

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 58 OF 2012

JOSEPH K. M. M. SIMIYU..... PLAINTIFF/APPLICANT

VERSUS

MICHAEL KIBIWOT SERONEY DEFENDANT/RESPONDENT

R U L I N G

1. The applicant herein Michael Kibiwot Seroney filed a notice of motion dated **10.2.2015** in which he seeks orders that the respondent's Originating Summons dated **19.4.2012** be struck out for failure to disclose a reasonable cause of action and that he be awarded costs.
2. The respondent had filed an Originating Summons in which he sought orders from court that he had acquired 2 acres out of the applicant's land by way of adverse possession. In the Originating Summons, the respondent had stated that he had bought the two acres vide an agreement executed on **23.12.2002** from a third party. The applicant therefore contends that he was not party to the said agreement and that in any case the respondent has not been in possession for a period of 12 years to entitle him to lay a claim for adverse possession.
3. The applicant's application was opposed through replying affidavit sworn by the respondent on **19.6.2015** and filed in court on **22.6.2015**. The respondent contends that the Originating Summons should not be struck out as what is being complained of can be cured by an amendment.
4. I have gone through the applicant's application as well as the replying affidavit by the respondent. During the hearing of this application, **Mr Chebii** for the applicant argued that if the respondent took possession of the two acres on **23.12.2002** and he filed the Originating Summons on **19.4.2012**, then he had not been on the land for a period of 12 years and as such the Originating Summons does not disclose any reasonable cause of action.
5. **Mr. Ondieki** for the respondent argued that what is being raised by the applicant is a matter which can be cured by amendment. He argued that the respondent who had been acting in person had filed an application for amendment which application was dismissed. He argued that this is a land matter which is emotive and that parties should be allowed to ventilate the issues in a hearing.
6. This is an application for striking out of a pleading. Striking out of a pleading is a drastic action which should be resorted to in very clear cases. In the instant case, the respondent has averred in his supporting affidavit that he bought the land in 1997. If he subsequently stated that he took possession in 2002 then this is a matter which can be sorted out through an amendment. A court can only strike out a pleading which in its face is so hopeless that no amount of amendment can breath life into it. The remedy of striking out should be granted sparingly and in the clearest of cases.

In the instant case, it is clear that the anomaly can be cured by an amendment. I therefore find that this is not a case where striking out of the originating summons can be allowed. The result hereof is that the applicant's application fails. The same is dismissed with costs to the respondent.

It is so ordered.

Dated signed and delivered at Kitale on this 17th day of September 2015.

E. OBAGA

JUDGE

In the presence of Mr. Chebii for applicant and the plaintiff in person. Court Assistant - Winnie.

E. OBAGA

JUDGE

17.9.2015