



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 201 OF 2013

LEONARD NJIRU NJOGU.....PLAINTIFF

VERSUS

OBED GACHOKI DIFATHA.....1ST DEFENDANT

SIMON MWANIKI GACHOKI.....2ND DEFENDANT

RULING

The power to strike out pleadings and thereby deny a party the opportunity to prosecute his case is a draconian step which ought to be resorted to only in the clearest of cases. In the case of **D.T. DOBIE & COMPANY (KENYA) LTD VS JOSEPH MBARIA MUCHINA & ANOTHER 1982 K.L.R 1**, the late **MADAN J.A** (as he then was) expressed himself as follows while addressing that issue:-

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the Judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way”

The late Judge went on to state that:-

‘No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. If 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’

In the same case, the late **MADAN J.A** cited **CAIL ZEISS STIFTUNG VS RANJUER & KEEL LTD & OTHERS (NO. 3) (1970 Ch. D 506** where **DANCKWERTS L.J.** said:-

“The power to strike out any pleading or any part of a pleading under this rule is not mandatory but permissive and confers a discretionary jurisdiction to be exercised having regard to the quality and circumstances relating to the offending pleading”

Following the promulgation of the 2010 Constitution and in the light of **Articles 47, 50 and 159** thereof, the principles that the late **MADAN J.A** was referring to now enjoy statutory support. Courts must now serve substantive justice and that is why, whereas the Courts have the power to strike out a pleading that

is a sham and raises no triable issue, such power must only be applied in the clearest of cases and only sparingly. On the other hand, a triable issue is not necessarily one that will succeed but rather, it is an issue which raises a prima facie case and which should go to trial for adjudication – **PATEL VS E.A CARGO HANDLING SERVICES LTD 1974 E.A 75.**

Nonetheless, the power to strike out pleadings is donated to the Courts and will be invoked in appropriate cases. In **FREMAR CONSTRUCTION CO. LTD VS MINAKASH N. SHAH C.A CIVIL APPEAL No. 85 of 2002 NBI,** the Court addressed itself in the following words:-

“This Court has stated many times before, and the learned Judge of the Superior Court was conscious of it, that striking out a pleading is a drastic remedy and the powers of the Court are to be exercised with great caution and only in clear cases. But the power is clearly donated in the rules and exists inherently for the Court, in the interest of justice, to reject manifestly frivolous and vexatious pleadings and suits to protect itself from abuse of its process”

The Court then went on to add:-

“Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined by oral evidence in open Court. Unless a trial is on discernible issues, it would be farcical to waste judicial time on it”

The principles cited above will therefore guide this Court in determining the plaintiff’s application dated 16th March 2012 which is the subject of this ruling. That application is brought under the provisions of **Order 2 Rule 15 (1) (a) (b) (c) (d) of the Civil Procedure Rules** and seeks the following orders:-

- 1. That the defence filed herein be dismissed for disclosing no proper defence in law, for being frivolous, scandalous and vexatious, for being a delaying tactics and an abuse of the Court process.***
- 2. The defence is a mere denial without any content whatsoever.***

The application is supported by the affidavit of **LEONARD NJIRU NJOGU** the plaintiff/applicant and is premised on the ground that the defence by itself is an admission that the applicant owns the land. In his supporting affidavit, the applicant depones that the defence is a sham, frivolous, vexatious and geared towards delaying the trial of this case and that there is no defence worth deliberation as it is a mere denial. The applicant also depones to other issues such as how he bought the land subject to this suit and was issued with a title deed only to find the defendants/respondents trespassing thereon. These are really matters for trial and cannot be addressed at this stage.

To fully appreciate what is at stake in this application, I must examine the pleadings by both parties.

By his plaint filed herein on 17th October 2011, the plaintiff/applicant sought judgment against the defendants/respondents in the following terms:-

- 1. Eviction from land parcel No. NGARIAMA/NGIRIAMBU/2461***
- 2. Costs of the suit***
- 3. Interest***
- 4. Any other relief this Court might deem fit to grant.***

The basis of the claim is that on 9th February 2000, the plaintiff/applicant bought land parcel No. NGARIAMA/NGIRIAMBU/2461 (the suit land) from the 1st defendant’s brother whose names are also given as **LEONARD NJIRU NJOGU**. The defendants have however trespassed onto the suit land hence this suit.

The defendants/respondents filed a joint statement of defence which, due to its brevity, is worth reproducing. They pleaded as follows:-

1. ***“The defendants admit the descriptive parts of the plaint.***
2. ***The defendants aver that they are strangers to paragraph 3 and 4 of the plaint and further aver that if the plaintiff obtained registration and title to land parcel number Ngariama/Ngiriambu/2461, then the said process was illegal, un-procedural and fraudulent***
3. ***The defendants further aver that the land in issue is their ancestral land which they have always lived on, and therefore deny any allegations of encroachment and trespass”***

The defence, not surprisingly, provoked the application now before me. On the face of it, and more so due to the very brief pleadings, the defence may appear to be bereft of any issues that ought to go to trial. Perhaps that is because the defendants are acting in person. Certainly the pleadings could have been better. However, as was held in the case of ***PATEL VS E.A CARGO HANDLING SERVICES LTD 1974 E.A 75***, a triable issue is not necessary one that will succeed but rather, an issue that raises a prima facie case and which should go to trial. From the parties pleadings, while the plaintiff/applicant states that he is the registered proprietor of the suit land and has indeed annexed a copy of the title deed in support of that assertion, the defendants/respondents by their short defence have nonetheless pleaded that that registration was fraudulent. More importantly, the defendants/respondents plead that they cannot be trespassers to the suit land because it is ancestral land on which they have ***“always lived”***. Although the defendants/respondents have not pleaded the particulars of fraud, the defence that the suit land is their ancestral land is clearly an issue that this Court must investigate at the trial. That is a serious triable issue and I am not persuaded that the defence herein is frivolous, scandalous or vexatious. A frivolous pleading is one that is without substance, groundless or fanciful. Thus a pleading is frivolous when the party is trifling with the Court or when what is put forward is not capable of reasonable argument. A scandalous pleading is, as the name itself suggests, one that is offensive or simply done to irritate or abuse the other party. It is simply meant to prejudice the other party. A vexatious pleading on the other hand is one that lacks bona fides, is hopeless, oppressive and tends to cause the other party unnecessary anxiety, trouble and expense – see ***PLEADINGS: PRINCIPLES AND PRACTISE BY SIR JACOB AND GOLDREIN***.

I am equally not persuaded that the defendants defence is a delaying tactic or an abuse of the process of this Court. It was promptly filed on 31st October 2011 and there is nothing to suggest that it is solely intended to misuse the process of this Court.

In light of all the above, I find no merit in the plaintiff/applicant’s Chamber Summons dated 16th March 2012. The same is accordingly dismissed with an order that each party meets their own costs.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016

Ruling dated, delivered and signed in open Court this 30th day of September 2016.

Mr. Mwangi for Mr. Maina for Applicant present

No appearance for the Respondents.

B.N. OLAO

JUDGE

30TH SEPTEMBER, 2016

