



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
ENVIRONMENT AND LAND COURT

E.L.C. NO.93 OF 2013

JAMLICK MWANGI & ANOTHER.....PLAINTIFFS

VERSUS

CHARITY WACUKA MICHAEL & 5 OTHERS.....DEFENDANTS

R U L I N G

The plaintiffs were served with the application herein but neither filed their responses nor appeared on the hearing date and therefore the same proceeded in their absence. However, this court is enjoined to consider the facts of this case and the relevant law.

The Notice of Motion seeks the striking out of the suit for being an abuse of the process of the court on the grounds that the first and second plaintiffs as well as second, third, fourth, fifth and sixth defendants are sons and daughters of the first defendant. That the first defendant is the widow of the late Michael Ndambiri Murathi who was the registered proprietor of the suit land Kabare/Njiku/158. That in a grant of letters of administration intestate dated 15th March 2004 made in Nairobi High Court Succession Cause No.1494 of 2003, the first defendant was named as the administratrix of the estate of the deceased Michael Ndambiri Murathi. That the said grant was confirmed on 1st December 2008 herein a schedule of distribution of the deceased's land parcel Kabare/Njiku/158 was set out. That land parcel Kabare/Njiku/158 was eventually partitioned between all the beneficiaries with the following resulting numbers Kabare/Njiku/2172, 2173, 2174, 2175, 2176, 2177, 2178, and 2179. That when this suit was filed the land had already been partitioned and new titles for each and every beneficiary issued. That though there is an *E.L.C Court* in Kirinyaga County where the suit land is situated, the plaintiffs unlawfully and irregularly filed the case at the High Court of Kenya at Nyeri. The plaintiffs have not annexed copies of their lists of documents to their pleadings served on the defendants. The plaintiffs have not taken any step in prosecuting their case. That this suit is an abuse of the process of the court. That the land parcel *No.Kabare/Njiku/158* has been partitioned and new titles issued to the beneficiaries including plaintiffs.

I have perused the pleadings and the Notice of Motion plus the supporting affidavit and do find that the dispute before court is a survey map that was allegedly used without the plaintiffs' consent that has caused their properties to be cut across.

Halsbury's Laws of England Fourth Edition paragraph 81 gives insight on Striking out pleading showing no reasonable cause of action or defence which can also be extended to abuse of the process of court.

it provides that the court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any writ in the action, or anything in any pleading or in the endorsement, on the ground that it discloses no reasonable cause of action or defence, as the case may be. The power so to order is complementary to the jurisdiction to stay or strike out any action under the inherent jurisdiction of the court. Although no evidence is admissible on an application invoking the rule, if the summons additionally invokes the court's inherent jurisdiction evidence may be filed, and all the relevant facts considered. The practice is not to consider this evidence until the question whether or not on the fact of the pleading some reasonable cause of action or defence, as the case may be, is disclosed has been determined.

In judging the sufficiency of a pleading for this purpose, the court will assume all the allegations in it to be true and to have been admitted by the other party. If the statement of claim then shows on the face of it that the action is not maintainable or that an absolute defense exists, the court will strike it out. A pleading will not, however, be struck out if it is merely demurrable; it must be so bad that no legitimate amendment could cure the defect. The jurisdiction to strike out a pleading should be exercised with extreme caution and only in obvious cases and where a question of general importance or a serious question of law would arise on the pleadings, the court will not strike out the pleading unless it is clear and obvious that the action will not lie.

In the case of **D.T. Bobie & Company (k) Ltd -VS- Muchina** Madam, Miller & Potter JJA held that a 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 process of court. At this stage the court need not deal with the merit of the case for this function is only reserved for the judge at 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.” (**Sellers LJ (supra)**). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.

If an action is explainable as a likely happening which is not plainly and obviously impossible, the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

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.

Clearly the claim by the plaintiffs against the defendants is not one that can be described as an abuse of the process of the court as the same is not as hopeless as the applicants would want this court to believe since there appears to be a second survey map in contention that the plaintiffs allege has created boundaries across their portions of land whose authenticity should be established and therefore the application fails on this ground. Moreover the plaintiffs can salvage their suit through an amendment.

A statement of claim would be an abuse of the process of court if it raised an issue that has been determined by the court or raises issues based on speculation rather than facts.

The defendant has failed through affidavit or otherwise to prove that the suit is an abuse of the process of court. The issue of statements can be addressed by the plaintiffs being given leave to file their statements albeit with costs.

The issue of the matter being filed in a court without the geographical jurisdiction can be addressed by the matter being transferred to the court with geographical jurisdiction thus the Environment and Lands Court at Kerugoya.

The upshot of the above is that the application is dismissed with no order as to costs. The matter is forthwith transferred to the Environment and Lands Court at Kerugoya. Orders accordingly.

Dated, signed and delivered at Nyeri this 21st day of March 2014.

A. OMBWAYO

JUDGE