga for Applicant

Ms. Mwemeke holding brief for Kaosa for Respondent

**COURT**

Ruling read in open court in the presence of counsel for the parties.

**MWANGI NJOROGE**

**JUDGE**

**19/10/2017**