



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURT**  
**ELC. CASE NO. 649 OF 2013**

**JOYCE WANGUI KAHARE.....1<sup>ST</sup> PLAINTIFF**

**NAOMI WOKI GICHUHI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JAMES NJENGA NGIGI..... 1<sup>ST</sup> DEFENDANT**

**KENNETH NDUNGU WAWERU..... 2<sup>ND</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Plaintiffs' Notice of Motion dated 19<sup>th</sup> May 2015 in which they seek orders that the Defence filed herein be struck out for not disclosing a reasonable defence and that judgment be entered for the Plaintiffs as prayed in the Plaint. The Plaintiffs also seek for an order condemning the Defendants to pay the costs of this Application and the main suit.

The Application is based on the grounds appearing on the face of it together with the Supporting Affidavit of the 1<sup>st</sup> Plaintiff, Joyce Wangui Kahare, sworn on 19<sup>th</sup> May 2015, in which she averred that the gist of the award of the Limuru Land Disputes Tribunal was that the 2<sup>nd</sup> Defendant's claim was to be satisfied from the parcel of land known as Limuru/Bibirioni/1238 out of which he was to obtain a portion measuring 0.20 Ha. She further averred that before and at the time of the said award, the parcel of land known as Limuru/Bibirioni/1238 did not exist. She further averred that the Defendants admitted this fact during the proceedings and award by the Limuru Land Disputes Tribunal and that accordingly, that award is incapable of enforcement. She further stated that in light of this, the Defendants have no defence to this suit.

The Application is contested. The Defendants filed their Grounds of Objection dated 3<sup>rd</sup> September 2015 whereby they relied on the following grounds:

1. That the Application is totally misconceived, frivolous and unfounded;
2. The 1<sup>st</sup> Defendant's Defence dated 6<sup>th</sup> August 2013 together with the 2<sup>nd</sup> Defendant's Defence and Counterclaim dated 16<sup>th</sup> July 2014 raise several triable issues necessitating a full trial of this matter.
3. The Application by the Plaintiffs is a desperate attempt to avoid and or delay the trial of the case

on merits.

4. The Defendants ought to be allowed to have their day in court as envisaged in **Article 159(1) and (2)(d) of the Constitution of Kenya**.
5. The Honorable Court has jurisdiction under **section 80(1) of the Land Registration Act** to make orders for the rectification of the register by directing that any registration be cancelled or amended if it is satisfied that any registration was obtained, made or omitted by fraud or mistake.
6. Given the issues arising in this matter, the same cannot be determined on cold affidavit evidence.
7. This Application ought to be dismissed with costs to the Defendants/Respondents.

The issue I am called upon to determine is whether or not to strike out the Defences filed by the Defendants and enter judgment in favour of the Plaintiffs. The applicable law is to be found in **Order 2 Rule 15(1) of the Civil Procedure Rules, 2010** which states 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. *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;*
- 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.”***

I have no doubt that this court has power at any stage of the proceedings, to strike out a pleading, including a plaint or defence. However, in what circumstances can the court properly exercise such power? In the case of **Sunday Principal Newspaper Limited [1961] 2 ALL E.R. 758**, the principles for striking out were expressed thus,

***“It is established that the drastic remedy of striking out a pleading or part of a pleading, cannot be resorted to unless it is quite clear that the pleading objected to discloses no arguable case. Indeed it has been conceded before us that the rule is applicable only in plain and obvious cases....”***

In their Plaint dated 29<sup>th</sup> May 2013, the Plaintiffs are seeking for an order to evict the Defendants out of the parcel of land known as Limuru/Bibirioni/1239 to which they are the registered proprietors. In his Defence dated 6<sup>th</sup> August 2013, James Njenga Ngigi stated that he occupies a portion of 0.2 Ha within Limuru/Bibirioni/1239 as an agent of one Kenneth Ndungu Waweru who purchased that portion from the late Kamau Gathata from whom the Plaintiffs inherited this parcel of land. He further stated that the said Kenneth Ndungu Waweru sued the Plaintiffs before the Limuru Land Disputes Tribunal being Tribunal Case No. LND/9/6/70/2008 claiming his 0.2 Ha and that the decision therefrom was filed in the **Senior Principal Magistrate’s Court Limuru in Land Case No. 11 of 2009** whereby judgment was entered to the effect that a portion of 0.2 Ha be excised out of the parcel of land known as Limuru/Bibirioni/1238 and be transferred to the said Kenneth Ndungu Waweru and that while waiting for this to be done, the said Kenneth Ndungu Waweru could continue to stay on Limuru/Bibirioni/1239. He averred that being just an agent of the said Kenneth Ndungu Waweru, this suit does not disclose any cause of action against him and stated that he would move the court to strike out his name from this suit. In their Reply to Defence, the Plaintiffs stated that the Decree relied upon by the Defendant concerned both parcels of land namely Limuru/Bibirioni/1238 and 1239, that as at the time the Tribunal made its award Limuru/Bibirioni/1238 was not in existence, that in the **Senior Principal Magistrate’s Court Limuru in Land Case No. 11 of 2009** the court declined to amend the award of the Tribunal as requested by the said Kenneth Ndungu Waweru, that the award of the Tribunal is irrelevant to this suit as it was made touching on Limuru/Bibirioni/1238 and not 1239 which is the subject matter of this present suit, that the said Kenneth Ndungu Waweru was to remain on Limuru/Bibirioni/1239 for sixty days only after the decision of the Tribunal was read and adopted in the Limuru Senior Principal Magistrate’s court and that the Defendant is therefore a trespasser on Limuru/Bibirioni/1239 and should vacate or be evicted therefrom. The said Kenneth Ndungu Waweru was subsequently added as the 2<sup>nd</sup> Defendant in this suit through an

Amended Plaintiff dated 30<sup>th</sup> May 2014. The 2<sup>nd</sup> Defendant filed his Statement of Defence and Counterclaim dated 16<sup>th</sup> July 2014 in which he made similar averments as were made by the 1<sup>st</sup> Defendant but made a Counterclaim seeking various orders.

Having regard to these pleadings, it appears to me that the Defendants have not made any admission as stated by the Plaintiffs and they have further raised a triable issue as regards the rights of the 2<sup>nd</sup> Defendant and by extension his agent the 1<sup>st</sup> Defendant over the parcel of land Limuru/Bibirioni/1239 which appears to have not been the subject of the case before the Tribunal. This case is not a clear and obvious case in which this court feels at liberty to dispense of in the manner suggested by the Plaintiffs. Accordingly, I hereby dismiss this Application. Costs shall be in the cause. The Plaintiffs are directed to make haste in setting this suit down for hearing.

**DELIVERED AND DATED IN NAIROBI THIS 5<sup>TH</sup>**

**DAY OF FEBRUARY 2016.**

**MARY M. GITUMBI**

**JUDGE**