



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ELC NO. 397 of 2017

GEORGE MUKOMA MWANGI - APPLICANT

VS

REUBEN KAMAU MANYEKI - RESPONDENT

1. The Applicant filed an application through Notice of Motion dated 5/07/2017 for orders that;

- a) the defence filed on 3/7/2017 by the defendant respondent be struck out
- b) judgment be entered against the respondent as prayed
- c) costs for the application and the suit to be borne by the respondents.

2. The Application is premised on the affidavit sworn by George Mukoma Mwangi and the grounds listed below;-

- a) The statement of defence is a general traverse that does not controvert the issues of law and fact enunciated in the plaint.
- b) The Respondent lodged a caution in the Suitland on 3/4/2017 claiming a licensee's interest. In contrast the defence discloses a purchaser's interest the two interests are mutually inconsistent/destructive.
- c) It therefore follows that the alleged interest of a licensee does not exist and the caution should therefore be removed forthwith.
- d) The Defendant is claiming that he purchased land from a person who is now deceased. That interest if any has not crystallized and cannot form the basis of the caution.
- e) The Defendant should have filed revocation proceedings in respect of Murang'a C.M.C.C SUCCESSION CAUSE NO. 107 OF 2004 to establish his interest if any and not lodge a caution claiming an interest that is non-existent. The caution is therefore unlawful.
- f) The Defence is a sham and should be struck out. It does not raise triable issues.
- g) It is just so order.

3. The Application is supported by the supporting affidavit of George Mukoma Mwangi the Applicant herein. He reiterates the grounds stated above and in a nutshell states that that the defendant respondent lodged a caution as a licensee while in his defence he alludes to a purchaser's interest, therefore the

alleged license interest does not exist. Further that the alleged purchase was between the respondent and a deceased person, thus the Applicant contends the respondent ought to have pursued a revocation of the grant in respect to CMCC Succession Cause No 107 of 2004 -Muranga instead. Further that the Land control board consent was not obtained within six months of the alleged agreement of sale. Finally, that the respondent is a busybody who has brought a defence devoid of any triable issue and an abuse of the process of the Court.

4. In opposing the application, the Defendant states attests to the lodging of the caution on suit Land LOC11/Maragi/4048 to protect a purchaser's interest over a portion of 0.3 acres of the suit land which he acquired via purchase sometime in 2007. He has attached an agreement of sale to support that averment. The plaintiff has refused to either transfer the portion to him or to refund the purchase price and hence the caution.

5. The genesis of this application is a suit filed on the 9/6/2017 by the plaintiff against the defendant claiming an order directing the defendant to remove the caution lodged on the suit property on the 3/4/2017 claiming a licensee's interest. According to the official search on record the suit property measuring 1.21 acres is owned by the plaintiff, Jane Wanjiru Mwangi and Peter Rubui Mwangi as absolute proprietors.

6. The defendant respondent then filed his defence to the suit on the 3/07/2017 in which he alleges that the plaintiff Applicant sold to him the said parcel of land which was initially registered in the name of the plaintiff's deceased father. After paying for the parcel of land, the estate was subdivided and the respondent was given vacant possession of the suit land, he proceeded to make developments on the suit land to wit erecting permanent rental houses, planting trees, deposited building material, and settled his parents on the said land. The Applicant then proceeded to apply for grant of administration on the deceased estate, and after it was finalized the land was registered in the name of the plaintiff Jane Wanjiru Mwangi and Peter Rubui Mwangi. The plaintiff then proceeded to evict the defendants from the suit land and took up possession of the same. The defendant then filed CMCC. No. 266/14 at Murang'a against the plaintiff claiming his interest in the portion of the suit land; the case is pending in the Chief Magistrates Court.

7. Counsels for both litigants opted to rely on the pleadings as filed. The issue for determination by this court in the present application is purely whether the defence filed on the 3/7/2107 is vexatious, scandalous and an abuse of the Court and whether it should be struck out as such.

8. Pleadings play a very important role in the fair administration of justice as seen in **Jacobs; The present importance of pleadings**” **Current legal problems at pages 175-761** which states as thus;

“Pleadings do not only define the issues between the parties for the final decision of the Court at the trial, they manifest and exert their importance throughout the whole process of the litigation.....They show on their face whether a reasonable cause of action or defence is disclosed. They provide a guide for the proper mode of trial and particularly for the trial of preliminary issues of law or fact. They demonstrate upon which party the burden of proof lies, and who has the right to open the case. They act as a measure for comparing the evidence of a party with the case which he has pleaded. They determine the range of the admissible evidence which the parties should be prepared to adduce at the trial. They delimit the relief which the Court can award....”.

9. **Order 2 rule 15** donates to the Court the discretionary power to strike out pleadings that are;

“15. (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.

(2) No evidence shall be admissible on an application under sub-rule (1) (a) but the application shall state concisely the grounds on which it is made.

(3) So far as applicable this rule shall apply to an originating summons and a petition.

11. It is trite law that the power to strike out any pleading under this order is not mandatory but permissive and confers a discretionary jurisdiction to be exercised by the Court. Courts, in applying two principles enunciated by Madan J (as he then was) in **D T Dobie (K) Limited Vs Muchina (1982) KLR 1** Quoting from **Sellers Lord Justice in Wenlock V Halony & Others (1963) WLR 1238 at page 1242** that is to say that parties will not be lightly driven from the seat of judgment and for this reason the court will exercise discretionary power with the greatest care and circumspection and only in the clearest of cases. That a stay or even a dismissal of proceedings may often be required by the very essence of justice to be done so as to prevent the parties from being harassed or being put into expense by frivolous vexatious and hopeless litigation.

12. The Court of Appeal in **Nitin Properties Vs Jagir Singh Kalsi NBI CA 132 of 1989** held that striking out is a drastic remedy and it has to be invoked only in plain and obvious cases and that the discretion must be exercised with extreme caution. In **Abubakar Zein Ahmed Vs Premier Savings and Finance Company Limited & 4 others (2007) eKLR** it was held that no suit ought to be summarily dismissed unless it so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak that it is beyond redemption and incurable by amendment. In **D T Dobie (Supra)** if such 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.

13. Sections 1A and 1B of the Civil Procedure Act mandate Court to place more premium on substantive justice rather than technicalities. The Court of Appeal observed in **Richard Ncharpi – Vs – IEBC & 2 Others [2013] EKLR** as follows;

“Nowadays pendulums have swung and the Courts have shifted towards addressing substantive justice and no longer worship at the altar of technicalities.” In this application the Court is being asked to strike out the defence for being vexatious scandalous and an abuse of the process of Court.

14. In applying the law and judicial principles to the current case, the question for determination is whether the defence is a candidate for striking out? The plaintiffs claim is for an order directing the defendant to remove the caution lodged on the suit land on grounds that the plaintiff is the absolute owner of the land and therefore the caution is illegal and unwarranted. In his defence the defendant has pleaded that he purchased a portion of the suit property measuring 0.3 acres from the plaintiff and that despite payment of the full purchase price and being put in possession, the plaintiff has refused to transfer the land to him and instead has evicted him, his servants and parents from the portion of the suit land and in the process destroying his fencing and building materials and has barred him from re-entering the suit land. He has attached an agreement for sale entered in 2007 to support his defence. That he lodged the caution therefore to protect his interest.

15. I have examined the wording of the caution registered on suit land stating “caution in favour of Rueben Kamau Manyeki claiming licensee’s interest”. It would appear that this is the bone of contention that has been raised by the plaintiff on the grounds that the claim of the defendant in the defence is purchasers interest as contrasted with the licensee’s interest stated in the caution. Whether the interest is premised on a licence or a purchase are issues to be canvassed in evidence at the trial. It is on this basis that the defence is said to be struck out for being an abuse of the process of the Court.

16. The totality of the above is that the defence cannot be said to be vexatious scandalous and an abuse of the process of the Court. I would be very hesitant to so find. In my view the defence is not hopeless but raises a bonafide triable issue which ought to be canvassed at the trial. Whether or not it will succeed is not a matter for consideration at this stage. In my view it does not make the defence fatal as it can be cured by amendment. In any case the caution is not his pleading, his pleading is premised on purchaser's interest which is consistent with the attached agreement of sale which has not been controverted by the plaintiff. The plaintiff in para 10 of his supporting affidavit alludes to an admission of sale of land to the defendant when he challenges the same on grounds of lack of Land Control Board consent. There is the issue raised by the defendant on specific performance or refund of purchase monies. This is an issue which the trial court will no doubt consider. To my mind this is not a matter that I would exercise my discretionary power to strike out the defendant's defence.

17. In the upshot the plaintiff's Notice of Motion dated the 5/7/2017 is dismissed with costs to the respondent.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 18TH DAY OF OCTOBER 2017.

J.G. KEMEI

JUDGE